

DIVVYLAND INVESTMENTS (PVT) LTD
versus
DAVID CHIWEZA
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 22, 23 & 25 February 2022

Ruling on issue of urgency of the Application filed as Urgent Chamber Application

F Chinyama with M Simango, for the applicant
CW Gumiro, for the 1st respondent

FOROMA J: Applicant filed this application as an Urgent Chamber Application seeking the following order:

- (1) That the execution of the eviction ordered under SC 138/21 and allowed to continue under HH 83/22 be allowed pending finalization of the appeal under CV SC 63/22.
- (2) That the first respondent pays applicant's costs of suit on the higher scale of legal practitioner and client.

The application is opposed by the first respondent who objected *in limine* that the matter is not urgent. After hearing the parties counsels on the point *in limine* I reserved the ruling in order to consider first respondent's notice of opposition which was only brought to my attention right at the end of Mr Gumiro's address in support of his argument that the application was not urgent. Applicant was served the said notice of opposition prior to the hearing and for this reason its counsel had no objection to the untimely production of the first respondent's notice of opposition. I must take this opportunity to remind legal practitioners involved in handling urgent matters filed as urgent chamber or court applications that when filing documents in matters where the application has already been allocated to a duty judge they ensure that after having the documents stamped by the registrar at the civil registry, they do not leave the copies for the court/duty judge

in the civil registry but ensure that the said documents are delivered at the duty judge's chambers. In the event that the clerks at civil registry object to parting with the registry copy of the process /document filed the party filing the process should serve an additional copy on the allocated judge's clerk immediately. This ensures that as the duty judge peruses the record in preparation for the hearing set down he/she does peruse a complete file as more often than not some documents only surface at the hearing despite the party filing same having done so in good time. By then the duty judge will not have had an opportunity to consider such document(s) and this results in the determination of the matter being delayed as very often the matter must be postponed to enable the judge to peruse and consider such documents. The judge's clerk /assistant cannot be expected to guess that the file he refers to the judge to prepare for the hearing is incomplete on account of some documents floating somewhere in the civil registry. Such postponements as are necessitated by failure to bring documents timeously to the judge tend to defeat the whole purpose of the Urgent Chamber Application procedure.

That said I proceed to consider the point *in limine* raised by first respondent namely that the applicant's application is not urgent. The applicant's application is for leave to execute the High Court judgement in HC 214/22 Annexure D on page 38 of the applicant's papers which judgement has been appealed against by first respondent. Applicant considers that the appeal noted has no prospects of success and has been noted for purposes of frustrating the applicant's efforts to recover its property from first respondent as ordered by the Supreme Court per judgment no. SC 138/21.

I do not propose to comment on the merits of the application as that is not necessary for purposes of determining the preliminary objection taken by the first respondent. In any event it would be undesirable to do so before the issue of urgency (the preliminary point raised) is determined.

The authority often cited when arguing determination of the issue of urgency in matters filed as urgent applications and which many regard as the *locus classicus* is the case of *Kuvarega v The Registrar General & Anor* 1998(1) ZLR 188 (H).

Both counsels referred me to it and its ratio cannot be gain said. The rules of the court do not define the term urgent or urgency. The High Court Rules 2021 in r 60(3)(d) provides for

situations where an applicant is excused from serving a chamber application on all interested parties. In that rule urgency is addressed as follows:

- “(3) a chamber application shall be served on all interested parties.....or unless that applicant reasonably believes one or more of the following:
- (a)
 - (b)
 - (c)
 - (d) the matter is so urgent and the risk of irreparable damage to the applicant is so great that there is insufficient time to give due notice to those otherwise entitled to it”.

This type of urgency is not necessarily the type of urgency which distinguishes ordinary chamber applications and ordinary court applications from urgent chamber applications. It is one of the types of situations which justify the non-service of the chamber application on interested parties. It however would qualify a matter to be instituted as an urgent chamber application.

The requirements for an urgent chamber application are governed by r 60(6) which provides as follows:

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

As indicated herein above the High Court Rules 2021 do not define the term urgent or urgency and in my view advisedly so. The court and the legal practitioners per force must be guided by precedent in determining the purview of this term which tends to elude many who believe that it must subjectively be assessed yet it can only be objectively tested and established. On the authority of *Kuvarega* case (supra) a matter is urgent if its determination cannot wait when the need to act has arisen lest by waiting irreparable damage/loss will be occasioned to a party craving the court’s intervention on an urgent basis.

In casu applicant seeks leave to execute a judgement appealed against pending the determination of the appeal noted against the said judgement. The judgement appealed against is that of the High Court which judgement dismissed an application for a stay of execution of the Supreme Court judgement granting applicant the right to eject respondent from premises known as Number 12 Le Roux Drive, Hillside, Harare. The applicant argued that the matter is urgent as

the appeal noted by first respondent not being meritorious and having no prospects of success will cause irreparable loss to applicant who:

- (i) must endure deprivation of the enjoyment of the right of use of its property
- (ii) risks vandalizing of the property or and including diminishing of the property's value by the day on account the day an amount of mounting judgements against him to vacate. In the certificate of urgency filed in support of the urgent chamber application (para 9) the legal practitioner claims "Applicant herein thus seeks an urgent order for execution pending appeal that was filed by the first respondent in the Supreme Court". Quite clearly once a party has successfully obtained an order from a court the speed with which its execution is achieved is not dependant on any further orders by the court as court orders are executed in the sheriff's office.

Generally an application for leave to execute pending appeal is pursued as a court application for good reason. This is understandable as such applications are sometimes not dealt with by the judge whose judgement is subject of appeal (even though that would be preferable) and for that reason the court will require a complete record which may take time to prepare. This is also in recognition of the fact that the judge whose judgement is on appeal being *functus* does not concern himself/herself with the speed with which his judgement is executed. The desirability of saving a party from the risk of a *nulla bona* or *brutum fulmen* on execution is never the test of urgency. Rather the test is the risk of irreparable damage/loss.

Applicant has not placed before me tangible bases for the argument that this matter is urgent to justify its being pursued as an Urgent Chamber Application. The matter could have been pursued as an urgent court application in terms of r 60 (12) of the High Court Rules 2021 – see also *Andrew John Pascoe v Ministry of Lands and Rural Resettlement & W Bungu & The Attorney General NO* HH 391/17. Most of the arguments advanced address the merits of the relief sought as opposed to the aspect of urgency. In terms of r 60(18) I find that the application is not urgent within the meaning of this rule and I accordingly strike it from the roll of Urgent Chamber Applications. Applicant is at liberty to proceed in terms of r 60(19) of the High Court Rules 2021.

Mushoriwa Pasi Corporate Attorneys, applicant's legal practitioners
Moyo Chikono & Gumiro, respondent's legal practitioners