PRESENTATION BY MRS JUSTICE GOWORA JCC AT THE JUDGES' END OF FIRST TERM 2019 SYMPOSIUM

THE DISPOSAL OF URGENT CHAMBER APPLICATIONS- A DISCUSSION FOSUCING ESPECIALLY ON THAT THE MATTER IS NOT URGENT

Introduction

In *Documents Support Centre P/L v Mapuvire* 2006 (2) ZLR 240, at 244C-D, MAKARAU JP, (as she then was) said the following in relation to urgent chamber applications:

> *"...urgent applications are those where if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant."*[1]

In my view these remarks capture the essence of this discussion, not only in terms of the need by the courts to give due weight to the urgency attendant upon a matter placed before a judge as urgent, but also the manner of disposal of such urgent application. Although the topic seems to suggest that the

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discussion should focus on the disposal of urgent matters on the basis of lack of urgency, the first port of call would be a discussion on what constitutes urgency.

What constitutes urgency?

The law on urgency is well settled. It was succinctly laid out in *Kuvarega* v *Registrar-General & Anor* 1998 (1) ZLR 188 H by CHATIKOBO J at at p 193 F –G where he stated that:

> *"**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 dead-line draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay." (my emphasis)*

Makarau JP (as she then was) in *Documents Support Center (Pvt) Ltd v Mapuvire* 2006 (2) ZLR (H) stated her understanding of Chatikobo J in *Kuvarega case (supra)* as follows*:*

> *"I understand CHATIKOBO J in the above remarks to be saying that a matter is urgent if when the cause of action arises giving rise to the need to act, the harm suffered or threatened must be redressed or arrested there and then for in waiting for the wheels of justice to grind at their*

ordinary pace, the aggrieved party would have irretrievably lost the right or legal interest that it seeks to protect and any approaches to court thereafter on that cause of action will be academic and of no direct benefit to the applicant.

The *Kuvarega case (supra)* also answers the question: **How does a Judge determine urgency? Is it the time limit or it is a matter of harm?** Based on the above, what constitutes urgency is based mainly on the fact that when the need to act arises, the applicant takes the requisite action because if he does not do so, irreparable prejudice would be suffered. It has also been aptly stated above that urgency must not be a self-created urgency where a party awaits the imminent arrival of the day of reckoning to take action. In my view urgency is a matter of both time limit and harm. One cannot separate the two as shown in the *Kuvarega case (supra).*

Over and above these requirements, the issue of determining whether or not an application is urgent is also a matter of discretion. In *Econet Wireless (Pvt) Ltd v Trustco Mobile (Proprietary) Ltd* SC 41/13 Garwe JA also had the following to say:

"It is clear that in terms of Rules 244 and 246 of the High Court Rules the decision whether to hear an application on the basis of urgency is that of a judge. ***The decision is one***

therefore that involves the exercise of a discretion. *(my emphasis)*

Our courts are called upon in rare situations to determine matters where the urgency alluded to is that of a commercial nature. In *Silver's Trucks (Pvt) Ltd & Anor v Director of Customs & Excise* 1999(1) ZLR 490, at 492E-F, SMITH J was convinced that commercial interests under threat can also be considered on an urgent basis. This is what the learned judge had to say:

"Fortunately in Harare at the present the hearing of an application as a matter of urgency does not result in the hearing of ordinary applications being delayed.

However, in the latter case, GOLDSTONE J at p 586 said:

'The respondent's counsel submitted that there was no urgency in the absence of some serious threat to life or liberty and that the only urgency here was of a commercial nature. It was because of this factor that the applicants' attorney in fact decided to set the matter down on a Tuesday when the Chamber Court

was in any event in session during the court recess to dispose of unopposed applications.

In my opinion the urgency of commercial interests may justify the innovation of Uniform Rule of Court 6 (12) no less than any other interests. Each case must depend upon its own circumstances. For the purpose of deciding upon the urgency of this matter, I assumed, as I have to do, that the applicants' case was a good one and that the respondent was unlawfully infringing the applicants' copyright in the films in question.'

Having regard to the probable consequences to the applicants and their employees of the application is not dealt with without, further delay, I consider the certificate of urgency is justified."

WHAT IS AN URGENT CHAMBER APPLICATION?

In the High Court, urgent chamber applications are provided for in terms of under Order 32, rule 244 as follows:

244. Urgent applications

Where a chamber application is accompanied by a certificate from a legal practitioner in terms of paragraph(b) of subrule (2) of rule 242 to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to a judge, who shall consider the papers forthwith.
Provided that, before granting or refusing the order sought, the judge may direct that any interested person be invited to make representations, in such manner and within such time as the judge may direct, as to whether the application should be treated as urgent.

I start this discussion on a consideration of the proviso to the rule. The judge before whom is placed an urgent chamber application is given a discretion to hear any interested party as to the urgency of the matter. The critical words therein are the following *"whether the application should be treated as urgent. "*

What makes this application peculiar is the term 'urgent' which connotes that the application should be dealt with expediently. As correctly noted in the case of *Gwarada* v *Johnson & Ors*[2]

> *"Urgency arises when an event occurs which requires contemporaneous resolution, the absence of which would cause extreme prejudice to the applicant. The existence of circumstances which may, in their very nature, be prejudicial to the applicant is not the only*

[2] 2009 (2) ZLR 159 (H) at p 160D-E

factor that a court has to take into account, time being of the essence in the sense that the applicant must exhibit urgency in the manner in which he has reacted to the event or the threats, whatever it may be."

A perusal of the rule suggests that the first consideration is the decision as to whether or not the matter ought to be treated as urgent. Kindly note the word "treated". The treatment of the matter leads to it being heard on the merits if urgency is present. If not then it should not be heard under the rule in question.

Disposal of the urgent chamber applications

The disposal of the application happens after presiding Judge having satisfied himself of the requirements stated in the *Kuvarega case (supra*) comes to any one of the two conclusions, i.e. either that the matter is urgent or is not urgent.

It has become apparent from a consideration of decided cases that our courts are hearing issues pertaining to urgency as opposed to hearing disputes. The question of urgency is one that allows the judge to hear the matter outside the time limits set in the rules and in addition on the urgent roll instead of the Registrar's ordinary roll. The issue of urgency is not dispositive of the dispute. An urgent chamber application is merely an

application wherein the applicant has by way of a certificate of urgency implored the court to be permitted to jump the queue. If it lacks urgency it must perforce join the queue.

The only thing that differentiates an urgent application from an ordinary application is the certificate of urgency. A certificate of urgency is a statement from a legal practitioner who has knowledge of the facts pertaining to the dispute. The legal practitioner is enjoined to take the court into his confidence and furnish details as to the urgency of the chamber application. In this exercise he is required to express his opinion as to why he considers the matter to be urgent. It is upon this certificate of urgency that the Judge then formulates an opinion as to whether or not the matter is urgent. It is important to note at this juncture that the substantive issues would not have been determined yet. In *Chidawu & Ors* v *Sha & Ors* 2013 (1) ZLR 260 (S), the Supreme Court held at page 264D as follows:

> *"It follows that a certificate of urgency is the sine qua non for the placement of an urgent chamber application before a Judge. In turn the judge is required to consider the papers forthwith and has the discretion to hear the matter if he forms the opinion that the matter is urgent. In making a decision as to the urgency of the chamber application the Judge is guided by the statements in the certificate by the*

legal practitioner as to its urgency in certifying the matter as urgent."

In the absence of the urgency the application, like any other application is placed on the ordinary roll. Therefore, as highlighted above the urgency or otherwise of an application does not take away from the substantive issues before the Court.

A practice has now evolved where judges dismiss a matter on the basis that it is not urgent. A few examples are set out hereunder-

Motsi v Elzont & Anor HB 329/16

The Judge therein was faced with an urgent chamber application wherein the applicant was claiming fees as a *curator bonis.* The 1st respondent challenged the claim on the basis that the fees claimed by the applicant were too excessive. Before determining the issue of urgency the Judge dealt with the merits wherein he took the respondent's view on the issue of costs highlighting that if the applicant was to be awarded the fees claimed this would deprive the beneficiaries thereof of any financial benefit. In my view, the Judge conflated issues in this case. It dealt with the merits of the dispute first and then dismissed the application on the basis that it was not urgent.

Mutanda & Anor v The President & Ors HH 747/16

The applicants challenged on an urgent basis the constitutional validity of the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Bond Notes) Regulations, 2016. The respondents opposed the application by raising several preliminary issues, chief among them was the issue of urgency. The Court considered all the requirements for urgency and found that the matter was not urgent and proceeded to dismiss the application. The court made the following order:

> *"In my view, the fact that the applicants chose to proceed in the ordinary course is testimony to the fact that there is no urgency on their part. Accordingly I uphold the second point in limine that this matter is not urgent. I will not deal with the arguments on the merits.*
>
> *In the result, it is ordered that the application is dismissed."*

Anderson v The Administrator, SMM Holdings (Pvt) Ltd & Anor HB 106/18

The applicant filed an urgent chamber application for an order interdicting the respondents from evicting the applicant from a certain premises. The application was opposed primarily on the basis that the application was not urgent. The Court also took

the same view and indicated that the certificate of urgency did not disclose any urgency. After making a finding that the matter was not urgent the Judge went on to dismiss the application.

Mukwasangombe & Anor v Vice Chancellor, University of Zimbabwe N.O & Anor HH 773/15

The applicants brought an urgent chamber application to the effect that the court application for review which they had filed in the same court under a different case number be reviewed urgently. The application was opposed by the respondents who among other issues argued that the matter was not urgent. In the result the court ordered as follows:

> *"Accordingly I uphold the second point in limine that this matter is not urgent. I will not deal with the arguments on the merits.*
>
> *In the result, it is ordered that the application is dismissed."*

Movement for Democratic Change v Khupe & Ors HB 111/18

The applicant filed an urgent chamber application seeking an interim interdict to bar the respondents from the alleged unauthorised use or exploitation of the applicant's registered trademark being its name "Movement for Democratic Change". The respondents opposed the application on the basis that it was

not urgent and that the applicant was not properly before the Court. The Court dismissed the application on the basis that the matter was not urgent and that the applicant was not properly before it.

All the above cases show instances where Judges faced with urgent chamber applications dismissed the applications upon finding that the matter was not urgent.

NB: *It is important to note that at this juncture the Judge has not heard the merits of the matter therefore he/she ought not to "dismiss" the application as that would bring finality to the matter when in actual fact it has not even started yet. Also it is very critical that the Judge clearly lays out his/her reasons for concluding that the matter is not urgent without getting into the merits of the matter.*

Kuvarega v Registrar-General & Anor 1998 (1) ZLR 188 (H).

This is the locus classicus on urgency within this jurisdiction. The facts as set out in the judgment are the following.

> *"The applicant was the councillor for ward 5 in Chitungwiza. She is a candidate in the by-election for the vacant parliamentary seat in the St Mary's constituency. The*

election, which was set out to take place on 23 and 24 February 1998, is being contested by two other candidates, one of whom is sponsored by the ruling party ZANU (PF). In the recent past an election for the position of mayor was held in Chitungwiza. The applicant claims to have observed that during the course of that election ZANU (PF) supporters were wearing T-shirts with election slogans and/or their candidate's picture adorned on thereon. These supporters patrolled the perimeters of the polling stations and queued and voted wearing these offending T-shirts. This, so the applicant contends, eroded the secrecy of the ballot.

During the run-up to the by-election now underway, the applicant's house has been attacked and so have the houses of some of her supporters. Although she stops short of naming the alleged assailants, the inescapable implication is that this was done by ZANU (PF) supporters. She therefore fears that the presence of ZANU (PF) supporters in labelled attire at the polling stations will scare away her supporters as they will feel intimidated. She does not say that she harbours any reasonable apprehension that ZANU

(PF) supporters or any other persons will disrupt the proceedings at the polling stations. She simply fears that the mere presence of people wearing labelled attire will intimidate her supporters. Had there been a reasonable apprehension that some people might try to disrupt the elections and had there been room for arguing that she is entitled to protection. Even then her prospects of success would have been pretty dim, bearing in mind that the duty to ensure that the orderliness of an election lies on the State under the watchful eye of the Electoral Supervisory Commission. Her application is based squarely on the premise that the conduct she complains of is outlawed by s 118(1) (c) of the Act."

What distinguishes Kuvarega from the cases mentioned above is that the learned judge had before him a provisional order in which the terms of the interim relief and final relief were exactly the same. At p 192-193E, he criticised the applicant for the manner in which the relief sought had been crafted—(read from judgment)

In 9 out of 10 judgments that come before SC, the authority quoted is Kuvarega. The question is are the legal practitioners appearing before the courts misreading the tenor of the judgment. The assumption is made that Kuvarega is authority for the view that a judge can dismiss an application on the grounds that the matter is not urgent. The learned judge made his determination based on the peculiar facts of that case and the relief being sought. We need to look at Kuvarega and discuss where we are going wrong in applying the principles set out therein.

Effect of a Judges' decision to dismiss a chamber application after finding that it is not urgent.

In certain instances Judges faced with urgent chamber applications commits an error, in that they dismiss an urgent chamber application after finding that the matter is not urgent. This cannot be correct. An order dismissing a matter which has not been determined on the merits has final effect. It disposes of a matter which has not been heard.

It appears that when faced with urgent chamber applications Judges tend to focus more on the term "urgent" rather than the "application" itself. They forget that the term urgent is just a

descriptive word which has little effect on the substantive issues that are before the Court. When a Judge makes a finding that the matter is not urgent he/she ought to set it down before the ordinary roll instead of dismissing it. The determination of urgency only speaks to the time frame within which the matter ought to be heard. It is a preliminary issue which must be determined prior to a determination on the merits and like in any other matters where preliminary points are raised, a Judge does not order a dismissal, but rather strikes the matter off the roll. The same approach is to be adopted in applications of this nature.

As indicated above, an order of dismissal of a matter has an effect of bringing the matter to finality. Once such an order is made before the substantive issues are heard the Court would have breached the rights of the parties in terms of both common law and the Constitution. In terms of common law litigants have a right to be heard which emanates from the common law maxim *audi alteram partem* rule. This common law right was succinctly encapsulated in *Attorney General v Mudisi & Ors* SC 48/15 where it was stated that:

> *"One of the fundamental precepts of natural justice, encapsulated in the maxim audi alteram partem, is the right*

of every person to be heard or afforded an opportunity to make representations before any decision is taken that might impinge upon his rights, interests or legitimate expectations" (my underlining)

The Court also expressed similar sentiments in University of Zimbabwe v Mugumbate & Ors SC 63/17 where it stated as follows:"

> *"In Taylor v Minister of Education and Another 1996 (2) ZLR 772 (S) at 780 A-B, the following was stated:*
>
> > *'The maxim audi alteram partem expresses a flexible tenet of natural justice that has resounded through the ages. One is reminded that even God sought and heard Adam's defence before banishing him from the Garden of Eden. Yet the proper limits of the principle are not precisely defined. In traditional formulation it prescribes that when a statute empowers a public official or body to give a decision which prejudicially affects a person in his liberty or property or existing rights, he or she has a right to be heard in the ordinary course before the decision is taken, see Metsola v Chairman, Public Service Commission & Anor 1989 (3) ZLR 147 (S) at 333 B-F.'"*

Our Constitution also enshrines the right to a fair hearing as a fundamental right. It is provided for under section 69 of the Constitution of importance is subsection (3) which states that

every person has a right of access to the Courts, or some other tribunal or forum established by law for the resolution of any dispute. It might appear to be a small issue when a Judge issues an order of dismissal after making a finding that the chamber application is not urgent but the consequences thereof are grave and this is an error that should not be taken lightly as it is one that also affect the public confidence in the our Court system and access to justice by litigants.

As a consequence, one can say that a dismissal such as this may be a dereliction of duty in addition to the denial of the litigant(s) their fundamental right to be heard in their own cause.

It becomes pertinent to consider what a judge faced with an urgent chamber application must do. This is set out in r 246 which reads:

> ***246. Consideration of applications***
> *(1) A judge to whom papers are submitted in terms of rule 244 or 245 may—*
> *(a) require the applicant or the deponent of any affidavit or any other person who may, in his opinion, be able to assist in the resolution of the matter to appear before him in chambers or in court as may to him seem convenient and provide, on oath or otherwise as the judge may consider*

necessary, such further information as the judge may require;
(b) require either party's legal practitioner to appear before him to present such further argument as the judge may require.
[Subrule amended by s.i. 25 of 1993]
(2) Where in an application for a provisional order the judge is satisfied that the papers establish a prima facie case he shall grant a provisional order either in terms of the draft filed or as varied.
(3) Before granting a provisional order a judge may require the applicant to give security for any loss or damage which may be caused by the order and may order such additional evidence or information to be given as he thinks fit.

A judge must consider the matter before him or her. That matter is by no stretch of the imagination the question of urgency. The rule deals with the manner in which a judge should proceed to achieve a resolution of the matter. It gives a judge the discretion to call any person before him and may require a party to give oral evidence on oath. This rule must be read together with rule 239 which rule makes provision for the manner in which a chamber application must be dealt with. The rule actually enjoins a judge to hear the application placed before him or her. It is cast in peremptory terms.

239. Hearing of application

At the hearing of an application—
(a) unless the court otherwise orders, the applicant shall be heard in argument in support of the application, and thereafter the respondent's argument against the application shall be heard and the applicant shall be heard in reply;
(b) the court may allow oral evidence.
Provided that if one of the parties has been barred the court shall deal with the application as though it were unopposed, unless the bar is lifted.
[Proviso inserted by s.i. 33 of 1996]

240. Granting of Order

(1) At the conclusion of the hearing or thereafter, the court may refuse the application or may grant the order applied for, including a provisional order, or any variation of such order or provisional order, whether or not general or other relief has been asked for, and may make such order as to costs as it thinks fit.
[Subrule amended by s.i. 25 of 1993 and s.i. 33 of 1996]
(2) Where the court grants a provisional order under subrule (1), rule 247 shall apply, mutatis mutandis, to the provisional order as though it were granted following a chamber application.

What is critical is that it is the application which must be heard. An application is heard on the merits after hearing the parties and the judge thereafter makes a determination in the resolution of the dispute. It could not have been the intention of the

legislature to have a matter dismissed for want of urgency which is a procedural step for having a matter jump the court roll.

If one removes the adjective urgent from the appellation of urgent chamber applications, one is left with ordinary chamber applications. These are provided for under r 241 which provides as follows:

> ***D. CHAMBER APPLICATIONS***
> ***241. Form of chamber applications***
> *(1) A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form 29B duly completed and, except as is provided in subrule (2), shall be supported by one or more affidavits setting out the facts upon which the applicant relies.*
> *Provided that, where a chamber application is to be served on an interested party, it shall be in Form No. 29 with appropriate modifications.*

The point I wish to make is that the term urgent is merely a describing word which does not take away from the substantive issues that have necessitated the making of the application. Therefore Judges should not be misled by the term "urgent" to think that, that is all the application is concerned with whilst overlooking the real issues that has brought the applicant before the Court.

To further buttress the point that urgency is only but a word that explains the immediate hearing of a matter, I turn to the rules of service in chamber applications under rule 242. The same rules that apply in an ordinary chamber application also apply in the case of urgent chamber applications, rule 242 states as follows:

> ***242. Service of chamber applications***
> *(1) A chamber application shall be served on all interested parties unless the defendant or respondent, as the case may be, has previously had due notice of the order sought and is in default or unless the applicant reasonably believes one or more of the following—*
> *(a) that the matter is uncontentious in that no person other than the applicant can reasonably be expected to be affected by the order sought or object to it;*
> *(b) that the order sought is—*
> *(i) a request for directions; or*
> *(ii) to enforce any other provision of these rules in circumstances where no other person is likely to object; or*
> *(c) that there is a risk of perverse conduct in that any person who would otherwise be entitled to notice of the application is likely to act so as to defeat, wholly or partly, the purpose of the application prior to an order being granted or served;*
> *(d) that 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;*
> *(e) that there is any other reason, acceptable to the judge, why such notice should not be given.*

(2) Where an applicant has not served a chamber application on another party because he reasonably believes one or more of the matters referred to in paragraphs (a) to (e) of subrule (1)—
(a) he shall set out the grounds for his belief fully in his affidavit; and
(b) unless the applicant is not legally represented, the application shall be accompanied by a certificate from a legal practitioner setting out, with reasons, his belief that the matter is uncontentious, likely to attract perverse conduct or urgent for one or more of the reasons set out in paragraphs (a), (b), (c), (d) or (e) of subrule (1).

The requirement for service of the application on all interested parties must act as a guide to the chamber application. Implicit in that rule is that the judge must hear the application. The Court can only do away with the rules of service on interested parties if satisfied that the applicant has satisfied the requirements under rule 242 (1) (d).

On the basis of the rules referred above, if the presiding Judge satisfies himself that the matter is urgent, he can then deal with the substantive issues, if not, he ought to remove the matter from the urgent roll and place it on the ordinary roll. As stated earlier the matter before the Court is not about urgency, as a result a finding that it is not urgent does not do away with the

substantive issues that brought the applicant to court, therefore legally the court is not supposed to dismiss the application on the basis that the matter is not urgent as this puts the applicant completely out of Court.

How should a Judge who finds that an urgent chamber application is not urgent dispose of that chamber application?

After assessing the facts presented on record and coming to a conclusion that the chamber application is not urgent, the next stage for the presiding Judge is to then remove the matter on the urgent roll and place it on the ordinary roll so that it follows the normal course of litigation.

How should a Judge who makes a finding that the urgent chamber application placed before him/her is indeed urgent ought to proceed?

It must be emphasised that the manner in which an urgent chamber application that is found to be urgent is disposed of is completely different from that which is found not to be urgent. When the presiding Judge comes to the conclusion that the application is urgent, only then can he/she delve into the merits

because he is now seized with the matter. It is only this Judge who can issue an order of dismissal if it is so warranted because he would have dealt with the substantive issues of the application. However, the reasons for concluding that the matter was urgent in the first must be clearly enunciated in his judgement or ruling. It should not be an issue that is left unsaid so that parties may infer that the matter could only have been heard because the presiding judge considered it urgent. The reasons for concluding that the matter was urgent must therefore appear *ex facie* the judgment of the Court.

Does a Judge faced with an urgent chamber application request opposing papers from the respondent(s)?

On whether the judge is required to address this issue recourse must be had to rule 244 of the High Court Rules, which governs urgent chamber applications.

In terms of service, the rules provide a degree of flexibility. Rule 232 states that if the matter is urgent the Court may specify a shorter period for the filing of opposing papers on good cause shown. Rule 242 also provides that a chamber application shall be served on all interested parties unless the defendant or

respondent, as the case may be, has previously had due notice of the order sought and is in default or unless the applicant reasonably believes that 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.

The Court can only do away with the rules of service on interested parties if satisfied that the applicant has satisfied the requirements under rule 242. In my view, it is always important for the Judge to hear the other side as this assists him in formulating an objective opinion on the matter.

In the Labour Court urgent chamber applications are provided for in terms of rule 18 of the Labour Court Rules 2017 which states that:

> " ***18. Urgent chamber applications***
>
> *(5) If the Judge considers that the application should be treated as an urgent application, he or she **may** issue a directive dispensing with the forms and service provided for in these rules and **may** give directions for the matter to be dealt with at such time and in such manner and in accordance with such procedure, which shall, as far as is practicable, be in accordance with these rules, as he or she considers appropriate."*

It seems to me that the rules of the Labour Court have an advantage over the High Court rules. The rule makes it clear that the judge, after considering that the matter is urgent, can dispense with forms and service and determines the application. It is devoid of any ambiguity. What must be considered is the application as opposed to the urgency attendant upon the matter. It simplifies the disposal of disputes by judges.

In general a Judge who is faced with an urgent chamber application is faced with an 'extra ordinary' application in which circumstances he ought to act expediently. However, it must be noted that the veracity of the applicant's claim should be assessed before the Court makes a decision and that can only be done upon requesting papers from the respondents. The Judge however has the discretion to adjust the timelines for service in light of the fact that the application before him would be urgent.

Does a Judge who makes a determination that the urgent chamber application is not urgent become *functus officio?*

The answer to this question is yes. Once a Judge makes a finding to the effect that the urgent application is not urgent, he/she should then remove the matter from the urgent roll for it to be heard on the ordinary roll. The moment that the Judge makes a

determination that the matter is not urgent, he/she will no longer be seized with the matter, therefore, he/she ought not to delve into the substantive issues of that application. Similarly, in circumstances where a court declines jurisdiction to hear a matter, it is not supposed to delve into the merits of that matter, it only assumes jurisdiction over the dispute if it makes a finding that the application is urgent. This issue falls under some of the errors that Judges make in dealing with urgent applications thus I saw the need to address it.

In *Madza & Ors v The Reformed Church in Zimbabwe Daisyfield Trust & Ors* SC71/14, the court said:

> *"If on perusal of the papers the Judge comes to the conclusion that the matter is urgent enough to merit an urgent hearing, then he or she conducts a hearing and gives such order as he or she thinks fit. But if the conclusion is reached, however, that the matter is not urgent, he or she must refuse to hear the application and remove it from the roll, in which event the applicant has the option of enrolling his matter for hearing on the ordinary roll of court applications.*
>
> *It is a contradiction in terms to dismiss a matter on the twin bases that it is not urgent and that the applicant has no locus standi for the later basis indicates that a decision on the merits of the application has been made in which event the applicant is barred from placing the matter on the ordinary roll for determination. The effect of the dismissal*

on the latter basis is that the applicant is put out of court and is deprived of his right to have the matter properly ventilated in a court application or trial. Where, however, the matter is struck off the roll for lack of urgency, the applicant, if so advised, may place the matter on the ordinary roll for hearing.

The Learned Judge, in giving his reasons for finding that the matter was not urgent, made certain findings of fact which involved the merits. For example, he found that the appellants' Board was dissolved on July 12, a fact of which the appellants claim they were unaware, and that the appellants had not established locus standi to act for the Board or seek remedy sought in the draft provisional order. Those issues went to the heart of the matter. In proceeding to determine them and to make those findings of fact, the court misdirected itself."

In *Portland Holdings Ltd v Tupelostep Investments (Proprietary Ltd & Anor* SC 3/2015 the appellant filed an urgent chamber application in the High Court seeking in the interim the release of its cement by the 1st and 2nd respondents. The application was opposed by the respondents. The High Court heard the parties on the question of urgency and decided that the application was not urgent. The court then dismissed the application with costs on the basis that it was not urgent. On appeal the Supreme Court held that the court *a quo* determined on facts which were not

before it because having found the application not to be urgent the matter ceased to be before it for hearing on the urgent roll. The Court also echoed the sentiments by Ziyambi JA in *Madza & Ors v The Reformed Church in Zimbabwe Daisyfield Trust (supra)* it stated as follows:

> *"I respectfully associate myself with the dicta by her Ladyship. It follows that the dismissal of the application for want of urgency is improper.*
>
> *It is also contended on behalf of Portland that, in addition to this, the court fell into further error by commenting on the merits of the case. It is contended that even if this court were to remit the matter for hearing before the High Court a plea of res judicata could be successfully raised by the respondents. I agree, in Purchase v Purchase 1960 (3) SA 383, CANEY J had this to say:*[3]
>
> > *"... He submitted that that dismissal of an application had the effect of an absolution; he likened that to dismissal of an action, which is an absolution from the instance. Becker v Wertheim, Becker and Leveson, 1943 (1) P.H. F 34 (A.D.). I am disinclined to agree with him, for I think that dismissal and refusal have the same effect, namely a decision in favour of the respondent."*

[3] At p 385A-B

The above authority also brings to the fore the effect of dismissal of an application merely on the grounds of lack of urgency. It is an order that places the applicant completely out of court and should be avoided at all costs especially in instances where the substantive issues of a matter have not been heard.

In *Air Zimbabwe (Pvt) Ltd & Anor v Nhuta & Ors* SC 65/14, the Court said the following:

> *Indeed, having found that the matter was not urgent it nevertheless proceeded to hear and determine it on an urgent basis. In so doing the court a quo contradicted itself. What it should have done once a finding of lack of urgency was made, was to strike or remove the matter from the roll of urgent matters and not proceed to hear the merits for, once a hearing has taken place and a decision made on the merits, the question of urgency becomes irrelevant.*

The above authorities spell out in clear and unambiguous terms the procedure that should obtain once a finding is made that the matter is not urgent.

Below are examples of matters where the Court after making a determination that the matter was not urgent, went on to deal with the merits.

Dongo v Matengambiri HH 551/17

The applicant in this matter filed an urgent chamber application seeking the court to suspend the writ of execution against the applicant so ensure his peaceful possession of certain premises. Respondent opposed the application on the basis that the matter was not urgent. The also Court found that the matter was not urgent but went on to deal with the merits found and that the applicant had no prospects of success and went on to issue an order of perpetual silence against the applicant.

Dongo v Babnik Investments HH 384/17

The applicant filed an urgent chamber application for a provisional stay of eviction so that he would remain in peaceful occupation of a certain immovable property. The Court held that the applicant had not properly laid the basis for seeking that the matter be heard on an urgent basis or established his *locus standi* to bring the application. After that determination the Judge then ventured into the merits where he made a finding that the matter had no prospects of success and thus dismissed the application.

All the above cases depict what could amount to a dereliction of duty by Judges faced with urgent chamber applications. The

inquiry into the matter ends the moment that the Judge finds the matter to be not urgent.

As earlier aluded to there might a misconception within the judiciary that Kuvarega is authority for an order dismissing an application on the basis of lack of urgency. In my view the facts in Kuvarega were very peculiar. In addition the nature of the relief being sought was such that an order to the effect that the matter was not urgent would not have stood the applicant in good stead in any event. Let's re-examine what his lordship said about the relief being sought:

At 192H-193D the Court stated as follows:

> *"There was nothing interim about the provisional relief sought. It would have provided the applicant with the relief she sought on the day of the election. The practice of seeking interim relief, which is exactly the same as the substantive relief sued for and which has the same effect, defeats the whole object of interim protection. In effect, a litigant who seeks relief in this manner obtains final relief without proving his case. This is so because interim relief is normally granted on the mere showing of a prima facie*

case. If the interim relief sought is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on proof merely of a prima facie case. This, to my understanding, is undesirable especially where, as here, the applicant will have no interest in the outcome of the case on the return day. The point I am making will become clearer if I put it in another way. If, by way of interim relief, the applicant had asked for a postponement of the election pending the discharge or confirmation of the provisional order she would not in that event gain an advantage over the respondents, because the point she wanted decided would have been resolved before the election was held. But, if the interim relief were granted in the form in which it is presently couched, she would get effective protection before she proves her case and the election would be conducted on the basis that it is unlawful to wear T-shirts emblazoned with party symbols and slogans. Thereafter it would be fruitless for the respondents to establish their entitlements to wear such T-shirts. Care must be taken in framing the interim relief sought as well as the final relief so as to obviate such incongruities."

In determining the issue of urgency, does a Judge go into the merits of the matter? If so to what extent?

I start by indicating that the issue of urgency is not an issue in abstract. It is mainly a factual issue and therefore for a Judge to be in a position to ascertain whether or not the urgent application satisfies the requirements for urgency, he/she has to measure those requirements against the facts that are on record. The Judge does not go into the legal issues before the Court but his/her inquiry should be limited to those facts that assist him in ascertaining the presence or absence of urgency in a matter. The legal issues (merits) can only be determined after the issue of urgency has been finalised *i.e.* after finding that the matter is urgent otherwise, if it is not urgent, there will be no need to determine the merits.

In *Mbatha & Anor v Ncube & Anor* SC 19/18

The applicant approached the court via an urgent chamber book seeking stay of the eviction pending the finalisation of their application for review. It was opposed by the respondent on the basis of urgency. In disposing the matter before him the Judge stated as follows:

> *"The conduct of the applicant does not clothe the application with urgency but borders on abuse of court process. Approaching the court more than once to try and stop execution which is imminent does not make a matter urgent. The applicant appears to have waited till the day of reckoning and sought to seek redress on more than one occasion on the same facts involving the same parties on an urgent basis. The fact that the urgency is self-created militates against the granting of the application. In any event there are no prospects of success on the pending review such that the balance of convenience does not favour the granting of the application."*

Commenting on the misdirection Makarau JA stated the following

> *"In passing I wish to comment on the wording of the above finding. I find it ambivalent and seeming to suggest that after finding that the application was not urgent, the court a quo nevertheless went ahead to assess the merits of the matter. I however take no issue on this lack of clarity by the court a quo for the purposes of determining this application."*

In *CAPS United Football Club (Pvt) Ltd v CAPS Holdings Limited & Ors* SC 11/09 the appellant filed an urgent chamber application in the High Court, in dealing with the application the learned Judge held that the matter was not urgent, and that there were disputes of facts which could not be resolved on the papers. On appeal Sandura JA stated the following:

> "*Having concluded that the matter was not urgent, the learned Judge went on to deal with the issue as to whether the matter could be resolved on the papers, although it was not necessary for him to do so,*

Conclusion

Where a Judge is faced with an urgent chamber application, the first requirement is determining whether or not the application is urgent and coming to any one of the two conclusions i.e. the matter is urgent or the matter is not urgent.

Secondly, if he finds the matter to be urgent he is obliged to get into the merits but if not he/she ought to remove the matter from urgent roll (this is as far as he/she can go) because he/she is now *functus officio.*

A Judge who finds that the matter is not urgent should not dismiss the matter as this would be tantamount to a breach of the litigants' common law right to be heard (*audi alteram partem* principle), their constitutional right to fair hearing as well as their confidence in the judiciary.

I will leave you with these remarks from one of the authorities I have had the privilege to refer to.

“For a court to deal with a matter on an urgent basis, it must be satisfied of a number of important aspects. The court has laid down guidelines to be followed. If by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt with immediately irreparable prejudice will result, the court can be inclined to deal with it on an urgent basis. Further it must be clear that the applicant did on his own part treat the matter as urgent. In other words if the applicant does not act immediately and waits for doomsday to arrive, and does not give a reasonable explanation for that delay in taking action, he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis.”

I thank you