

BULAWAYO UPCOMING TRADERS ASSOCIATION

Versus

THE CITY OF BULAWAYO

And

**THE MINISTER OF LOCAL GOVERNMENT
PUBLIC WORKS AND NATIONAL HOUSING, N.O**

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 24 JUNE AND 9 JULY 2020

Urgent Chamber Application

R Ndlovu with Mr D Ncube, for the applicant
P Ncube with Ms I Madziwo and Mrs S Mugiya, for the 1st respondent

MAKONESE J:

INTRODUCTION

On the 23rd of March 2020, the President of the Republic of Zimbabwe declared a state of disaster in the wake of the ravaging Coronavirus pandemic which had already been declared by the World Health Organisation as a global pandemic. In declaring a state of disaster, all arms of Government were enjoined to take extraordinary measures to curb the spread of the Coronavirus. In that regard, the Government issued a directive to Local Authorities styled “Guidelines for the Resilient Food Supply Chain System During and After the Lockdown.” In compliance with that directive, on 26th April 2020 the City of Bulawayo adopted a raft of measures to deal with the surge of Conoravirus in order to mitigate and control the spread of the virus. The objective of the 1st respondent was to protect the citizens of Bulawayo against the effects of the virus and to ensure the health and safety of the public. In or around January 2020, 1st respondent allocated vending bays along 5th Avenue, in the Central Business of Bulawayo to the applicant’s members. This was a temporary measure to accommodate the members. To facilitate this, 1st respondent advertised the temporary

closure of 5th Avenue and allowed applicant's members to trade on the Avenue. Vending bays were created and applicant's members were allowed to erect structures to enable them to trade. Vehicle and pedestrian movement was restricted. With the outbreak of the Coronavirus, one of the measures undertaken by 1st respondent was to immediately decongest the Central Business District. 1st respondent decided to reopen 5th Avenue to vehicle and pedestrian traffic and to relocate the vendors to areas outside the Central Business District. Various sites were identified as suitable vending areas around the city. 1st respondent placed an advert to that effect in the newspaper on 26th April, 2020 and 30th April 2020.

On the 3rd of May 2020, 5th Avenue market was opened for vehicle and pedestrian traffic in line with the advertisement. All the vending bays had been removed and the road properly marked for traffic. 5th Avenue is now being used for vehicle and human traffic.

The Application

This urgent application has been brought by the applicant under a Certificate of Urgency. The applicant is a voluntary organization being an association of informal traders duly established in terms of its Constitution. One of the stated objects of the association is to promote, encourage and assist members of the association to develop good working relations with all responsible authorities. On 17th June 2020 the applicant filed this application seeking the following relief:

“INTERIM RELIEF SOUGHT

Pending the finalization of the matter, the applicant be and is hereby ordered to forthwith allow the licenced members of the applicant unhindered access to their vending bays along 5th Avenue, Bulawayo Business District, to carry on their vending business, subject to compliance with the relaxed COVID – 19 Lockdown Regulations in force as announced on 12th June 2020.”

“FINAL ORDER SOUGHT

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

1. The administrative decision of the 1st respondent's officials to prevent/close vending bays allocated to the applicant's licenced members be and is hereby declared unlawful and a violation of the affected members' right to lawful and for administrative action under section 3 (1) (a) of the Administrative Justice Act (Chapter 10:28).
2. The 1st respondent be and is hereby permanently interdicted from unlawfully hindering or preventing the applicant's licenced members from accessing their

vending bays at the vending sites along 5th Avenue, Bulawayo, Central Business District.

3. The 1st respondent pays the costs of suit.”

The application is strenuously opposed by the 1st respondent. The matter was set down for oral argument on the 24th June 2020. After hearing oral argument I reserved judgment. Various points *in limine* were taken by the 1st respondent. I shall consider these points in turn.

URGENCY

1st respondent contends that there is no urgency in the matter and that the urgency alleged in the Certificate of Urgency and Founding Affidavit is self created and contrived. The first issue raised by 1st respondent is that there are no longer any vending bays along 5th Avenue to talk about, and that being the case, applicant cannot come to court on an urgent basis and seek to be placed on non-existent vending bays. Secondly, as shown in paragraph 13 of the applicant’s Founding Affidavit, on the 26th of April 2020, 1st respondent’s Town Clerk advertised in the newspapers the re-opening of 5th Avenue and 8th Avenue in the City of Bulawayo’s Central Business District to “normal vehicular and pedestrian traffic.” In the third paragraph of the advertisement it is stated as follows.

“As directed by the Government of Zimbabwe through the document “Guidelines for the Resilient Food Supply Chain System During and After Lockdown”, the said portions of roads shall be open to normal vehicular and pedestrian traffic with effect from midnight Sunday 3rd of May 2020.”

The advertisement by the 1st respondent’s Town Clerk was clear. From the 3rd of May 2020, 5th Avenue and 8th Avenue would be opened for vehicles and pedestrian traffic. This is what 1st respondent put into effect. The applicant was well aware of this development. The advert was placed in the newspapers from the 26th April 2020. The implementation of the directive was from the 3rd of May 2020. Applicants were well aware of this turn of events. By placing an advert in the newspapers, 1st respondent was alerting everyone concerned, including the applicants of the status of 5th Avenue, and naturally the fate of the vending bays along that avenue, before the closure of that avenue. The applicant annexed to its Founding Affidavit a Resolution dated 26th May 2020 indicating that the agenda of the meeting was the “Removal of vendors operating along 5th Avenue by Council.” Applicant therefore, had full knowledge of the fate of the vending bays from the 26th April 2020. The resolution to take legal action is dated 26th May 2020 and yet the application was only filed on the 17th June

2020. The urgency is clearly self- created by the applicant. There was never any intention by the applicant to treat the matter as urgent as shown by the series of events, that led to the closure of 5th Avenue, and its subsequent re-opening for vehicular and pedestrian traffic. It is important to note that applicant avers that on the 15th of June 2020 a select group of the applicant’s members went to the vending site “to prepare for trading.” Applicant’s members were well aware at that time that they were no vending bays. They were arrested and paid admission of guilt fines for contravening section 23 (34) of the Bulawayo City By-Laws for blocking a pavement. The arrest of the applicant’s members cannot give rise to the urgency contemplated by the Rules of this court. This is clearly contrived urgency.

The Certificate of Urgency filed by the applicant is not very useful. The applicant has failed to establish urgency and has wantonly failed to meet the rudiments of an urgent application as required by the law.

See *CABS v Ndlovu* HH 3/06 where CHATUKUTA J held at page 2 of the cyclostyled judgment as follows

“Applicant is required to satisfy the court that irreparable harm may be suffered if the matter is not dealt with urgently....”

See also: *Triangle Limited v Zimbabwe Revenue Authority* HB 12-11 at page 3.

In *Hove v Commissioner General ZIMRA* HB 29-11 MATHONSI J (as he then was) stated at page 3 of the cyclostyled judgment as follows:

“The averment relating to irreparable harm is a bald one not supported by any fact and why the certifying legal practitioner thinks irreparable harm will be suffered is not sated. The applicant cannot expect the court to use its discretion to accord him audience on an urgent basis without useful information to sustain such a claim that there is a close relationship between urgency and irreparable harm is obvious...”

In this matter there is not a single allegation that applicant will suffer irreparable harm, let alone proof or details of the perceived irreparable harm. The only conclusion is that in the absence of an allegation that applicant is likely to suffer irreparable harm, such harm does not in fact, therefore exist. The court cannot even begin to determine whether there is irreparable harm. Without any averment of any harm certified by the author of the Certificate of Urgency, the applicant cannot even be heard.

See: also *Kuvarega v Registrar General* 1998 (1) ZLR 188 (H).

Before concluding on the matter of urgency it has not escaped the notice of this court that minutes of the applicant Association and the City of Bulawayo held on the 4th of May 2020 outlined certain recommendations regarding the closure of the vending bays. In the minutes it was recorded on matters arising, that 5th Avenue was now open to vehicular traffic. It was noted that all vendors operating along 5th Avenue would be affected. It was resolved at that meeting that displaced vendors would be given preference in vending sites closer to places of their residence. A specific recommendation was made that vendors willing to remain in the Central Business District would be accommodated at Highlanders Football Club premises.

It is my view, therefore that this application fails to meet the requirements for urgency. On that basis alone, this application should be declined and struck off the roll of urgent matters. I propose however, to deal with the other points *in limine* that have been raised by 1st respondent, for the sake of completeness.

PROPRIETY AND INCOMPETENCE OF THE APPLICATION AND DRAFT ORDER

The Certificate of Urgency seeks to vindicate the rights of the applicant's affected members through an interdict against 1st respondent, barring it from interfering with the licensed vendors' access to and occupation of their vending bays. The interim order buttresses that fact by seeking an order directing 1st respondent to "forthwith allow the licensed members of the applicant unhindered access to their vending bays along 5th Avenue, Bulawayo Central Business District." The critical issue to note is that at the time the application was filed the applicants and its members were aware that there were no vending bays along 5th Avenue. This is confirmed by the applicant's minutes of their meeting of the 4th of May 2020. The applicant deliberately approached the court on a falsehood. Applicant is seeking an order to grant unhindered access to bays that no longer exist. In paragraph 6 of the Founding Affidavit applicant concedes that the vending bays have been dismantled or destroyed by 1st respondent. In fact in the same paragraph applicant in contradiction to the averments in the Certificate of Urgency and Draft Order, seeks the "restoration of the vending bays." In reality though, there are no vending bays. That much is common cause. It was within the knowledge of the applicant that all the vending bays had been dismantled. The issue of the demolition of all the vending sites along 5th Avenue was not only known to

the applicant, but was a matter of public knowledge. In paragraph 14 of the Founding Affidavit, applicant confirms that 1st respondent deployed its workers to paint road markings along 5th Avenue where there were vending bays for some of applicant's members. Applicant was at all material times aware that 5th Avenue is now used by vehicular traffic and pedestrians. 5th Avenue is no longer a market or vending site. The road is now demarcated for vehicle movement. There are vehicle markings designating spaces for car parking spots. For the applicant to approach the court on an urgent basis knowing full well seeking an order that it be given "unhindered access to vending bays" that no longer exist is not only disingenuous but an abuse of court process. The order sought is clearly incompetent. A close look at the Draft Order shows that the interim relief seeks to grant applicant's members unhindered access to non-existent vending bays "forthwith." The final relief seeks to declare the closure of the vending bays by 1st respondent unlawful and in violation of applicant's rights. Effectively, applicant is seeking through the interim relief to consummate the final relief without proving its case. The courts have repeatedly stated that it is wrong and incompetent to consummate the final relief without proving one's case and by merely showing a *prima facie* case. In this matter, the interim relief is final in nature and once it is granted, the applicant would simply have no interest in setting the matter down for the final relief. This approach is not permissible and must be discouraged.

In *Qalisani (Pvt) Ltd v Zimbabwe Revenue Authority* HB 106/11 at page 3 of the cyclostyled judgment MATHONSI J (as he then was) had this to say:

"The courts have stated times without number that it is inappropriate for an applicant to seek interim relief which is final in nature because doing so means the applicant obtains final relief without proving its case."

See also: *Machakwi Estate (Pvt) Ltd & Others v The Minister of State for National Security Responsible For Land Reform and Resettlement in The President's Office and Others* HH 62-06.

In *Memory Chingwenya & Another v Zimbabwe Revenue Authority & Others* HB 72-17 at page 6 of the cyclostyled judgment I made the following remarks.

"The respondents contend that the Provisional Order being sought by the applicants in this matter is incompetent at law in that it has the effect of a final order. In the Provisional Order sought, applicants have sought an order directing the release of 1st

respondent's motor vehicle a Toyota Gaia Registration number AED 4899 forthwith or at least 48 hours of the date of this order, without paying storage fees. Then in the final order applicants purportedly seek a declaratory order that the impounding of 1st respondent's motor vehicle and demanding exorbitant fines for its release be declared wrongful and unlawful. However it is clear that by the time the Provisional order is confirmed, the vehicle would have been released. The deed would have been done. It would be a fair accomplice. It is clear that granting the order as prayed is not competent as it allows the applicant to secure the release of the motor vehicle without arguing the merits of the case."

These sentiments apply with equal force in the circumstances of this case. If the interim relief is granted, the applicant would have no reason to seek confirmation of the order. It would have secured its objective by obtaining the interim relief.

In the result, I am satisfied that the order sought is incompetent at law. It shall not be necessary to deal with the rest of the preliminary issues canvassed by the 1st respondent. This application should never have seen the door of this court. There is no need to deal with the merits of the case.

I accordingly make the following order:-

1. The application be and is hereby dismissed.
2. The applicant shall bear the costs of suit.

*Messrs R Ndlovu and Company, applicant's legal practitioners
Coghlan and Welsh, 1st respondent's legal practitioners*