PARKHAM ENTERPRISES (PVT) LTD

Versus

ROOFCOVER PROPERTIES (PVT) LIMITED

And

ADHESIVE PRODUCT MANUFACTURERS (PVT) LTD

And

THE MESSENGER OF COURT N.O

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 8 AND 13 SEPTEMBER 2021

Urgent Chamber Application

N. Mazibuko, for the applicant
L. Ngwenya, for 1st and 2nd respondents
No appearance for 3rd respondent

KABASA J: This is an urgent chamber application wherein the applicant seeks the following interim relief:-

> "The 1st, 2nd and 3rd respondents jointly and severally, the one doing the others to be absolved, be and are ordered to forthwith upon service of this order on them, surrender immediate control of the premises known as No. 1A Dunlop Road, Belmont, Bulawayo to the applicant and pursuant thereto to remove all its locks, chains and other impediments placed or installed at the premises and to thereafter allow applicant undisturbed control and occupation of the premises."
>
> In the event that this interim relief is granted, the final order sought is in the following terms: -
>
> "That the 1st and 3rd respondents be and are hereby interdicted from executing the judgment of the Bulawayo Magistrates Court under case number CC 487/2019 pending the determination of the appeal pending in this Honourable Court under case No. HCA 58/2020.
>
> The 2nd respondent be and is hereby interdicted from instructing or causing the Sheriff of Zimbabwe or his deputy, to remove applicant's property from No. 1A Dunlop Road, Belmont, Bulawayo or from any other location.

The 1st and 2nd respondents or their legal practitioners are ordered to supply the applicant with their bank account details to enable the applicant to deposit therein the monies due to the 2nd respondent under case No. HC 875/2015 as per the judgment therein and the monies due to the 1st respondent either as agreed or as may be determined due by the court under case No. HCA 58/2020.

The respondents shall pay the costs of suit jointly and severally, the one paying the others to be absolved, on a legal practitioner scale."

The application was accompanied by a certificate of urgency certifying the matter as urgent on the basis that the applicant was evicted from premises it is leasing on the force of a judgment which has been taken on appeal. Such appeal suspends the execution of the judgment and the respondents acted unlawfully by locking the applicant out of the premises. Such conduct is adversely affecting the applicant's economic interests as it is unable to operate.

The background facts as put by the applicant are these:-

On 5th July 2014 the applicant entered into a lease agreement for the premises known as No. 1A Dunlop Road Belmont. Such lease is between applicant and 1st respondent. The applicant was facing viability problems and was unable to meet its creditors' demands, such creditors included the 1st and 2nd respondent. On 14th May 2015 the 2nd respondent obtained judgment against the applicant in the sum of US$53 294,54. In an attempt to address these financial problems the applicant sought and was granted a provisional judicial management order on 1st March 2016. Paragraph 1.6 of that order was to the effect that all actions and applications and the execution of all writs, summons and other process against the applicant were stayed and could only be proceeded with, with the leave of the court. The 1st respondent under case number HC 1869/19 subsequently sought and obtained leave to institute action against the applicant for arrear rentals and ejectment. The 1st respondent then issued summons in the Magistrates Court against the applicant and obtained a default judgment under case number CC 487/2019. An attempt to have the judgment rescinded failed and the applicant filed an appeal under case number HCA 58/20. Such appeal had the effect of suspending judgment in CC 487/2019. The 1st and 2nd respondent however instructed the 3rd respondent to proceed with execution and such execution has adversely affected the applicant as it has no access to the leased premises which is the hub of its operations as a business.

Efforts to engage the respondents failed resulting in the filing of this application.

This application was filed on 3rd September 2021 and was accompanied by Form No. 25. It was placed before me on 6th September 2021. The reference to perverse conduct in the certificate of urgency appeared to be an attempt to bring the application within the purview of Rule 60(3)(c) of SI 202 0f 2021, thereby justifying the use of Form No. 25 as the applicant did not serve the application on the respondents.

I however ordered that the application be served on the respondents together with a notice of set down for the 8th of September 2021.The decision to order the service of the application on the respondents was informed by the rather curious reference to perverse conduct in the certificate of urgency. The legal practitioner put it thus:-

> "As a legal practitioner, I consider the execution of a judgment which is pending appeal without leave of the court being granted, as being perverse conduct on the part of the judgment creditor."

A mere reading of this excerpt clearly shows that the legal practitioner did not apply his mind to what is envisaged by Rule 60(3)(c) as perverse conduct justifying the non-service of a chamber application to all interested parties. Ejectment having already occurred, there could not have been "risk of perverse conduct in that any person who would otherwise be entitled to notice of the application is likely to act so as to defeat, wholly or partly, the purpose of the application prior to an order being granted or served."

Following the directive that the application be served on the respondents, the 1st and 2nd respondents duly filed a notice of opposition, in which they took nine points *in limine*. However, at the hearing of the application counsel for the 1st and 2nd respondents abandoned all but 3 of these preliminary points. The remaining 3 are these:-

1. The matter is not urgent
2. The relief sought is incompetent.
3. The applicant has approached the court with dirty hands.

This judgment is concerned with these points *in limine*. I propose to deal with each one in turn:-

1. Is the matter urgent

Counsel's contention was that the matter is not urgent. This being so because the eviction order was granted in July 2020. The 1st respondent had that order successfully executed by the 3rd respondent on 8th October 2020. After such execution applicant filed an *ex-parte* application seeking restoration of possession and occupation of the disputed premises and in the event that the 1st and 3rd respondents failed to restore applicant, applicant be authorised to move back into the premises on its own accord. In a judgment handed down on 27 October 2020 the application was dismissed.

The applicant then filed an application for rescission of the judgment granted in July 2020, which judgment resulted in its eviction. That application was dismissed on 2nd December 2020. Such dismissal was premised on the dirty hands principle, with the court observing that the applicant had restored itself into the premises from which it had been evicted through an extant court order.

On 9th December 2020, the 1st respondent wrote to the applicant advising it that "re-eviction" was proceeding. The applicant did not act and only sought to do so in September 2021. The urgency is therefore self-created.

In response, *Mr Mazibuko* for the applicant agreed that the need to act arose in December 2020 with the dismissal of the application for rescission. Counsel however contended that the Magistrate Court decision was appealed against and such appeal had the effect of suspending the execution of the judgment granted by that court.

In considering this point *in limine* I cannot ignore the fact that the applicant had not disclosed all the facts which were crucial to disclose in order to assist the court in determining the urgency of the matter. It is also worth taking note of the fact that the provisional judicial management order has since been discharged and applicant's efforts to vacate the order have so far been unsuccessful.

The certificate of urgency and the founding affidavit left out the important detail relating to the fact that after judgment was entered for the 1st respondent in July 2020, execution was successfully completed in October 2020. The applicant's presence in these premises was by means of "self- help" in defiance of the court order, which court order was extant.

In *Graspeak Investments (Pvt) Ltd* v *Delta Corporation (Pvt) Limited and Another* 2001 (2) ZLR 551, the court sounded a warning against material non-disclosure of facts.

The background facts of the matter assists the court in determining whether the applicant in an urgent chamber application has made a case justifying an urgent hearing of their matter ahead of other litigants.

Counsel for the applicant referred the court to BERE J's (as he then was) decision in *Centra (Pvt) Ltd* v *Pralene Moyas and Anor* HH 57-12 where the learned Judge quoted, with approval, NDOU J's remarks in Anabas Services (Pvt) Limited v Minister of Health and Others HB-88-03 in which NDOU J said: -

> "The courts should, in my view, always frown on an order, whether *ex parte* or not, sought on incomplete information. It should discourage material non disclosures, *mala fides* or dishonesty. They may, depending on the circumstances of the case, make adverse or punitive orders as a seal of disapproval of *mala fides* or dishonesty on the part of litigants. This is one of the cases where, in exercise of my discretion, I should dismiss the application on account of the material non-disclosure. It is for these reasons that I dismissed the application with costs on 25 March 2003."

In casu the applicant sought to gain the court's sympathy by giving an economical factual background which highlighted that which the applicant considered would work in its favour. To demonstrate this point, had I not instructed that the urgent chamber application be served on the respondents and decided to rely on the "perverse conduct" alluded to in the certificate of urgency, the facts as shown on Form 25 and the founding affidavit, I would not have known that the applicant was evicted from these premises on the basis of a valid court order but decided to force its way back into the premises in contemptuous disregard of an extant court order.

When a matter is urgent the true facts speak for themselves without embellishment or withholding of facts. Where a litigant cherry picks on what facts to divulge, such conduct is telling and indicative of such litigant's appreciation of the negative impact the divulging of such facts would have on its case.

It cannot be said the need to act arose on 31st August 2021 when the applicant was locked out of the premises it had forced its way into after being evicted. This is so because after the order was executed the applicant sought to obtain a "stay of execution" which failed. The subsequent application for rescission also failed.

As far back as 9th December 2020 the applicant became aware of the respondents' intention to remove it from the premises, what the respondents called "re-eviction" and the applicant did not deem it fit to try and stop the "imminent harm."

If one is to be generous, the need to act arose in December 2020. The applicant must have appreciated that the odds were stacked against it as a result of the reasons given for the dismissal of its urgent *ex-parte* and rescission applications. The applicant sought to employ a different tact, deciding that the appeal route would best serve its purposes.

Whilst in *Kuvarega* v *Registrar General and Another* 1998(1) ZLR 188 CHATIKOBO J said:-

> "What constitutes urgency is not only the imminent arrival of the day of reckoning. A matter is also urgent if at the time the need to act arises, the matter cannot wait. Urgency which stems from deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. If there has been any delay, the certificate of urgency or supporting affidavit must contain an explanation of the non timeous action," *in casu* the applicant was not galvanized into action because of the imminent arrival of the day of reckoning but the facts betray a calculated tactical move meant to sanitise that which had failed to get the applicant the desired outcome.

The facts *in casu* are a far cry from what MAKARAU JP (as she then was) said in *Documents Support Centre P/L* v *Mapuvire* 2006 (2) ZLR 240 at 244C-D regarding urgent applications. She had this to say:-

> "…urgent applications are those where if the court fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant."

This is so because only a litigant who submits to due process and is desirous to protect a genuinely threatened right can have the moral ground to say such to the court.

Equally in *Gwarada* v *Johnson* 2009 (2) ZLR 159 the court had this to say on urgency:-

> "Urgency arises when an event occurs which requires contemporaneous resolution, the absence of which would cause prejudice to the applicant. The applicant must exhibit urgency in the matter in which he has reacted to the event or threat."

Turning to the facts *in casu*, by letter dated 9th December 2020 the applicant was aware of the fate that was soon to befall it and could have acted in whatever lawful manner it deemed fit to forestall the harm but chose not to act. I have already surmised as to the reason why it was hamstrung in seeking a solution through the courts. It had forced its way back into the premises after being evicted by the 3rd respondent who acted on the force of a valid court order.

The courts should not be seen to sympathise with litigants whose conduct is not deserving of such sympathy. Every litigant would want to have their day in court with minimal delay. To allow a litigant to jump the queue ahead of others takes more than a mere request from such litigant.

As GOWORA J (as she then was) said in *Triple C Pigs and Anor* v *Commissioner-General ZRA* 2007 (1) ZLR 27: -

> "Naturally every litigant appearing before these courts wishes to have their matter heard on an urgent basis, because the longer it takes to obtain relief, the more it seems that justice is being delayed and thus denied. Equally, the courts in order to ensure delivery of justice, would endeavour to hear matters as soon as is reasonably practicable. This is not always possible, however, and in order to give effect to the intention of the courts to dispense justice fairly, a distinction is necessarily made between those matters that ought to be heard urgently and those to which some delay would not cause harm which would not be compensated by the relief eventually granted to such litigant. As courts, we therefore have to consider, in the exercise of our discretion, whether or not a litigant wishing the matter to be treated as urgent has shown the infringement or violation of some legitimate interest, and whether or not the infringements of such interest, if not addressed immediately, would not be the cause of harm to the litigant which any relief in the future would render *brutum fulmen*."

For the reasons already alluded to the applicant *in casu* has not made a case justifying the exercise of my discretion in its favour. But for the applicant's decision to defy the October 2020 duly executed eviction, there would be no infringement of a legitimate interest to protect, deserving of a hearing on an urgent basis.

I had a mind to stop on this issue of urgency but for completeness's sake I decided to consider the issue of the relief being sought.

2. Is the relief competent

A provisional order is sought and granted on the basis of prima facie proof. The interim relief must therefore not be final in nature. This is so because to grant a relief which to all intents and purposes is final in nature on *prima facie* proof defeats the whole purpose of confirmation proceedings where the final relief calls for proof of a real right.

In *Chiwenga* v *Mubaiwa* SC 86-20 BHUNU JA had this to say:-

"The definition and purpose of a provisional order is diametrically different from that of a final order. C. B Prest in his book, *The Law and Practice of Interdicts* defines and explains the purpose of a provisional order as follows;

> "A provisional order is a remedy by way of an interdict which is intended to prohibit all *prima facie* illegitimate activities. By its very nature it is both temporary and provisional, providing (interim) relief which serves to guard the applicant against irreparable harm which may befall him, her or it, should a full trial of the alleged grievance be carried out. As the name suggests, it is provisional in nature, as the parties anticipate certain relief to be made final on a certain future date upon which the applicant has to fully disclose his, her or its entitlement to a final order that the interim relief sought was ancillary to."

In casu the applicant was evicted through an order of the court. The property which is within those premises which the applicant argues it uses in its business was attached on the force of three different court orders and has been sold or is in the course of being sold on site.

An order that seeks to compel the 1st, 2nd and 3rd respondents to forthwith surrender immediately control of the premises and to remove any and all impediments therefrom so as to allow the applicant undisturbed control and occupation of the premises has the effect of a final order.

The argument by *Mr Mazibuko* that the order seeks to address the unlawful actions of the 1st and 2nd respondent because the execution of the writ in CC 487/19 was done without the leave of the court does not make much sense. Counsel conceded that the action taken by the 1st respondent was done after leave to institute such was granted by the court. To argue that on getting judgment the applicant ought to have gone back to seek leave to execute is an unattractive argument that is not persuasive.

To equally argue that the applicant forced its way back into the premises after eviction but seeks to be restored to those premises with undisturbed and complete control of the same is tantamount to asking the court to sanitise unlawful conduct.

The effect is final as that is the applicant's objective, to be restored to the premises from which it was evicted. Once that is done what more will the applicant require? Therein lies the finality of the interim order sought.

I therefore hold that the interim relief sought is incompetent as it is sought on a prima *facie* basis.

With the resolution of these points *in limine* against the applicant I do not intend to unduly exercise my mind on the issue of dirty hands.

The respondents prayed for the dismissal of the application with punitive costs. Given that this matter has been disposed of on the basis of two preliminary points, i.e., lack of urgency and incompetent interim relief, I am of the considered view that the appropriate order is to strike the matter off the roll of urgent applications in terms of r60 subrule 18.

I however intend to make an order for costs. The applicant's conduct deserves censure. The factual background of this matter speaks to an applicant who was determined to harass the respondents and unnecessarily put them out of pocket. The non-disclosure of material facts regarding the issue of urgency is equally deserving of censure.

The court will show its displeasure with an appropriate order for costs.

In the result I make the following order:-

The urgent chamber application be and is hereby struck off the roll, with costs on a legal practitioner-client scale.

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners
Mathonsi Ncube Law Chambers, 1st and 2nd respondents' legal practitioners