ISHUMAEL CHAURURA
versus
CITY OF HARARE
and
MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS
AND NATIONAL HOUSING N.O

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 26 July & 22 November 2022

Urgent Chamber Application

S T Mutema, for applicant
M Matanhire, for respondent

MANGOTA J: On 5 July, 2022 the first respondent, the City of Harare, clamped the applicant's motor vehicle with registration number AFS 0365. He had parked it in Angwa Street, Harare as he went into the Deeds Office for business.

The clamping of his motor vehicle constitutes the applicant's cause of action. He filed this application through the urgent chamber book. He alleges that he was in peaceful and undisturbed possession of his motor car and that the first respondent despoiled him of the same. He couched his draft order in the following terms:

"**IT IS ORDERED THAT**

1. Application for spoliation be and is hereby granted.
2. The clamping of the Applicant's vehicle having been done Ultra-Vires the provisions of section 4 of the Municipal Traffic Laws Enforcement Act [*Chapter 29:10]* be and is hereby deemed illegal and void ab initio.
3. The Notice issued to the Applicant be and is hereby deemed invalid for noncompliance with the provisions of section 8 of the Municipal Traffic Laws Enforcement Act [*Chapter 29.10];* consequently, the clamping of the vehicle was illegal."

The first respondent ("the respondent") opposed the application. The second respondent who is the Minister of Local Government, Public Works and National Housing who has an

oversight role on the respondent did not file any notice of opposition. His attitude to the application leaves the applicant and the respondent in the equation.

The respondent's four preliminary points are that:

a) the certificate of urgency is defective and therefore invalid;
b) the court application is not signed;
c) the application is not urgent- and
d) the applicant approached the court with dirty hands.

It, on the strength of the above-stated matters, moved me to dismiss the application which it contends is premised on an invalid certificate of urgency. It claims, on the merits, that the motor vehicle had been lawfully clamped. It insists that the court cannot interfere with a process which is lawful. It moved me to dismiss the application with costs.

During submissions, counsel for the respondent abandoned the last three *in limine* matters. He focused his attention on the validity or otherwise of the certificate urgency. The proceedings therefore revolve around that aspect of the case more than on anything else. More than on anything because the certificate is a *sine qua* non aspect of an application which is filed through the urgent chamber book and *a fortiori* where, as *in casu*, the applicant enjoys legal representation.

The respondent's case is that the certificate of urgency upon which this application is premised is invalid. It raises two reasons for its assertion. The reasons are that:

i) the legal practitioner who prepared the certificate of urgency works in the law-firm which represents the applicant – and
ii) the certificate of urgency pre-dates the applicant's founding papers.

The applicant's legal practitioners for this application are Stansilous and Associates. The legal practitioner who prepared the certificate of urgency is one Isheanotida Chikaka. He states, in the first paragraph of the certificate, that he is a legal practitioner of this court and he works under the style of Stansilous & Associates. The statement which he made constitutes the respondent's first ground of criticism. It casts doubt on the propriety and/or the validity of the certificate which relates to the present application. It insists that the certificate which was prepared by a legal practitioner of the law – firm which represents the applicant cannot be impartial, unbiased and independent of the application which it supports.

The applicant's view on the matter at hand is to the contrary. He asserts that any legal practitioner including the one who represents the applicant can prepare as well as sign a certificate of urgency. He supports the view which he holds of the matter on the case of *Mudekunye & Ors* v *Mudekunye & Ors*, HC 5224/10 which analyses the meaning and import of Rule 242(2) of the repealed rules of court and came to the conclusion upon which the applicant is pleased to rest his case on the point.

A certificate of urgency is provided for in sub-rule (6) of Rule 60 of the High Court Rules, 2021. The sub-rule reads:

> "Where a chamber application is accompanied by a certificate from a legal practitioner ….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".

It follows from a reading of the sub-rule that an urgent application cannot be allowed to wait. It compels the judicial officer who is seized with it to leave everything which is to do with the duties of his office so that he attends to it with the minimum of delay. For him to do so, however, the certificate which accompanies the application should contain clear, cogent and convincing reasons which persuade the judicial officer before whom the application is placed to leave everything which he is doing in order for him to attend to it. The converse of the stated matter is that, if such an application is allowed to wait when it should not, whatever order the court will enter for the applicant subsequent to the occurrence of the event the occurrence of which he intended to prevent by the order of court, will be of no meaningful purpose to him. The order will, in the stated set of circumstances, fall into the realms of what is often referred to as a brutum fulmen.

It is for the mentioned reason, if for no other, that the law of practice and procedure drew, and continues to draw, a clear distinction between urgent and non-urgent applications. The distinction remains alive because of the certificate of urgency which is filed together with the application. The certificate's contends persuade the judicial officer who reads it to formulate an initial view of the matter. It is from its contents that he is able to assess whether or not the application which has been placed before him is urgent.

The trust which is reposed in the legal practitioner who certifies a matter as being urgent should not be open to doubt. That trust is more dominant than otherwise where a legal practitioner other than the one whose law-firm is representing the applicant certifies the

application as urgent. Such a legal practitioner is regarded as having applied his mind in an as objective a manner as he humanly can. He is not regarded as having abused the trust which the law reposes upon him.

A certificate which is prepared by a legal practitioner who represents the applicant cannot, in my view, be taken seriously. It cannot for the simple reason that it runs contrary to the principles which the court laid down on this aspect of the case in *General Transport & Engineering (Pvt) Ltd and Others* v *Zimbank Corp (Pvt) Ltd*,1998 (2) ZLR 301 wherein it was stated that:

> "Where the rule relating to a certificate of urgency requires a legal practitioner to state his own belief in the urgency of the matter, that invitation must not be abused. He is not permitted to make as his certificate of urgency a submission in which he is unable to conscientiously concur. He has to apply his own mind and judgment to the circumstances and reach a personal view that he can honestly pass on to a judge and which he can support not only by the strength of his arguments but on his own honour and name".

The principles which have been stated in the foregoing paragraph speak to the legal practitioner who prepares as well as sign the certificate of urgency operating on an objective and independent mind. Such a legal practitioner should not be influenced by any consideration other than his clear intention to inform the duty judge of the urgency of the application which he has had the occasion to comment upon in the certificate of urgency after he has acquainted himself with the applicant's founding papers. CHEDA J, whose views I associate myself with on the subject-matter, discouraged legal practitioners from either attesting to an affidavit or signing a certificate of urgency for, and on behalf of, a litigant who is being represented by the legal practitioner's law-firm. He stated in *Chafanza* v *Edgars & Anor*, 2005(1) ZLR 301 (H) that:

> "….it is improper for a legal practitioner to act in that matter as he has an interest in the matter at hand. The interest in the matter is grounded on two grounds:
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> Firstly, in that he has a pecuniary interest in the earning of fees from the said client.
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> Secondly, he is interested in promoting the goodwill of his company by bringing his affairs to a successful conclusion. In other words, it means a financial and not a mere social or ethical interest or view."

The law of practice and procedure has, for a considerable duration, supported the principles which the court laid down in *Chafanza* v *Edgars (supra).* The principles made sure that the certifying legal practitioner should be impartial, unbiased and independent in relation to the certificate of urgency. A legal practitioner who works in the law-firm which is representing

the applicant cannot, in all honesty, prepare a certificate of urgency which is not impartial or unbiased. He derives a benefit from working for the applicant. The benefit which he derives more often than not tend to cloud his judgment. He will not look at the matter of the applicant in an objective manner as he should. He is, in the stated sense, a lot different from the legal practitioner whose law-firm is completely divorced from the application. The second legal practitioner has every opportunity to read the applicant's founding papers, assess the same in an objective manner as well as the urgency or otherwise of the application which has been filed through the urgent chamber book. He adopts a dis-passionate approach to the application and will therefore state his own unbiased mind to the same. His sense of judgment in respect of the application tends to be impartial, unbiased and/or so objective that his certificate is more readily credible and acceptable than the one which a legal practitioner who represents the applicant places before the judicial officer who is seized with the urgent chamber application.

The statement of the applicant on this aspect of the matter is that any legal practitioner including the one who is representing him can certify the urgency of the application. I disagree. It is my considered view that, if the position which the applicant has adopted were to be allowed to remain undisturbed, an unmanageable scramble for case management by legal practitioners and the litigants whom they represent would ensue. Many legal practitioners and those whom they represent would move to have their cases heard on the basis of urgency when they, in reality, are not such.

Every litigant, it is a fact of life, wants to have his case heard and determined on the day that he files it, if not yesterday. A measure of control had, therefore, to be developed. An objective opinion by a legal practitioner who has nothing to gain from the application constitutes the desired measure of control. That measure should not therefore be allowed to remain blurred in the manner which the applicant seeks to do in this application. The distinction which necessarily exists between urgent, and non-urgent, applications should always remain clear, unambiguous and unblurred. It operates for the benefit of not only the court but of litigants as well. It assists in the management of many cases which applicants file at court on a daily basis. It is only urgent matters which have been distilled by a clear and objective mind of a legal practitioner who is divorced from the application which carry the day.

Judicial officers, it is needless to mention, are human beings. They do not throw bones to discern if the applications which have been placed before them are urgent or not. A certificate which, on the face of it, is divorced from bias sway their mind in a direction which is more favourable to the application than one which, on the face of it, was /is prepared by the legal practitioner who works in the law-firm which represents the applicant let alone the one which is prepared by a legal practitioner who is representing the applicant as *Mudekunye* v *Mudekunye* seems to suggest.

But for the confession which the applicant made in his answering affidavit, the first part of the respondent's *in limine* matter which relates to the certificate of urgency having been prepared by a legal practitioner who works in the law-firm which represents the applicant would have held. It would have for the simple reason that the possibility of the law-firm making common cause with the applicant is more probable than it is fanciful. The *in limine* matter is, however, no longer relevant given the statement of the applicant which is to the effect that Isheanotida Chikaka who certified the application as having been urgent is not in the employee of Stansilous and Associates but in that of Zvimba Law Chambers. The statement put to rest the first part of the respondent's preliminary matter. The only jurisprudential point which comes out of the first part of the respondent's *in limine* matter, therefore, is the undesirability of having the law –firm which represents the applicant, let alone the legal practitioner who represents the applicant, preparing the certificate of urgency for, and on behalf of, the applicant. The court will, with difficulty, place some weight, if any, on such a certificate.

The respondent's second preliminary point relates to the certificate of urgency which it alleges pre-dates the applicant's founding papers. It submits that the certificate is invalid to the extent that it pre-dates the application. It submits, further, that an application which is premised on an invalid certificate of urgency *is ipso facto* invalid.

A certificate of urgency, it has been enunciated, cannot vouch for anything which is said in the founding affidavit which was not there when the certificate was executed. A certificate of urgency must show, *ex facie*, that the legal practitioner who executes it, carefully examined the founding affidavit for facts which support the belief that the matter is indeed urgent. ….An urgent application is incurably defective if the certificate of urgency purports to vouch for facts

which were non-existent at the time the certificate was executed: *Diamond Bird Services (Pvt) Ltd & Anor* v *Massbreed Investment (Pvt) Ltd & Anor*, HH413/ 21.

In stating as it did, the court was only re-emphasizing the sentiments which it expressed in *Condurago Investments (Private) Limited t/a Mbada Diamonds* v *Mutual Finance (Private) Limited*, HH 630/15 which, in dealing with a point which was similar to the present, stated that:

> "….a vital essential element for a valid certificate of urgency is missing in that the certificate of urgency was prepared without recourse to a valid founding affidavit as it pre-dated the affidavit. ..the certifying lawyer could not have properly applied his mind to the facts arising from a non-existent founding affidavit. For that reason alone, I come to the conclusion that the urgent chamber application is fatally defective for want of an essential element of such an application. The urgent chamber application is therefore unsustainable."

The distilled thinking of the court as is observed in the above-cited case authorities cannot be assailed. The court had no option but to dismiss with costs the urgent chamber application which rested on a certificate which pre-dated the founding papers of the applicant in the *Condurago Investment* case. It did so on the ground which the respondent is raising *in casu.*

That the certificate of urgency which relates to this application pre-dates the applicant's founding papers requires little, if any, debate. The certificate, the record reveals, was executed on 5 July, 2022. The founding affidavit, on the other hand, was executed on 7 July, 2022. The certificate, therefore, pre-dates the founding papers of the applicant by two whole days.

It follows, from the above-observed set of circumstances, that Isheanotida Chikaka was not being candid with me when he stated, in the certificate, that he has read and considered the papers in the matter. He could not have read and considered the papers which were non-existent when he executed the certificate of urgency. He executed it two days before the founding papers were at hand. He could not, in short, have applied his mind to papers which were never before him. He, in fact, told a blue lie on that aspect of the case. His statement, in the mentioned regard, is difficult, if not impossible, to believe.

It is trite that a legal practitioner who tells a lie in the certificate of urgency which he executes in support of the urgency of the application which has been entered through the urgent chamber book makes the entire application fatally defective. Fatally defective because it is on the strength of the certificate which he executes that the court is able to discern the urgency or

otherwise of the application which has been placed before it. No court will place reliance upon a certificate which tells an obvious lie about itself.

The submission of the applicant is that there is no rule of procedure or substantive law which requires that a certificate of service *(sic)* should be drafted on the basis of a signed founding affidavit. The submission is, without doubt, misplaced. Equally misplaced is his statement which is to the effect that the certificate of urgency is prepared on the strength of facts which come to the legal practitioner's attention when the latter consults with the applicant whom he represents.

The undesirability of the legal practitioner preparing the certificate of urgency for, and on behalf of, a litigant whom he represents has already been discussed. The statement of the applicant seems to fall into the same pit out of which he is being assisted to emerge. Secondly, no meaningful reliance may be placed on the discussion which the legal practitioner conducts with the applicant privately in the chambers of the former. If the discussion were allowed to serve as a yardstick for measuring the urgency or otherwise of an application which has been entered through the urgent chamber book, chaos would remain the order of the day. It would be so as nothing would be transparent as regards such an arrangement. Each legal practitioner would argue that he/she consulted with the person whom he/she represents and there would be nothing which the court would be able to employ to objectively measure the veracity or otherwise in regard to the allegation of the applicant who, at any rate, has filed his application on the basis of urgency.

A certificate of urgency, it has been stated, should be able to demonstrate to the court that it should leave everything else which it is dealing with to attend to the urgent application*: Hwange Colliery Co. Ltd* v *Commissioner- General of Zimbabwe Republic Police* NO, HH 267/18. The only yardstick which would assist the court to assess whether or not the application is urgent is not what the legal practitioner and the applicant state as the latter seems to suggest. The acceptable and reliable yardstick in the resolution of the urgency or otherwise of the application is process which the applicant files with the court. Process will show when the application was prepared as well as the date that the certificate of urgency was executed. It leaves no one in doubt as to the veracity of the papers which have been filed at court.

An application which rests on an invalid certificate of urgency is, *ipso facto*, a nullity. It stands on no foundation at all. It, accordingly, has to fall to pieces. If the application rests on an invalid certificate but is seeking a provisional, and not a final, order as is the case with the present application, the application would automatically turn itself into an ordinary one which would be heard and determined at some future date. Where, however, the relief sought is that of a final nature as is the case with the present application which is filed under the relief of the law of *mandament van spolie*, the same cannot turn itself into an ordinary opposed application as the applicant seems to suggest. It cannot, in short, be struck off the roll of urgent matters because the applicant filed it on the basis of urgency as a result of which it has to be considered as a whole and not in a piece-meal manner. Such an application is either urgent or not. It cannot be both. Where it is not urgent, as is the case *in casu*, because of defects which are inherent in the certificate of urgency which is meant to support it, the result is that it has to be dismissed.

The preliminary matter which the respondent raised in respect of the certificate of urgency is not without merit. It is therefore upheld. The application is, in the result, dismissed with costs.

Stansilous & Associates, applicant's legal practitioners
Mbidzo Muchadehama & Makoni, first respondent's legal practitioners