LORRAINE ELIZABETH HEYNS
and
KURT LOUIS HEYNS
versus
BELIEVE GUTA
and
CHRISTABEL MAFIRAKUREWA
and
PETERSON MARIVADZE
and
ALOIS MABHUNU
and
EZEKIEL CHINONGAIRA
and
AGGRIPA BANDA
and
DONALD JARAVAZA
and
ADMIRE GOWERA
and
G CITSAKA
and
I MUTERO
and
H MAWEMA
and
BALWEARIE HOLDINGS (PVT0 LTD
(company reg. no. 1898/20)
and
GATOOMA DEVELOPMENT CORPORATION (PVT) LTD
(under liquidation)
and
PARAGON TEAL ESTATE (PVT) LTD
AND
SABRE SERVICES (PVT) LTD
and
BHEREBENDE LAW CHAMBERS
and
W O M SIMANGO & ASSOCIATES
and
SINYORO & PARTNERS
and
REGISTRAR OF DEEDS AND COMPANIES

and
SHERIFF FOR ZIMBABWE
and
MASTER OF THE HIGH COURT
and
KADOMA CITY COUNCIL

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 18 & 20 October 2022

Urgent Court Application

Z T Zvobgo, with him *S Chigumira*, for the applicants
C Daitai for the 1st, 2nd & 12th respondents
E Mubaiwa for the 3rd, 13th, 14th & 15th respondents
E Matsanura for the 5th and 6th respondents
L Madhuku for the 9th, 11th, 16th & 17th respondents
S Banda for the 10th & 18th respondents
No appearance for the 4th, 7th, 8th, 17th, 19th, 20th, 21st & 22nd respondents

ZHOU J: This is an urgent court application for an order declaring certain court applications instituted under the various case numbers stated in the draft order to be null and void *ab initio*, a declaration that the company known as Balwearie Holdings (Pvt) Ltd registered under Company Number 45/77 is the legitimate owner of a Certain Piece of Land Situate in the District of Hartley, called Remainder of Westhey of Sabonabon Estate measuring 97 0653 hectares and held under Deed of Transfer Number 4110/92, and an order that the first, second and twelfth respondents have no enforceable rights or interests in the property. The applicants also seek a declaration that the first to eighteenth respondents have acted in common purpose to illegally acquire title in the above described immovable property. Further, there is consequential relief which is being sought as detailed in the draft order.

The application is opposed by the first, second, third, fourth, fifth, sixth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth and eighteenth respondents. Following indications from some of the parties that they had preliminary objections to raise, I

directed that the parties file opposing papers to deal specifically with the objections *in limine*. Determination on these objections would then determine the future course of the proceedings. At the hearing counsel addressed the court on two points *in limine*, namely (a) whether the application is fatally defective and therefore invalid, and (b) whether the matter is urgent.

Whether the application is fatally defective

The respondents' contention is that the court application is fatally defective for non-compliance with r 59 of the High Court Rules, 2021, in that it is not in the required Form. Respondents further submited that the form used does not contain the elements of the appropriate form which are designed to inform the respondents of their rights and obligations in relation to the application. In response, the applicants submitted that the form used substantially complies with the requirements of r 59. They make the alternative argument that the court can invoke its inherent powers to deal with the application notwithstanding the failure to comply with the exact form required by the rules.

The relevant provisions of r 59 provide as follows:

> "(1) A court application shall be in Form No. 23 and shall be supported by one or more affidavits setting out the facts upon which the applicant relies:
> Provided that, where a court application is not to be served on any person, it shall be in form of a chamber application with appropriate modifications.
> (2) . . .
> (3) . . .
> (4) . . .
> (5) . . .
> (6) The time within which a respondent in a court application may be required to file a notice of opposition and opposing affidavits shall be not less than ten days, exclusive of the day of service, plus one day for every 200 kilometres or part thereof where the place at which the application is served is more than 200 kilometres from the court where the application is to be heard.
> Provided that in urgent cases a court application may specify a shorter period for filing of opposing affidavits if the court on good cause shown agrees to such shorter period.
> (7) The respondent shall be entitled, within the time given in the court application in accordance with subrule (6), to file a notice of opposition, together with one or more opposing affidavits.
> (8) . . .
> (9) A respondent who has failed to file a notice of opposition and opposing affidavit in terms of subrule (8) shall be barred.
> (10) . . .
> (11) . . .
> (12) . . .

(13 Where the respondent is barred in terms of subrule (9), the applicant may, without notice to him or her, set the matter down for hearing in terms of rule 64."

The current Form 23 is what used to be Form 29 of the now repealed High Court Rules, 1971. It does not contain the *dies induciae*. These are provided for in r 59(6). Contrary to the submission made on behalf the respondents, the period of ten days is not a mandatory requirement. The rules refer to "**not less than ten days**" (emphasis added). This aspect distinguishes the rule from the provisions of the rules which the Supreme Court was relating to in the case of *Nyathi* v *The Trustees of the Apostolic Faith Mission of Africa* SC 63-22, wherein the period of three days was mandatorily prescribed as the period within which opposing papers were to be filed. More significantly, the rules of this court in the proviso to subrule (6) cited above explicitly allow a court application to specify a shorter period than the ten days if the case is urgent. What is clearly envisaged is that such a shorter period must be stated in the court application itself. However, the proviso goes on to state that such a shorter period may be stipulated if the court on good cause shown agrees to the shorter period. Clearly, there is a lacuna in the rules in terms of the stage at which the court is called upon to give its consent to the statement of the shorter period for filing opposing papers. I emphasise that the wording of the provisio requires the agreement of "the court" and not of "a judge in chambers". A literal interpretation of the provision would mean that before filing the court application the applicant must file a court application to seek the consent of the court to the abridgment of the *dies induciae*. This interpretation results in a patent absurdity bearing in mind that upon such an interpretation the court application to seek the leave to truncate the number of days for the filing of opposing papers would have to be an ordinary court application.

The courts have innovatively developed a practice by which a party who had filed an ordinary court application stipulating the ten days as the period for opposing it would simultaneously or soon thereafter file an urgent chamber application for an order directing the urgent hearing of the court application. In the urgent chamber application the applicant would propose through the draft order the abridgment of the *dies induciae*. This was a procedure that was not explicitly provided for even in the old rules. The procedure would also not find ready support from a reading of the proviso to r 59(6) because, as noted earlier on, what is required is the agreement of the court, not a judge in chambers. The definitions of court and judge in r 2 of the High Court rules are clear that there is a distinction between a court and a judge; "'judge'

means a judge of court sitting otherwise than in open court". And by definition a chamber application is an application to a judge other than a judge sitting in open court, according to r 2. Thus the rules have no provision for an urgent chamber application to seek the urgent setting down of an ordinary court application. This means that when that procedure is employed the court will be falling back on its inherent jurisdiction to control its own procedures and processes in order to address the lacuna in the rules.

I accept the submission by the respondents that the form used *in casu* falls short in that (a) it does not tell the respondents the form of the notice of opposition, (b) it does not tell the respondents the consequences of a failure to file opposing papers within the time specified in the court application, and (c) it does not specify the High Court station at which the opposing papers are to be filed. The respondents also stated that the *dies induciae* stated are less than the ten days. I have already held that the rules permit the stipulation of a shorter period than the ten days if the case is urgent. This submission is therefore not sound.

Regarding the form of the notice of opposition, there is substantial compliance in that the notice filed invited the respondents to file a notice of opposition "as provided for in the rules of court". The manner in which this matter proceeded excludes an prejudice which may be suffered as a consequence of a failure to file opposing papers within the time stated in the notice of the application, because the shortened time is subject to the agreement of the Court which agreement is reached after hearing all the parties involved. In other words, the *dies* stated in the application are merely a proposal from the applicant which does not bind any of the parties unless the court has agreed to them. If the applicants stated the consequences of a failure to file the opposing papers within the proposed *dies* they would in effect be arrogating to themselves the authority of the court. In essence, the gap in the rules regarding the procedure of an urgent court application accounts for the manner in which the issue of the consequences of a failure to file opposing affidavits within the indicated *dies* has manifested itself. Equally, the omission to state the station at which the opposing papers are to be filed cannot be held to be a fatal defect in circumstances where all the papers clearly state in the heading that the matter is to be: "Held at Harare".

This court was referred to the case of *Veritas* v *Zimbabwe Electoral Commission & Others* SC 103-20. That case was decided before the advent of the current rules of Court. The old rules of court had no explicit provisions dealing with urgent court applications. Equally, as noted earlier

on, the current form 23 merely reproduced the old Form 29. In fact, a look at the Form 23 reveals that it does not even warn a respondent of some of the time lines prescribed by the current rules for the service of opposing papers and the filing of proof of service of such papers as provided for in r 59(8). Form 23 also does not warn a respondent of the automatic bar which follows in terms of r 59(9) upon a failure to file opposing papers timeously. In short, form 23 is not a complete catalogue of the consequences which follow upon a failure to file the opposing papers in terms of the rules. The new regime ushered in by the current rules cannot therefore be understood exclusively by reference to cases decided before these rules came into operation.

For all these reasons, the objection to the validity of the application cannot be sustained. The objection is accordingly dismissed.

Urgency

The objection to the urgent hearing of the application is predicated upon two grounds, namely, (a) that the certificate of urgency does not show that the certifying legal practitioner applied an independent mind to the matter, and (b) that the circumstances of the matter reveal no urgency. The first observation to be made is that there is no requirement for a certificate of urgency to be filed in a court application which is sought to be dealt with as an urgent court application. The requirement for a certificate of urgency is contained in r 60(4)(b) and r 60(6) which apply to chamber applications. This matter is brought by way of court application, not chamber application. The debate on the certificate of urgency was therefore misplaced. In fact, the strength with which the debate on the certificate of urgency ensued underscores the point that the certificate itself may have outlived its purpose and is merely a fertile ground for endless objections *in limine*. The court can decide by reference to the founding affidavit and having regard to all the circumstances of the case whether the case before it is urgent or not. The opinion of a legal practitioner adds very little or no value to the question of whether or not a matter is urgent.

Turning now to the facts and circumstances of this case, the welter of cases decided in this jurisdiction espouse the applicable principles on what constitutes urgency. A matter is urgent if it cannot wait to be resolved through an ordinary court application, see *Dilwin Investments (Pvt) Ltd t/a Formscaff* v *Jopa Engineering Company (Pvt) Ltd* HH 116-98 at p.1; *Pickering* v *Zimbabwe Newspapers (1980) Ltd* 1991 (1) ZLR 71(H) at 93E. In the celebrated case of *Kuvarega* v *Registrar-General* 1998 (1) ZLR 188(H) at 193F-G, CHATIKOBO J said:

> "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 which is contemplated by the rules."

As was correctly submitted on behalf of the respondents, the urgency is measured by reference to the time taken by the applicants to act *vis-a-vis* the time when the need to act arose, as well as the consequent harm which would follow if the matter is not dealt with urgently. As regards the time aspect, the time when the need to act arose is visibly missing from the applicant's papers. Some of the cases in respect of which declarations of invalidity are being sought are 2020 and 2021 matters. Even in relation to those which were instituted in 2022, there is hardly any cogent reason given why the relief that is being sought now was not sought earlier. It is as if the applicants were waiting for the matters to accumulate before approaching this court on an urgent basis to seek relief. This court has held that a party who is seeking relief on an urgent basis is essentially seeking preferential treatment by jumping the long queue of other matters waiting to be heard on the ordinary roll. The applicants' case for an urgent hearing fails spectacularly on this point alone.

In relation to the harm, the respondent must show irreparable harm which would render any order to be obtained by way of an ordinary court application a *brutum fulmen*. Mr *Zvobgo* for the applicant submitted that the harm involved in this case accrues not just to the applicant but also to the courts whose procedures and processes are said to have been manipulated and/or abused. Prejudice to the court, if such prejudice existed, is certainly not irreparable harm to the applicants who have instituted the application on an urgent basis. The irreparable harm to the applicants themselves has not been established which cannot be remedied by an ordinary court application. The prejudice, if there is any, can be remedied by ordinary application or by the other procedures which have been invoked in respect of some of the applications where applications for rescission of judgment or appeals have been instituted. The declaratory and consequential relief being sought herein is of such a nature that it would not qualify for an urgent hearing.

In all the circumstances, the matter does not satisfy the requirements for it to be set down on an urgent basis.

Costs

The respondents sought costs on the attorney-client scale. These are a punitive order of costs reserved for special cases. In this case, one of the grounds of objection has been decided in favour of the applicants. This means that the application does not qualify as a vexatious one or one where there is misconduct on the part of the applicants to justify the special order of costs. Even in relation to the question of urgency, I do not believe that a special order of costs is warranted.

Conclusion

In the result**, IT IS ORDERED THAT**:

1. The matter be and is struck off the roll of urgent matters.
2. The respondents are given ten days within which to file their opposing papers on the merits which ten days shall be calculated from the date of this order.
3. The applicants shall pay the costs jointly and severally the one paying the other to be absolved.
4. For the avoidance of doubt, the objection that the application is invalid is dismissed.

Whatman Stewart Law Firm, applicants' legal practitioners.
Magwaliba & Kwirira, first, second & twelfth respondents' legal practitioners
Mtombeni Mkwesha & Muzawazi, third, thirteenth, fourteenth & fifteenth respondents' legal practitioners.
Sinyoro & Partners, eighth, and tenth respondents' legal practitioners.
Lovemore Madhuku Lawyers, ninth, eleventh sixteenth & seventeenth respondents' legal practitioners.