

NATIONAL RAILWAYS OF ZIMBABWE t/a RAILTON SPORTS CLUB
versus
PATNAH TRADING (PRIVATE) LIMITED
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 29 August & 15 November 2023

Urgent Chamber Application

A Muchadehama, for the applicant
E Mubayiwa, for the 1st respondent
P Nkomo, for the 2nd respondent

CHITAPI J: The applicant National Railways of Zimbabwe is a statutory corporate body established in terms of the Railways Act [*Chapter 13:09*]. The first respondent Patnah Trading (Pvt) Ltd is a duly incorporated and registered company in accordance with the laws of Zimbabwe. The second respondent City of Harare is a body corporate established in terms of the City of Harare (Private) Act, [*Chapter 29:04*].

The second respondent is the owner of the property called stand 12939/40 Harare Township. The property is commonly called Raylton Sports Club. The applicant leases the property from the second respondent by virtue of an existing lease agreement between the two parties. The applicant attached a copy of the lease agreement which in terms of its provisions has a tenure due to end on 31 May 2026. The provisions of the lease agreement provide *inter alia* that the property on the lease shall be used as a sports club and for purposes incidental to the operation of a sports club. Any other uses would be subject to the written consent of the second respondent being first granted.

The applicant avers that the first respondent entered into a Clandestine lease agreement for portion of the same property with the Secretary of the Management Committee of the Raylton Sport Club, the club being a juristic body constituted under a constitution as a voluntary

association. A dispute arose between the first respondent and the applicant over the legality of the sublease aforesaid. There have been past and current litigations between the parties over the disputed right of occupation by the respondent of the property in issue. It is not necessary to individually give full details of the nature of the cases for purposes of deciding the point which is subject of this judgment. It suffices to note that this application is cross referenced to case number HC 5332/23; HC 5028/23; HC 3235/23 and HC 5224/23. On its part the first respondent quoted further cases decided and pending in the magistrates' court, viz CCG 163/23 and CCG 1613/23. The long and short of the dispute is that the applicant and the first respondent are at loggerheads over the occupational rights of the first respondent over the property.

Reverting to this application, the applicant seeks relief as set in its provisional order as follows:

TERMS OF FINAL ORDER SOUGHT

That you show to this Honourable Court why a final order should not be made in the following terms:

1. The parties shall maintain the *status quo ante* pending resolution of the summons matter for a declaratur issued by the applicant under HC 5332/23. Court application for rescission of default judgment under HC 5025/23 and urgent chamber application for interdict by 1st respondent under HC 3235/23
2. 1st respondent shall pay costs of suit on an attorney and client scale.

INTERIM RELIEF GRANTED

Pending determination of this matter, the applicant is granted the following relief-

1. The 1st respondent be and is hereby prohibited from acting unlawfully by continuing to erect any structures at stand number 12939/40 Harare Township commonly known as Raylton Sports Club without approval of applicant and 2nd respondent.
2. The 1st respondent, its assignees, or proxies be and are hereby interdicted from interfering with the applicant's business or use of all recreational facilities at stand number 12939/40 Harare Township commonly known as Raylton Sports Club.

SERVICE OF PROVISIONAL ORDER

The provisional order shall be served on the 1st and 2nd respondents or their legal practitioners by the Sheriff of Zimbabwe or by the applicant's legal practitioners.

In short the applicant seeks an interim order that the first respondent be interdicted from continuing to erect structures on the property in issue, save with approval of the first and second respondent.

The first respondent has taken issue with the certificate of urgency filed by the applicant as part of its application. The first respondent contented that the certificate is invalid hence unsuited the application to be heard on the urgent roll and that the application be struck off the roll.

The first respondent impugned the certificate of urgency on the alleged ground that the maker of the same did not give an independent and objective opinion in coming to the conclusion that the application was urgent and that it be accorded urgency status for immediate hearing. It is convenient to reproduce para 3.1 of the opposing affidavit.

“3.1 The certificate of urgency is fatally defective in that the certifying legal practitioner is neither independent nor objective to the extent that he not only argues the merits of the dispute but is on that dispute, partial in applicant’s favour. He argues applicant’s case and takes the position that on the substance, first respondent’s conduct is unlawful and that applicant is correct and entitled to succeed. Having taken sides on the merits of the matter, the certificate of urgency is not that of a clean unpolluted mind. The certificate in fact reads like it is applicant’s founding affidavit. It is in breach of principle and may be struck off together with the application to the extent that it may not get an urgent hearing in the absence of a certificate of urgency.”

The applicant’s counsel in response submitted firstly that there was no set or standard format for a certificate of urgency. Counsel submitted that the certifying legal practitioner had only picked out what he expressed in his certificate from the founding affidavit. He submitted that the certificate should be read as a whole instead of nit picking individual paragraphs and seeking to impugn the certificate on the basis of the picked up paragraphs.

The first respondent picked up on a number of paragraphs in the certificate in the attack on its validity. In para 2-1, the certifying legal practitioners stated:

“2-1 Applicant has a lawful right to enjoy unhindered access and use of the facilities at Raylton Sports Club by virtue of a lease agreement with City of Harare.”

It was argued that the certifying legal practitioner was judgmental and in so stating was partial in favour of the applicant.

In para 2-8 of the certificate of urgency again impugned by the first respondent, the certifying legal practitioner stated:

“2-8 A situation that has arisen in terms of which the first respondent is erecting and continue to erect structures which are illegal which have blocked and hindered the applicant’s access and use of the facilities at the sports club should be addressed.”

It was submitted by the first respondent’s counsel that by stating that the first respondent had erected “structures which are illegal” and had blocked the applicants access to the property, the certifying legal practitioner was again partial and judged the matter against the first respondent.

In para (s) 2-11, 2.12 and 2.14 the certifying legal practitioner stated as follows:

“2-11 The applicants rights aforesaid have clearly been violated by the first respondents unlawful actions of erecting these illegal structures. The applicant cannot discharge its obligations to its employees and members who use the recreational and other facilities at Raylton Sports Club.

2-12 If the application is not heard on an urgent basis the illegality will persist. The applicant will be out of business and runs the risk of members pulling out of the sports club as the facilities they have been enjoying since 1971 are no longer available.

2.14 There is no other alternative remedy available to the applicant than to approach this court on an urgent basis for an interdict. The applicant acted as soon as it realized that the continued erection of the illegal structures was now hampering its business and blocking access to the recreational facilities like swimming pool, tennis court, canteen and public parking space on 11 August 2023”

I would add para 2.15 of the same certificate of urgency where the certifying legal practitioner states”

“2.15 The respondent will not suffer any prejudice if all developments are halted pending finalization of the various court cases between the parties. If the first respondent is objective, it surely should not continue building on a portion where there are legal disputes. It should allow these disputes to be resolved by the courts and if it wins it may resume the construction.”

The certifying legal practitioner then stated in para 2.16 of the certificate of urgency:

“2.16 This court is therefore urged to arrest the situation in order to avoid unending interlocutory applications being made by the parties. The main matter should be allowed to sail through without any of the parties involved being prejudiced.”

There can be no doubt that the certifying legal practitioners exhibited an exuberance of inexperience in the drawing up of the certificate of urgency. However, a holistic approach to a consideration of the certificate of urgency shows that the certifying legal practitioner was simply buying in on the averments made by the applicant to justify urgency in the founding affidavit. Indeed a legal practitioner who certifies the matter as urgent is moved to hold so upon a consideration of the founding affidavit. The applicant’s case as trite must be made on the founding affidavit. At the stage of certifying the matter as urgent, the certifying legal practitioner does not

consider the respondent's defence if any as it gets filed after the certificate of urgency has already been made to accompany the application. In my view, the submission that the certifying legal practitioner in his or her opinion favours the applicant against the respondent is not sound. There are no favours which may be given to the applicant because before the respondent has opposed the matter there are no choices or two sides or accounts to choose from because the respondent will not have filed a defence for the legal practitioner to consider. The certification of a matter as urgent is informed by what the applicant alleges in the founding affidavit. Urgency must arise from a consideration of the ground facts and nature of the alleged conduct of the respondent, complained of which needs to be dealt with on an urgent basis.

The approach that it is the facts and circumstances of the nature of the respondents conduct and additionally the nature of the harmful effects such conduct on the applicant's rights which must inform the decision whether or not a matter should be accorded with common sense and logic but is also supported by precedent. In the case of *Mayor Logistics (Private) Limited v Zimbabwe Revenue Authority CCZ 7/14*, the court..... stated:

“A party favoured with an order for a hearing of the case on an urgent basis gains a considerable advantage over persons whose disputes are being set down for hearing in the normal course of events. A party seeking to be accorded the preferential treatment must set out in the founding affidavit facts that distinguish the case from others to justify the granting of the order for urgent hearing without breach of the principle that similarly situated litigants are entitled to be treated alike.”

It is therefore settled that the urgency of the matter placed before the court must be determined upon a consideration of the facts alleged in the founding affidavit. Indeed it is the applicant who petitions the court with a plea that his or her matter should be heard on the urgent basis. It is the party suffering the harm sought to be regulated by the granting of that party's prayer in the provisional order who feels that his or her matter cannot wait for a normal hearing. That party should therefore set out such facts as justify urgency and it is those facts which inform the certifying legal practitioner's opinion that objectively considered the matter is urgent.

Rule 60(6) of the Rules of Court S I 202/21 is clear in its import and meaning. The rule reads as follows:

“(b) Where a chamber application is accompanied by a certificate from a legal practitioner in subrule (4)(b) to the effect that the matter is urgent, giving reasons for its urgency, the regulator shall immediately submit it to the duty judge handling urgency applications who shall consider the papers forthwith.”

In the first instance, the certificate of urgency informs the registrar on how to deal with an application which is accompanied by a certificate of urgency. The registrar on sight of certificate of urgency being part of a chamber application must without further ado submit or place the application before the duty judge dealing with urgent application. The practice at Harare High Court is that the Honourable Judge President or in her absence, the next Senior Judge acts as the duty judge for urgent application. The duty judge deals with and/or allocates the application to any of the judges at station. Every judge is a duty judge for urgent applications because urgent applications are allocated to the judge notwithstanding the judges schedules for the day. The judge is expected to best manage an urgent application allocated to him or her. The point I make here is that an urgent application also places a strain on the judges as they must stop what they will be doing to deal with an urgent application. Only deserving cases are allowed to jump the queue.

Rule 60(6) as quoted is clear that the judge to whom the urgent application to referred for handling must consider "...the papers forthwith." The rule does not state that the judge must consider the certificate of urgency only. The full papers must therefore be considered by the judge. It would therefore in my view be anomalous for the judge to only consider the certificate of urgency as the basis for making a finding on urgency. Rule 60(6) is also consistent with the trite principle that an applicant's case is made in the founding affidavit. To the founding affidavit is attached supporting documents and urgency must therefore be founded on the whole application. there is a plethora of cases which suggest that urgency must arise from the certificate of urgency alone and the certificate is singularly scrutinized for its inadequacies and validity. I respectfully do not subscribe to that view or approach because the r 60(6) requires that urgency be founded on the "papers" filed by the applicant. *In casu*, the respondent's legal practitioners in attacking the certificate of urgency did so by treating it as a stand alone document that informs the court whether the matter is urgent or not. This is wrong.

In relation to the certificate of urgency itself subrule 4(a) & (b) referred to in subrule (b) as quoted, provides as follows:

- "4 Where an applicant has not served a chamber application on another party because he or she reasonably believes one or more of the matters referred to in r 61(*sic*) [it should be 60(a) to (e)-]
- (a) He or she shall set out the ground for his or her belief fully in his or her affidavit; and
 - (b) Unless the applicant is not legally represented, the application shall be accompanied by a certificate of urgency from a legal practitioner setting out, with reasons, his or her belief that

the matter is uncontentious, likely to attract perverse conduct or urgent for one or more reasons set out in subrule (3)(a) to (e).”

I should note that although the quoted rule refers to chamber applications not served, the general practice is to require the applicant to serve the application unless service would defeat the relief sought. What however strikes about subrule (4)(a) and (b) is that the requirements in (a) and (b) are conjunctive. An analysis of the two shows that the applicant is required to set out the grounds for urgency in the affidavit. It can only be from the stated grounds that the legal practitioner certifying the matter as urgent can discern agency otherwise if the legal practitioner were to provide reasons of his or her own not arising from the grounds stated in the applicant’s affidavit the legal practitioner would be giving evidence which is irregular.

It is for the reason that grounds to justify urgency arise from the founding affidavit that the Constitutional Court in the Mayor Logistics case (*supra*) then stated;

“.....The certificate of urgency should show that the legal practitioner examined the founding affidavit and documents filed in support of the urgent application for facts which support the allegation that a delay in having the case heard on an urgent basis would render the eventual relief ineffectual.”

In the Mayor Logistics case, the founding affidavit was found to be deficient in its omission to provide grounds for urgency. In *casu*, the first respondent has taken issue that the certificate of urgency is partial and the maker did not apply an objective mind in certifying the application as urgent. It must be noted importantly so that it is the judge who decides whether the matter is urgent or not. The urgency arises from the grounds set out in the founding affidavit and not in the certificate of urgency because the reasons for urgency in the certificate of urgency are justifiable on the basis of facts set out in the founding affidavit and any supporting documents thereto attached.

In determining the first respondent’s objection, I take the view that the certificate of urgency should not be excised from the application but must be read as a whole and holistically together with the founding affidavits and any supporting documents. The certificate of urgency expresses an opinion of the legal practitioner that the matter is urgent. Such opinion could be right or wrong. The judge in my view should not strike out or dismiss an application filed on an urgent basis on the sole basis that the certificate of urgency suffers from a defect as to form and content unless the defect is a fatal one to the applicants case. I cannot immediately think of a fatal defect

to an application, which arises from a defective certificate of urgency. The fatal defect which is apparent is one wherein the founding affidavit does not set out the grounds for urgency and the certifying legal practitioner manufactures or volunteers his or her own grounds thereby litigating so to speak.

The first respondent relied on the judgment of the Supreme Court in *Chidawu and Others v Shah and Others* SC 12/13 by the learned GOWORA JA (as then she was) wherein the learned judge stated that:

“In certifying the matter as urgent, the legal practitioner is required to apply his or her own mind to the circumstances of the case and reach an independent judgment as to the urgency of the matter. He or she is not supposed to take verbatim what his or her client says regarding perceived urgency and put it in the certificate of urgency. I accept the contention that it is a condition precedent to the validity of a certificate of urgency that a legal practitioner applies his mind to the facts.”

The learned judge then quoted GILLESPIE J *dicta* in the case *General Transport and Engineering (Pvt) Ltd & Ors v Zimbank Corp (Pvt) Ltd* 1998 (2) ZLR 301 where the learned judge stated that the power given to legal practitioners to certify applications as urgent should not be abused and that only a matter which a legal practitioner believes on the facts and honestly so to be urgent should be so certified.

However, in regard to the validity of a certificate of urgency and again in *Chidawu* case, the learned judge stated that a certificate of urgency was a matter of substance rather than form. The learned judge said:

“the genuineness of the belief postulated in the certificate must be tested by reference to all the surrounding circumstances and facts to which the legal practitioner is expected to have regard.....”

The learned judge also stated at p 7 of the cyclostyled judgment that:

“In order for a certificate of urgency to pass the test of validity it must be clear *ex facie* the certificate that the legal practitioner who signed or actually applied his her mind to the facts and the circumstances surrounding the dispute.”

The common thread from the *dictas* above is that it is the facts of the case which establish urgency and the opinion of the certifying legal practitioner derives from those facts. The question is where it is apparent from the certificate that the certifying legal practitioner has not properly applied his or mind to the facts in reaching a conclusion that the matter is urgent, but the facts themselves and circumstances of the case as alluded to in the founding affidavit establish urgency and the judge is of the view that the matter is urgent, does the judge strike the matter off the roll

as not urgent for invalidity of or defect in the certificate of urgency when on the facts there is urgent need for intervention by the court. This crisp question is not addressed, as it did not in the *Chidawu* case. My view is that and I already stated so, the certifying legal practitioners in terms of the rules gives his or her opinion on urgency. That opinion may or may not coincide with the judge's opinion. An opinion is exactly that. It may depending on the judge's own opinion be right or wrong. The judge should therefore not be detained by the certificate of urgency where the facts in the founding affidavit show the matter to be urgent. The interest of justice will be served by hearing the matter instead of denying justice to parties because the certificate of urgency is deficient in one way or the other.

In case of *Pascoe v Minister of Lands and Rural Resettlement and 2 Ors HH 11/17*. I expressed the view that the certificate of urgency should be considered as a tool of case management. I interrogated rule 244 of the old High Court Rules 1971 then in force in reaching that conclusion. Rule 244 is now r 60(6) in the current rules. My view still remains. The Supreme Court case of *Chidawu (supra)* is not contradicted by the *Pascoe* judgment. The learned judge in the *Chidawu* case in fact perceives the certificate as a case management tool because it is accepted that its presence is the one that informs the registrar that the matter is referred to a judge under the urgent roll for the judge to either agree to enroll the matter as urgent or not.

Therefore to reiterate my view, a certificate of urgency suffers from some defect of form or substance but the facts and circumstances of the case cry for urgent intervention, the judge must use his or her judicious discretion to hear the matter on the urgent roll. Various considerations commend this approach. Firstly, this court has power to regulate its processes in order to dispense substantial justice between litigants. This is a constitutional power granted in s 176 of the Constitutional and reads:

“176 Inherent powers of Constitutional Court, Supreme Court and High Court.

The Constitutional Court, The Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of this Constitutional.”

Secondly, in terms of r 7 of the High Court rules 2021 the court or judge may in regard to any particular case before the judge or court direct, authorize or condone a departure from any provisions of these rules where a departure is in the view of the judge required in the interests of

justice. Such departure should be granted in deserving cases where a slavish or strict or inflexible adherence to the rules will defeat the interests of justice.

In *casu*, I already noted that the certifying legal practitioner appeared excitable. He did in fact give an opinion that he considered that the applicant had a good case and that its case would succeed. A holistic reading of the certificate of urgency however, shows that the legal practitioner alluded to those facts stated in the founding affidavit and drew conclusions from them. The conclusions would not bind the court. In this case the applicant seeks an interim interdict to stop the first respondent from carrying out construction works on the disputed stand until the dispute is resolved. The certificate of urgency alludes to the applicants' allegations. It however goes beyond that with the certifying legal practitioner here and there giving his opinion that the respondent is the wrong party. Such opinion does not bind the court and in my view should not have been made. That said, the opinions are is not the decision of the court. I would ignore the opinion and concentrate on matters raised which the judge or court may properly take into account in deciding on the urgency of the matter.

Thus upon a consideration of the objection *in limine* all arguments and all the documents filed of record, I am not in this instance persuaded that the matter be struck off the roll on account of the allegedly defect in the certificate of urgency. The application will be enrolled on the roll for continuation.

IT IS ORDERED THAT:

- (i) The objection *in limine* for the striking off of the application from the roll on the basis of an alleged defective certificate of urgency is dismissed.
- (ii) The Registrar shall reset the application for continuation.
- (iii) Costs are reserved.

Mbedzo Muchadehama & Makoni, applicant's legal practitioners
Nyahuma sons, first respondent's legal practitioners
Gambe Group, second respondent's legal practitioners