

WOODREW W. PAYNE

Versus

MANICA FREIGHT

And

TONDERAI SITHOLE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 29 & 7 SEPTEMBER 2021

Urgent application

Applicant in person
Mr *Masiye-Moyo*, for the respondents

DUBE-BANDA J: This is an urgent chamber application. This application was lodged in this court on 17 September 2021. It was placed before me on the 21st September 2021, and I directed that it be served on the respondents together with a notice of set down for the 24th September 2021. Some problems arose administratively leading to the set-down of the 24th September being aborted for failure to pay the Sheriff costs for service of the application and a notice of set-down. I then directed that it be re-set down for the 29th September 2021.

At the commencement of the hearing applicant informed me that he just been served with respondent's notice of opposition. I enquired from him whether he needed time to familiarise himself with the issues raised in the notice of opposition, and if needs be seek legal representation. I made this suggestion because I noted that respondents were taking a number of points *in limine*, which might be beyond the comprehension of a litigant without the benefit legal representation. I even proposed to postpone the matter to the 4th October 2021, for that purpose. Mr *Masiye-Moyo*, counsel for the respondents agreed to such a proposed postponement of the matter. Applicant refused a postponement and indicated that he wanted the hearing to continue, the hearing continued.

The application is opposed by the respondent. Applicant seeks an order couched in the following terms:

1. That the 1st and 2nd respondents be and are hereby directed to release the Container LPL 1017331/FSCU4937333 immediately after granting of this order.
2. Failure (a) above the Deputy Sheriff of this Honourable (Court) be and is hereby directed to restore to the applicant container being held by 1st and 2nd respondents forthwith.
3. Costs of suit.

Factual background

Applicant is a returning resident from the United Kingdom. He contracted a company CMA CGM (UK) Shipping Limited to ship his Container to Beira, Mozambique, the final destination of the Container being Bulawayo, Zimbabwe. It is CMA CGM Zimbabwe Limited which transported the Container from Beira to Bulawayo. 1st respondent runs a receiving and storage depot in Bulawayo. On the 25 June 2021, 1st respondent received for storage applicant's Container from CGA CGM Zimbabwe Limited.

When applicants Container was not collected for two months, 1st respondent enquired from CGA CGM Zimbabwe Limited the reason the Container was not being collected, there appeared to be some disagreements between applicant and CGA CGM Zimbabwe Limited about some alleged unpaid invoices. Applicant says he has paid all invoices from CGA CGM Zimbabwe. Applicant then approached 1st respondent to collect his Container, the release of the Container was declined. 1st respondent contends that the Container had accrued storage charges of USD\$ 6 000.00 in the three months since 25 June 2021. 1st respondent referred applicant to CMA CGM Zimbabwe Limited for the resolution of this dispute.

Applicant contends that the Container was cleared by the Zimbabwe Revenue Authority (ZIMRA). He says that he has no contractual relationship with 1st and 2nd respondents, who are claiming outrageous storage fees him. He was prepared to take the Container upon its arrival in Bulawayo to Trenance whereupon ZIMRA would have carried out its assessment thereat. But the Container was diverted to 1st respondent without his approval and thus he is not obliged to pay storage fees. Now there is a stand-off between applicant and 1st respondent regarding storage fees. It is against this background that applicant has launched this application seeking the relief mentioned above.

Preliminary points

Other than resisting the relief sought on the merits, respondent took a number of preliminary points which were also a subject of argument in this matter, *viz* there is no entity by the name Manica Freight; the use of the wrong form; incompetent relief sought; urgency and material non-joinder. Respondent urged this court to strike this application off the roll on the basis of the preliminary points without a consideration of the merits.

At the commencement of this hearing I informed applicant and Mr *Masiye-Moyo* that in this case I shall adopt a holistic approach. This approach avoids a piece-meal treatment of the matter, and the preliminary points are argued together with the merits, but when the court retires to consider the matter it may dispose of the matter solely on preliminary points despite that they were argued together with the merits. I now consider the preliminary points.

Urgency

Respondents argue that this application is not urgent. The entitlement of litigants to approach this court on an urgent basis is now trite. This court enjoys a discretion in urgent applications to authorise a departure from the ordinary procedures that are prescribed by its rules. It is usually hesitant to dispense with its ordinary procedures, and when it does, the matter must be so urgent that ordinary procedures would not suffice. See: *Kuvarega v Registrar General and Another* 1998 (1) ZLR 188; *Triple C Pigs and Another v Commissioner-General* 2007ZLR (1) 27. *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2019] ZACC 27.

In the ordinary run of things, court cases must be heard strictly on a first come first serve basis. It is only in exceptional circumstances that a party should be allowed to jump the queue on the roll and have its matter heard on an urgent basis. The *onus* of showing that the matter is indeed urgent rests with the applicant. An urgent application amounts to an extraordinary remedy where a party seeks to gain an advantage over other litigants by jumping the queue and have its matter given preference over other pending matters. This indulgence can only be granted by a judge after considering all the relevant factors and concluding that the matter is urgent and cannot wait. See: *Kuvarega v Registrar General and Another* 1998 (1) ZLR 188; *Triple C Pigs and Another v Commissioner-General* 2007ZLR (1) 27.

The leading case within this jurisdiction in relation to urgency is *Kuvarega v Registrar General & Anor (supra)*, a judgment by CHATIKOBO J. The learned judge had the following to state at p 193F-G.

What constitutes urgency is not only the imminent arrival of the day of reckoning, a matter is urgent if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated rules. It necessarily follows that the certificate of urgency or supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay.

In assessing whether an application is urgent, the courts have in the past considered various factors, including, among others: the consequence of the relief not being granted; whether the relief would become irrelevant if it is not immediately granted; and whether the urgency was self-created. See: *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2019] ZACC 27. Further to pass the urgency test, applicant must show that there is an imminent danger to existing rights and the possibility of irreparable harm. See: *General Transport & Engineering (Pvt) Ltd & Ors v Zimbank* 1998 (2) ZLR 301; *Document support Centre (Pvt) Ltd v Mapuwire* 2006 (1) ZLR 240 (H); *Dextiprint Investments (Pvt) Ltd v Ace Property Investment company* HH 120/2002; *Madzivanzira & Ors v Dextrint Investments (Pvt) Ltd & Anor* 2002 (2) ZLR 316 (H).

In motivating the issue of urgency applicant contends that he is the lawful owner of the Container. Respondents have no right to claim storage fees from him as there is no contractual relationship between the parties. The Container held by the respondents is incurring a huge storage bill to his prejudice. He seeks release of his Container because it is being unlawfully held and at a huge expense to him.

1st respondent received the Container on the 25 June 2021. Applicant knew or must have known on the 25th June 2021, or soon thereafter that his Container was kept in storage by the 1st respondent. He must have known as early as in June that 1st respondent was declining to release the Container and the reasons thereof. He knows that his Container is being held for want of payment of storage fees. The issue whether 1st respondent is entitled to such fees or not entitled is not an issue that can be resolved *via* an urgent application. The time to act was on the 25th June or soon thereafter. Applicant cannot be permitted to create an emergency on the 17 September 2021, approximately three months from the date his Container was taken into

storage by the 1st respondent. This is not the kind of urgency anticipated by the rules of court. It is a text-book case of self-created urgency.

Applicant's contention that respondents have no right to claim storage fees from him as there is no contractual relationship between the parties, that the Container held by the respondents is incurring a huge storage bill to his prejudice, that he seeks release of his Container because it is being unlawfully held and at a huge expense to him cannot be a trigger of urgency. This is what other litigants who have their matters waiting in the queue have to contend with. Applicant cannot be permitted to gain an advantage over other persons whose disputes are being dealt with in the normal course of events.

Every litigant bringing their cases before these courts wishes to have their matters 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. This is not always possible. See: *Triple C Pigs and Another v Commissioner-General* 2007(1) 27. For a litigant to successfully motivate a court to hear its matter on an urgent basis, it must show that its matter is out of the ordinary. Applicant has failed to show that this matter meets the test of urgency.

This court cannot hear this application on the roll of urgent matters. It simply has to join the queue of other matters awaiting set-down on the ordinary roll. It is high time that litigants understand and internalise the fact that enrolling a matter on the roll of urgent matters is not there for the taking. This abuse of filing unmerited urgent applications must come to a stop.

In the circumstances, I come to the conclusion that the matter is not urgent and it cannot be afforded a hearing in the roll of urgent matters. It falls to be struck from the roll with an appropriate order of costs. Having found that the matter is not urgent, it is not necessary for me to consider the other preliminary points taken by the respondents. As such would just be for academic purposes only.

Costs

The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule.

In this case respondents sought costs on an attorney and client scale. A court may award attorney and client costs against an unsuccessful party where his conduct has been unworthy, reprehensible or blameworthy or where he has been actuated by malice or has been guilty of grave misconduct either in the transaction under enquiry or in the conduct of the case.¹

Mr *Masiye-Moyo* argued that applicant has been very uncooperative. He declined a proposal to have the matter postponed to enable him to read and understand the opposing papers, and if needs be to seek competent and effective legal representation. It is contended that had he accepted to take a step back, read the opposing papers or even sought proper legal advice, he would have noted that his application was doomed to fail. In answer applicant submitted that he did not come to this court to discuss legalities or procedures, he came here to seek justice.

It was contended for the respondents that the fact that applicant is without legal representation must not be taken into account in deciding the issue of costs and the scale on which they must be paid. He must be treated like any other litigant, with legal representation or not. I find myself in agreement with this submission. I say so because if litigants without legal representation would be judged on a different standard from those with the benefit of legal representation, such would amount to negative discrimination against the former. The law demands that litigants should be treated equally, i.e. there must be equality before the law.

To mulct a litigant with punitive costs requires a proper explanation grounded in law. These are costs that are meant to be penal in character and are therefore supposed to be ordered only when it is necessary to inflict some financial pain to deter wholly unacceptable behaviour and instil respect for the court and its processes.

I do not think that applicant by refusing a proposal to postpone the matter to enable him to read and understand the opposing papers, and if needs be seek legal representation should earn him costs on a legal practitioner and client scale. Like any other litigant, he argued his case, but failed to get the relief he sought from this court. He should not be mulct with

¹ The Law of Costs, AC Cilliers, Butterworths paragraph 4.50.

punitive costs for exercising his right to access to justice. I have further had regard to the requirements of law and fairness in relation to an order of costs, and I am satisfied that such an order is not appropriate given the circumstances of this case.

Disposition

In the result, I make the following order: -

1. The point *in limine* on urgency be and is hereby upheld.
2. This application is not urgent and is accordingly struck off the roll of urgent matters.
3. The applicant shall pay the costs of this application on a party and party scale.

It is so ordered.

Gill Godlonton & Gerrans 1st and 2nd respondents' legal practitioners