**DESIRE NKOMO**

**Versus**

**MICHELLE GONA**

**And**

**P.NKIWANE N.O.**

**And**

**THE MINISTRY OF LANDS, LAND REFORM AND RESETTLEMENT**

**And**

**THE MINISTER OF LANDS, LAND REFORM AND RESSETLEMENT**

**And**

**UMGUZA RURAL DISTRICT COUNCIL**

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 9 APRIL 2021 AND 29 APRIL 2021

**Urgent chamber application**

*K Nxumalo,* for the applicant
*Ms S. Mpofu,* for the 1st respondent

**DUBE-BANDA J:** This is an urgent application. This application was lodged in this court on the 1st April 2021. Itwas then placed before me and I directed that the copy of the application and a notice of set down be served on the respondents. The application was then set-down for the 7th April 2021, and on the set-down date, 1strespondent was not in attendance. I scrutinised the return of service and observed that the application and the notice of set down were served by affixing the processes on a letter box at number 15 1st Avenue, Famona, Bulawayo. I was not satisfied with this service, and noted that in a cross-reference matter i.e. case No. HC 16/21, 1st respondent was represented by a firm of legal practitioners. I then directed that the application and the notice of set down be served on such legal practitioners.

This matter was then argued on 11 April 2021. At the commencement of the hearing, Mr *Nxumalo,* counsel for the applicant said he had been asked to appear by a Mr *Sithole* who had prepared the court papers. He literally had no idea of the facts of this case and the relief sought by the applicant. All he was content to submit was that "*I stand by the papers filed of record*," and no more. I found this conduct falling below the threshold or standard of competent and effective legal representation, which applicant, as a litigant in this court, is entitled to. I then stood down the matter to enable Mr *Nxumalo*to either ask Mr *Sithole* to come argue the matter, or to familiarise himself with this application, and the two cross-reference files, i.e. HC 16/2021, HC 260/2021 and judgment HB 38/21 (on the authority of *Mhungu v Mtindi* 1986 (2) SA 171 (SC) at 173A-B this court is entitled to refer to its own records and proceedings and to take note of their contents).

When the hearing resumed, Mr *Nxumalo* informed the court that Mr *Sithole* would not be available to argue the case, and that he was now ready to proceed with the hearing. Notwithstanding the fact that he said he was ready to argue the application, I could still detect incoherencies from his submissions, typical of counsel who was not prepared for a hearing.

In this urgent chamber application, the applicant seeks a provisional order drawn in following the terms:-

**Terms of the final order sought**

1. 1st respondent, its agents or employees or assignees or proxies, be and is hereby ordered to permanently cease and desist from entry into premises known as subdivision 1 of Lot 15 Lower Nondwane, Umguza, for purposes of constructing any dwelling or structure whatsoever thereon, or for purposes of carrying out any agricultural or related operations or activities thereon.
2. 1st respondent be and is hereby ordered to pay the costs of this application on a client and attorney scale.

**The interim relief granted**

1. Pending the determination of the applicant's application for review filed under cover of case number HC 260/21, 1st respondent, its agents or employees or assignees or proxies, be and is hereby ordered to permanently cease and desist from entry into premises known as subdivision 1 of Lot 15 Lower Nondwane, Umguza, for purposes

of constructing any dwelling or structure whatsoever thereon, or for purposes of carrying out any agricultural or related operations or activities thereon.

**Service of the provisional order**

2. The Sheriff / Assistant / Additional Sheriff / Applicant's legal practitioners / their agents or assignees be and are hereby authorized to effect service of application and provisional order on the respondents.

The 1st respondent opposed the application. The 2nd, 3rd, 4th and 5th respondents have not been active in this matter.

**Background**

What is clear is that applicant and 1st respondent, i.e. the disputantsin this matter are entangled in a mortal fight over the right to occupy an immovable property known as Subdivision 1 of Lot 15 Lower Nondwane (the land). This is State land. Applicant claims the right of occupation of the land in terms of a Certificate of Occupancy issued by Umguza Rural District Council (5th respondent). The certificate was issued in terms of section 9(1) of the Communal Land Act 20 of 1982. The 1st respondent claims the right of occupation of the land in terms of an Offer Letter dated 3rd October 2019. For the purposes of this application, I take the view that the certificate of occupancy and the offer letter relate to the same piece of land, i.e. Subdivision 1 of Lot 15 Lower Nondwane.

On the 3rd February 2021, applicant under cover of case No. HC 16/21, filed with this court an urgent chamber application. Two respondents were cited therein, one (Michelle) Gona and one Mpofu. 1st respondent in HC 16/21, Michelle Gona, is again the 1st respondent in this application. In HC 16/21 applicant sought an interim relief reading as following; "pending the determination of this matter, 1st and 2nd respondents, or their agents or employees or assignees or proxies, be and is hereby interdicted from entering into a piece of land known as subdivision 1 of Lot 15 Lower Nondwane, Umguza, for purposes of constructing any dwelling or structure whatsoever thereon, or for purposes of carrying out any agricultural or related operations or activities of any nature whatsoever upon the said land."

In case No. HC 16/21 applicant averred that in 2001, he applied and was allocated Plot No. 1 of Lot 15 Lower Nondwane, in Umguza District. He alleges that he took occupation of the land in 2001, and has been dutifully paying rates, taxes and fees to the local authority. He places before court proof of such payment, however I note that the proof relates to payments made on the 17 July 2019 and 16 July 2020, nothing though turns on this point. He avers that over the years, he has cleared the fields, fenced them off, build a permanent dwelling structure and constructed cattle pens. On the 27 January 2021, he found some men digging a foundation for a two-roomed house at his plot. It is contended that the digging men were doing so at the instance of the 1st respondent. The interim relief sought in HC 16/202, was then meant to interdict 1st respondent from constructing any dwelling or structure whatsoever on the disputed land.

Case No. HC 16/21, was opposed and on 18 March 2021, this court in HB 38/21 ruled as follows:

1. The matter is not urgent.
2. There are disputes of fact in the matter which are incapable of being resolved on the papers.
3. The applicant has not exhausted initial and alternative remedies in the matter which are clearly provided for and apparent from the papers.
4. There is a clear and fatal misjoinder in the application.
5. The matter is removed from the roll of urgent matters.

On the 31st March 2021, applicant filed, under cover of case number HC 260/21, a court application for review. The application is still pending. The order sought is as follows:

1. The offer letter *cum* recommendation letter issued by the 2nd respondent to the 1st respondent on the 3rd October 2019, with respect to the 1st respondent's occupation of a piece of land known as Subdivision 1 of Lot 15 Lower Nondwane, be and is hereby reviewed as an administrative act, and is set-aside.
2. 1st respondent be and is hereby ordered to pay the costs of this application on a client and attorney scale.

Now in this application, it is averred that on 30 March 2021, 1st respondent sent back its building contractors to construct a dwelling at the disputed piece of land. It is contended

that the application for review is directed at the offer letter, which gives 1st respondent a right to construct a dwelling at the plot. The import of the interim relief sought in this application is to interdict 1st respondent from constructing any dwelling or structure, or of carrying out any agricultural or related operations or activities at the disputed land.

At the commencement of the hearing, Ms *Mpofu,* counsel for the 1st respondent raised a point *in limine* to the effect that the application brought on the basis of urgency, by the applicant, is not at all urgent. I asked Mr *Nxumalo* to address the issue of urgency.

**Urgency**

I now deal with urgency. 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: *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; *Bonface Denenga & Anor* v *Ecobank Zimbabwe Pvt Ltd*, HH 177-14.

In the matter of *Bonface Denenga & Anor* v *Ecobank Zimbabwe Pvt Ltd*, HH 177-14 the court summarized what constitutes urgency as explained in case law. The general thread which runs through all these cases is that a matter is urgent if: it cannot wait the observance of the normal procedural and time frames set by the rules of the court in ordinary applications as to do so would render negatively the relief sought; there is no other alternative remedy; the applicant treated the matter as urgent by acting timeously and if there is a delay to give good

or a sufficient reason for such a delay; and the relief sought should be proper at law. See: *Kuvarega* v *Registrar General and Another*1998 (1) ZLR 188.

In this application and in case No. HC 16/2021, the real protagonists are applicant and the 1st respondent. The facts are the same, except for some use of different words and phrases here and there in this application, which I consider a deliberate and calculated ploy to mislead and create a façade that these two applications are different. What is clear is that in both applications the cause of action or thealleged trigger to the urgency is 1st respondent's alleged construction or intended construction at Plot No. 1 of Lot 15 Lower Nondwane. In both applications interim relief sought is to interdict 1st respondent from constructing any dwelling or structure, or of carrying out any agricultural or related operations or activities at the plot. Mr *Nxumalo* argued that the main difference between the two applicationsis that in case No. HC 16/2021, applicant had not yet filed an application for review, i.e. HC 260/21. This is just a distinction without a difference. I take the view that the filing of an application for review on the 31st March 2021, does not change the import and similarity of these two applications, and is therefore of no consequence. These two applications remain substantially identical.

MABHIKWA J in HC 16/2021 (HB 38/21), ruled as follows: that the matter is not urgent; that there are disputes of fact in the matter which are incapable of being resolved on the papers; that the applicant has not exhausted initial and alternative remedies in the matter which are clearly provided for and apparent from the papers; that there is a clear and fatal misjoinder in the application; and removed the matter the from roll of urgent matters. The judgment in HB 38/21 is extant. I take the view that applicant is simply aggrieved by the judgment of MABHIKWA J. He then approaches this court, makes twists and turns to create a façade that this application is anchored on a different cause of action, when in fact he is recyclingthe facts in case No. HC 16/2021. In the event I grant this provisional order, I would be in effect reviewing or setting aside the judgment of MABHIKWA J. It is trite that I have neither jurisdiction nor competence to review, alter or change a judgment or order of a judge of parallel jurisdiction.Thisapplication is tantamount to an appeal through the back-door. What applicant is asking this court to do is the prerogative of the Supreme Court. See: *Unitrack (Pvt) Limited v Telone (Pvt) Limited* SC 10/18; *Pyramid Motor Corporation (Pvt) Ltd v Zimbabwe Banking Corporation* 1984 (2) ZLR 29. Applicant is attempting to subvert

the court system in a manner that undermines the judicial process. He is not entitled to do so. The relief sought by applicant is not proper at law.

Again the argument that this matter is urgent must also fail on another simple point, the review referred to in this application, though filed on the 31st March 2021, seeks to review an offer letter dated 3rd October 2019.It is now approximately one year and five months since the letter sought to be reviewed in HC 260/21 was written. How the review of such a letter written that long back, would be the cause of an urgent application on the 1st April 2021, is not explained. This is not the kind of urgency anticipated by the rules of court. See: *Kuvarega* v *Registrar General and Another*1998 (1) ZLR 188.

Furthermore, HC 16/2021was removed from the roll of urgent matters. In terms of Practice Directive 3 /2013, the term removed from the roll refers to a matter adjourned indefinitely without the court specifying the date when the matter shall be heard again.This application was filed approximately two weeks after HC 16/2021was removed from the roll of urgent matters.The simple reading of Practice Directive 3 / 2013, shows that the application in HC 16/2021 is still pending. The net effect of it all is that there are now two applications between the same parties, and founded upon the same cause of action pending before this court. For this reason again, this matter is not urgent.

Therefore, I decline to hear this application as one of urgency as I find that this is not the type of urgency contemplated by the rules. This application must join the queue, there is no basis why it should be allowed to jump the queue and be given preference over other pending matters. It can wait for its turn. The only issue remaining therefore is that of costs.

**Costs**

I asked Mr *Nxumalo,* that in the event this court finds that this application amounts to a text-book case of abuse of court process, who should be ordered to pay the costs of suit, and at what scale. I asked him to reflect and rethink whether this is not a costs *debones proprisc*ase. He submitted that in such an event, applicant should pay the costs on a legal practitioner and client scale.

More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. See

*Orr v Solomon* 1907 TS 281. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or *mala fides* (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court. See: *Public Protector v South African Reserve Bank* [2019] *ZACC* 29.

The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium. It should only be in relation to conduct that is clearly and extremely scandalous or objectionable that these exceptional costs are awarded. *See Plastic Converters Association of South Africa on behalf of Members v National Union of Metalworkers of SA* [2016] ZALAC 39; [2016] 37 ILJ 2815 (LAC).

To mulct a litigant in punitive costs requires a proper explanation grounded in our law. All of the above said, 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. The punitive costs mechanism exists to counteract reprehensible behaviour on the part of a litigant. The question whether a party should bear the full brunt of a costs order on an attorney and client scale must be answered with reference to what would be just and equitable in the circumstances of a particular case. See *De Lacy v South African Post Office* [2011] ZACC 17; 2011 JDR 0504 (CC); 2011 (9) BCLR 905 (CC) at paras 116-7 and 123 A court is bound to secure a just and fair outcome. A punitive costs order is justified where the conduct concerned is "extraordinary" and worthy of a court's rebuke.

*In casu*, on the 3rd February 2021, applicant filed an urgent application in this court. On the 18 March 2021, this court handed down its judgment and ruled, *inter alia* that the matter was not urgent. Approximately two weeks later, applicant again filed this application, duplicating HC 16/2021, the protagonists being the same, the cause of action being the same, and the relief sought being the same. This is an application which should not have been brought to this court. It amounts to an extreme abuse of the process of this court. I take the

view that this is a border-line case between costs *debones propris* and costs on a legal practitioner and client scale.

I will spare Mr *Nxumalo* such costs, with a warning that litigants are entitled to effective and competent legal representation, and that it is the duty and obligation of counsel to give representation of such quality. On the facts of this case though, applicant cannot escape costs on a punitive scale. This case epitomises an unacceptable abuse of the process of this court. This conduct is extraordinary and worthy of a court's rebuke.On the factual matrix of this case, and in the exercise of my discretion, I find that an award of costs on an attorney and client scale is merited.

**Disposition**

In the result, I order as follows:

This application is not urgent and is removed from the roll of urgent matters with costs on a legal practitioner and client scale.

*Ncube Attorneys*, applicant's legal practitioners
*Kossam Ncube & Partners*, 1st respondent's legal practitioners