

SIBONGILE NCUBE (NEE NDLOVU)
versus
DUMISANI NCUBE
and
LORELAY INVESTMENTS (PRIVATE) LIMITED
and
PERFECT CORE SUPPLIES (PRIVATE) LIMITED
and
THABA PATRICK MOYO
and
CITY OF BULAWAYO
and
UMGUZA RURAL DISTRICT COUNCIL

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 21 and 22 March 2022

Urgent Chamber Application

Mrs *N Dube-Tachiona*, applicant's legal practitioners
Mr *K Ncube*, respondents' legal practitioners

MUNANGATI-MANONGWA J: The applicant herein approached this court on an urgent basis seeking the following relief:

TERMS OF FINAL ORDER SOUGHT

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

Pending the finalization of the divorce proceedings filed by applicant under case No. HC 1600/22:

1. 1st Respondent be and is hereby interdicted from interfering with applicant's running of 3rd respondent's business affairs carried out at Shop 14 Bulawayo Centre, JMN Nkomo Street and 9th Avenue/Fort Street and 10th Avenue, Bulawayo.
2. 1st Respondent be and hereby barred from interfering or tampering with the lease agreement between 3rd respondent and National Railways of Zimbabwe Contributory Pension Fund.
3. 1st respondent be and is hereby ordered to restore management and possession of Shop No. 14 Bulawayo Centre and Cowdray Park Supermarket to Applicant.
4. 1st, 2nd and 3rd Respondent be and hereby barred from disturbing Applicant's operations and running of Cowdray Park Supermarket situated at Stand No. 22567 Cowdray Park Township, Bulawayo.

5. Applicant be and is hereby granted right to occupy, possess and use the following properties:
 - a. House No. 23138 Pumula South Township Bulawayo. Alternatively, House No. 6684 Gwabalanda Township, Luveve, Bulawayo.
 - b. Motor vehicle being Toyota Mark A Registration No. AFD2308
6. 1st Respondent be and is hereby interdicted from disposing, selling, transferring, donating or alienating the following properties:
 - a. Stand No. 14820, 12 Inhloni Close, Selbourne Park, Bulawayo
 - b. Stand No. 6684 Gwabalanda Township, Luveve, Bulawayo
 - c. Stand No. 23138 Pumula South Township, Bulawayo
 - d. Stand No. 22567 Cowdray Park Township, Bulawayo
 - e. Stand No. 4C 1, Heany Junction Village, Umuguza
 - f. Plot No. 65, Mopani, Umguza
7. 5th Respondent be and is hereby ordered and directed to immediately register caveats against the following properties:
 - a. Stand No. 14820, 12 Inhloni Close, Selbourne Park, Bulawayo
 - b. Stand No. 6684 Gwabalanda Township, Luveve, Bulawayo
 - c. Stand No. 23138 Pumula South Township, Bulawayo
 - d. Stand No. 22567 Cowdray Park Township, Bulawayo
8. 6th Respondent be and is hereby ordered and directed to immediately register caveats against the following properties:
 - a. Stand No. 4C 1, Heany Junction Village, UMUGUZA
 - b. Plot No. 65, Mopani, Umguza
9. 1st respondent be and is hereby ordered to pay costs of suit on an attorney and client scale.

INTERIM RELIEFD GRANTED

Pending the determination, the Applicant is granted the following relief:

1. 1st Respondent be and is hereby ordered to give Applicant the sum of USD\$1 300.00 which he grabbed from 3rd Respondent business at Bulawayo Centre which is being controlled by Applicant.
2. 1st Respondent be and is hereby temporarily interdicted from interfering with Applicant's running of 3rd Respondent's business at Shop No. 14 Bulawayo Centre.
3. 1st Respondent and 4th Respondent be and are hereby temporarily interdicted from interfering with Applicant's running of 2nd Respondent's business being Cowdray Park Supermarket situated at Stand No. 22567 Cowdray Park Township, Bulawayo.
4. 5th Respondent be and is hereby ordered and directed to immediately place caveats against the following properties:

- a. Stand No. 14820, 12 Inhloni Close, Selbourne Park, Bulawayo
 - b. Stand No. 6684 Gwabalanda Township, Luveve, Bulawayo
 - c. Stand No. 23138 Pumula South Township, Bulawayo
 - d. Stand No. 22567 Cowdray Park Township, Bulawayo
5. 6th Respondent be and is hereby ordered and directed to immediately place caveats against the following properties:
- a. Stand No. 4C 1, Heany Junction Village, Umuguza
 - b. Plot No. 65, Mopani, Umguza
6. Applicant be and is hereby granted right to occupy, possess and use the following properties:
- a. House No. 23138 Pumula South Township Bulawayo. Alternatively, House No. 6684 Gwabalanda Township, Luveve, Bulawayo.
 - b. Motor vehicle being Toyota Mark X Registration No. AFD2308
7. 1st Respondent be and is hereby ordered to pay costs of suit on an attorney and client scale.

The brief facts of the matter are that Applicant is married to the 1st respondent. 1st and 4th Respondents are Directors to 2nd Respondent. The 3rd Respondent is a shop jointly operated by applicant and 1st respondent's.

The Applicant recently issued divorce summons so there is a pending divorce matter before the High Court in Bulawayo. Applicant states that she has been running and managing 3rd Respondents business affairs at Shop 14 Bulawayo Center, JMN Nkomo Street and 9th Avenue/Fort Street and 10th Avenue Bulawayo as well as Cowdray Park Supermarket in Bulawayo. She has also moved out of the matrimonial home and seeks to be placed in another house which is not the matrimonial home which is in Pumula South, Bulawayo as reflected in the interim relief sought. It is her evidence that the 1st Respondent has barred her from managing the entities she has been managing and has collected rentals which she was entitled to collect. She thus seeks the far and wide relief outlined above which comprises spoliation, interdicts, placement of caveats on properties amongst other relief.

The application is opposed. The counsel for respondents (1st, 2nd, 3rd and 4th respondents) raised two points *in limine* being:

- i. That the matter is not urgent and should be removed from the roll and
- ii. That the relief sought being a spoliation is not competent given that it is sought as interim relief.

Mr *Ncube* for the respondents submitted that the certificate of urgency does not disclose when the need to act arose. He submitted that the certificate mentions factual issues but there is silence on when the need to act arose. There are no dates as to when the alleged acts of the 1st respondent complained of were committed. He further submitted that the certificate of urgency does not show that

the requirements of urgency were met. Mr Ncube submitted that the founding affidavit suffers similar deficiencies as there is no mention of when the events complained of took place. Thus, in the absence of clarity as to when the need to act arose, the application cannot qualify as urgent. He thus maintained that what makes a matter urgent is whether the applicant acted as soon as the need to act arose, the court cannot, given the facts at hand, know when the need to act arose to be able to decide as to urgency.

The other point raised pertained to the nature of the relief sought. He submitted that as part of the relief sought pertained to **spoliation**, such relief could not be sought by way of interim relief hence the relief was incompetent.

In response, applicant's counsel pointed out that paragraph 14 of the founding affidavit pointed to when the need to act arose. It partly reads:

“Recently, 1st respondent unilaterally decided that he will collect money from 3rd respondent business in Bulawayo Centre as more fully shown in the attached Whatsapp conversation between him and myself where he said to me.....”

The court was referred to a Whatsapp message in Applicant's phone where the 1st Respondent was telling the Applicant that he was to collect rentals from tenants. It was submitted that the message from the phone indicated that it was on 2 March 2022. Hence that is the date the need to act arose.

The applicant's counsel further drew my attention to the fact that the certificate of urgency refers to serious financial loss if there is no interference by the court, thus this points to the urgency. It was argued on behalf of the applicant that applicant has a reasonable fear that if caveats are not placed on the properties listed, the 1st respondent is likely to dispose of the properties much to the prejudice of the applicant. He referred to the fact that the fear is further exacerbated by the fact that the first respondent revealed in his papers that one of the properties had been encumbered by UNTU. Further he referred to connivance between the first and fourth respondent who had come up with an attached resolution empowering 1st respondent to act on behalf of the company without the awareness of applicant who is also a director of second respondent. It was argued she was never notified of a meeting hence if the court does not grant the relief sought by the time the divorce is heard there will be nothing, in terms of assets, for the applicant. The applicant thus urgently requires to be restored as the manager of Shop 14 Bulawayo Centre so that she continues to collect money since she is being sidelined in the second respondents' operations. Equally the Cowdry Park Supermarket which she was operating for years had been taken away from her hence the matter was urgent.

On spoliation it was argued on behalf of the applicant that since she had been dispossess through unlawful actions it was proper to have the *status quo ante* restored.

Approaching the court on an urgent basis is a drastic step which litigants need to think through before engaging upon. It calls upon the court to leave everything it has been doing and immediately attend to such an application. The application jumps the queue to receive the urgent attention of a judge. Such priority status has to be justified to be earned.

It has to be apparent from the certificate of urgency right through the founding affidavit that urgent action by the court is required otherwise the court should not bother to act, if relief cannot be granted now. The case of *Document Support Centre (Pvt) Ltd v Mapuvire* 2006 (2) ZLR 240 (H) is instructive on what constitutes urgency

It is not for the court to sift through averments and try to decipher where the urgency lies. *In casu* the certificate of urgency does not indicate when the actions complained of arose so as to give the court benefit of deciding whether applicant acted timeous. Equally the founding affidavit is bereft of any evidence pointing to when the need to act arose. As remarked by MANZUNZU J in *Chirisa v Magwegwende & 2 Ors* HH 390/20:

“A close reading of the certificate of urgency falls far too short of what is expected, it does not say when the need to act arose.”

In casu there is no satisfactory canvassing of the requirements of urgency. To say that the urgency has to be read as from the date of the whatsapp message which is annexed as part of annexures to the founding affidavit is not acceptable. The said annexure “O” which is at p 66 of the record contains plain messages of the first respondent advising the applicant on Wednesday 2 March (presumably 2022) that he will go to collect rentals from tenants. The message is neither threatening nor rude, its normal conversation.

To then point to same as the reason for urgency and as proof of when the need to act arose is rather ridiculous. In essence there is nothing in the certificate of urgency and the founding affidavit to raise alarm and alert the court that there was, on a particular date, an event that called upon the applicant to act and she so acted. The bulk of the submissions by the applicant’s legal practitioner pertain to the merits rather than showing the court that the matter had been spurred by a particular urgency upon which the applicant acted.

There seem to be long outstanding issues between the parties given the issues of assault (in 2016) and infidelity by the first respondent.

The respondents were correct in asserting that there is no urgency in the matter especially in the absence of indication when the need to act arose. The time and place of events triggering action are facts which are crucial to allege in demonstrating to court that an applicant acted timeously and did so when the need to act arose. This is not so *in casu*. I do not find it necessary to delve into the second point *in limine* pertaining to the appropriateness of the relief sought given that the matter is not urgent.

I find that the matter is not urgent. Accordingly, the matter is removed from the roll of urgent matters, with no order as to costs.