EDDIE PFUGARI (PVT) LTD
and
EDWARD NYANYIWA (JNR)
versus
KNOWE RESIDENTS AND RATE PAYERS ASSOCIATION
and
RURAMAYI DAVY TUKWE
and
NORTON TOWN COUNCIL

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 17, 21 January & 8 March 2023

Urgent Chamber Application

B Hwachi and S Simango, for the applicants
RKH Mapondera, for the 1st respondent
2nd respondent in person
S Chatsanga, for the 3rd respondent

WAMAMBO J: This matter came as an Urgent Chamber Application for stay of execution.

The genesis of the matter can be traced back to an HC 2887/05 order granted by GUVAVA J (as she then was) and an HH 458/19 order granted by FOROMA J.

The first applicant is a company, in this matter represented by its general manager by virtue of a resolution attached as Annexure "A". The company develops and sells residential stands.

The second applicant is a male adult associated with first applicant.

First respondent is an association of residents of Knowe. Second respondent was a chairman of first respondent and was its representative in HC 2887/05 and HH 458/19. Third respondent is a Council established in terms of the Urban Councils Act [*Chapter 29:15*].

In HC 2887/05 besides the second applicant and second respondent the parties herein were parties in that case.

GUVAVA J (as she then was) made a number of findings in that case. She found that the now first respondent had *locus standi* to sue the now applicant. The learned Judge ultimately found that the applicant in that case who is the first respondent in this case was successful in its claim and made an order for first applicant herein to fully service Phase 1 of the Knowe Housing Development in Norton and to provide reticulated water stands, sanitary systems, proper drainage systems and service of roads.

In HH 458/19 FOROMA J dealt with a civil trial wherein first respondent in this case was plaintiff. Plaintiff herein was the first defendant, second applicant herein was second defendant, third respondent herein was third defendant and the Registrar of the High Court was the fourth respondent.

The learned judge therein made the following order:

(1) First and second defendant are hereby declared to be guilty of contempt of this court.

(2) First defendant is hereby sentenced to a fine of Two Thousand United Stated Dollars (US$2 000) for contempt of court.

(3) Second defendant is sentenced to 90 days imprisonment the whole of which is suspended on condition that first defendant performs its obligations as ordered by this court in HC 2887/05 to the satisfaction of Norton Town Council as the local authority which satisfaction shall be evidenced by the issue of an appropriate certificate of compliance.

(4) First and second defendants pay plaintiff's costs of suit on a legal practitioner and client scale jointly and severally the one paying the other to be absolved.

About three years later on 7 December 2022 under HC 7091/22 MUSITHU J confirmed an earlier interim order in the following terms:

"(a) The respondent be and is hereby permanently interdicted from masquerading and/or purporting to be representing Knowe Residents and Ratepayers Association as the claim in breach of the provisions of the Constitution of the Association.
(b) The respondent and is hereby declared illegitimate chairperson of Knowe Residents and Ratepayers Association.
(c) Respondent to bear costs of suit at an ordinary scale."

Pursuant to the order under HC 7091/21 above the applicants have filed an application seeking an order that all documents filed by the second respondent herein (Ruramayi Davy Tukwe) from 2004 were illegal and of no force or effect.

In this matter applicants seek a stay of execution pending a decision under the said pending application. The full proposed order is contained at pages 41 to 42 of the record.

The first and second respondents were opposed to the application. The third respondent filed a notice wherein she represented that she is bound by the decision of the court.

A number of points *in limine*, were raised. I will deal with them presently. Mr *Hwachi* for the applicants raised the preliminary point that Denford Derera who deposed to an affidavit on behalf of first respondent has no *locus standi*. It was averred that first respondent has had no executive Committee since 2004.

Mr *Mapondera* for first respondent averred that applicant is wrongly placed to object to a Constitution he is not a party to. Further that the issue of Denford Derera as an interim chairperson of first respondent is raised in HC 55/23. Effectively it was averred that applicant seeks a predetermination of an issue specifically raised under HC 55/23 which matter is yet to be determined.

It appears that the citation of the yet to be determined as HC 55/23 was erroneous. The correct citation is actually HC 54/23.

First respondent also had its own three points *in limine*, to raise. The first point is that this court has no jurisdiction as the application effectively seeks to set aside a Supreme Court order under SC 468/22. The High Court cannot set aside or interfere with a Supreme Court Order.

The second point *in limine* raised is that the applicant has disregarded orders of this court before the MUSITHU J order of December 2022. The applicant it was submitted has not complied with the earlier High Court orders.

The third point *in limine* raised is that the matter is not urgent as the order by MUSITHU J is not retrospective.

Mr *Hwachi*'s response to first respondent preliminary points was as follows:

The orders sought to be suspended are High Court Orders and not Supreme Court Orders. The Supreme Court is not a Court of first instance.

On the issue of dirty hands Mr *Hwachi* submitted that there was partial compliance and that one cannot enforce a nullity.

On urgency it was argued that the need to act arose on 3 January 2023. This was after applicant wrote to the Sheriff on 9 December 2022 and the Sheriff responded on 3 January 2023.

I will commence with the issue of urgency. Urgency, specifically because if I find that the matter is not urgent there is no need to visit the other points raised as preliminary points.

Case law on urgency abounds. Both counsel appeared to appreciate case law that speaks to urgency.

I am of the view that the issue of urgency can easily be decided on the facts and circumstances of the case as traversed by the parties.

Applicant's position is that the need to act arose on 3 January 2023. This is said to arise from a response by the Sherriff to a letter written by applicant's legal practitioners dated 9 December 2022.

I note that this urgent application was filed on 10 January 2023. The order by MUSITHU J was granted on 7 December 2022. The writ for personal attachment and committal to prison is date stamped 23 June 2021. The applicants have clearly not treated this matter with urgency.

The applicants seek to stay the extension of the order made in HC 2887/05 from which the writ of personal attachment and committal to prison springs.

The subsequent order by MUSITHU J was only granted on 7 December 2022.

To now seek to hang on to a subsequent order of 7 December 2022 without taking any action since at the latest 25 June 2021 is not to act when the need to act arose.

I find that as noted by FOROMA J in HH 458/19 at page 35 of the record:

> "The defendants determined that they did not agree with the judgment of Guvava J hence their appeal against the said judgment. This they were entitled to. However when this appeal was dismissed by the Supreme Court it was incumbent upon them to abide and comply with the order of the High Court."

I disagree that the need to act rose on 3 January 2023 for the above reasons.

In *Equity Properties (Private) Limited* v *Alshams Global BVI Limited and Registrar of Deeds* SC 101 /21 KUDYA AJA (as he then was) said the following at p 11:

> "The law on what constitutes urgency is settled. Urgency is manifested by either a time or consequence dimension. See *Kuvarega* v *Registrar* General 1998 (1) 188 (H) at 193F *Document Support Centre (Pvt)* L*td* v *Mapuvire* 2006 (2) ZLR 210 (H), *Gwarada* v *Johnson & Ors* 2009 (2)

ZLR 159 (H) *and Sitwell Gumbo* v *Porticullis (Pvt) Ltd t/a Financial Clearing Bureau* SC 28/14 at p 3."

The learned judge of Appeal continued as follows at p 12:

"It is apparent that the consequence dimension presupposes that the harm sought to be protected in an impending matter would be armorphously irremediable without the interim indulgence."

In *CMED Private Limited* v *Kenneth Maphosa and Sheriff of Zimbabwe N.O. and Zimbabwe Revenue Authority* HH 151/15.

CHIGUMBA J at pp 6 to 7 said:

"In my view which I personally expressed in the case of *Finwood Investments (Private) Limited & Anor* v *Tetrad Investments Bank Limited and Anor* in order for a matter to be deemed urgent the following criteria which have been established in terms of case law, must be met.

A matter will be deemed urgent if:

(a) The matter cannot wait at the time when the need to act arises.
(b) Irreparable prejudice will result, if the matter is not dealt with straight away without delay.
(c) There is *prima facie* evidence that the applicant treated the matter as urgent.
(d) The applicant gives a sensible rational and realistic explanation for any delay in taking action.
(e) There is no satisfactory alternative remedy."

The orders by GUVAVA J (as she then was) in HC 2887/05 and FOROMA J is HH 458/19 are clearly orders that were either ignored or partially complied with by the applicant.

The extent of laxity did not end there. The Supreme Court pronounced itself that the applicant should adhere to the High Court Orders.

The order by MUSITHU J in HC 7091/22 coming as it did in 2022 does not suddenly create urgency in the matter. The issue of *locus standi* was previously raised by applicants and dismissed.

The applicants seek to hold on to the latter order by MUSITHU J to create urgency in circumstances where they had sat on their laurels. Because of the aforegoing I do not consider this matter as one of those that cannot wait. I also find that when the need to act arose the applicant did not act expeditiously.

I do not fathom any irreparable harm emanating from this matter not being dealt with as an urgent matter. There appears to be flagrant disregard of court orders by applicant.

The subsequent order by MUSITHU J in HC 7091/22 is not formulated to such an extent that it is retrospective. I note here that the order was a confirmation of an interim order.

I find that both on a time and consequent dimension that the application fails to reach the threshold of urgency.

I will thus proceed in terms of Rule 60(18) of the High Court Rules 2021 which empowers me to strike the application from the roll of urgent matters upon a finding that the matter is not urgent.

I order as follows:

The application is struck from the roll of urgent matters with costs.

Nyikadzino, Simango & Associates, applicant's legal practitioners
Mapondera and Company, first respondent's legal practitioners
Mwonzora & Associates, third respondent's legal practitioners