WILMAR INDUSTRIAL SCHOOL DEVELOPMENT COMMITTEE
versus
TAURAI NYAWATA
and
TANEMARK AGRICULTURAL COMPANY
and
MANTOWA TRADING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 11, 12 and 16 July 2018

URGENT APPLICATION

E Ngwerewe for the applicant
R Mabwe for the 1st and 2nd respondent
D Sheshe for the 3rd respondent

CHIRAWU-MUGOMBA J: This urgent chamber application was placed before me on 10 July 2018. I immediately caused the matter to be set down for hearing on 11 July 2018. The applicant seeks the following relief through a provisional order:

TERMS OF FINAL ORDER SOUGHT

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

1. The respondents be and are hereby ordered to restore Daniel Senzere and Steyn Berejena as signatories to Wilmar Industrial School's Ecobank account number 0051037605411401.
2. The respondents shall pay the costs of suit on a high scale.

INTERIM RELIEF GRANTED

That pending the confirmation or discharge of this provisional order, the applicant is granted the following relief:-

1. The respondents be and are hereby ordered to restore Daniel Senzere and Steyn Berejena as signatories to Wilmar Industrial School's Ecobank account number 0051037605411401.

SERVICE OF THE PROVISIONAL ORDER

The applicant's Legal Practitioners be and are hereby given leave to serve this order on the Respondents' or their legal practitioners.

At the hearing of this matter, the 1st and 2nd respondents' legal practitioner raised the following points *in limine.*

a. That the applicant has no *locus standi* to file the application since it is a committee that is not recognised by law.

b. The final and interim relief sought by applicant is the same in nature.

c. The application is not in a proper form as Rule 241(1) requires that if an application is to be served, it must be in form No. 29 with appropriate modifications.

d. That the certificate of urgency does not meet the requirements.

e. That the matter is not urgent

In response, the applicant's legal practitioner averred that the applicant is a legal *persona* in terms of s 36 of the Education Act [*Chapter 25:04*]. On interim and final relief being the same, he insisted that this is not fatal as the court is at liberty to amend the order. He admitted that the form used is not the proper one and again that this is not fatal to the application. He also averred that the matter was indeed urgent. After hearing argument on the points *in limine,* I reserved judgement.

The points *in limine* raised by the 1st and 2nd respondent's legal practitioner are by no means new and I shall proceed to deal with them in sequence.

LOCUS STANDI

Locus standi has been defined by Herbstein and Van Winsen in *The Practice of the High Courts of South Africa* 5thed on p 186 as follows;-

> *"*In some cases, it has been held that the applicant must have a direct and substantial interest in the relief claimed, other cases have explained that a 'direct and substantial interest' means a legal interest. Traditionally South African Courts adopted a restrictive attitude to this issue, requiring a person who approached the court for relief to have an interest in the sense of being personally adversely affected by the wrong alleged".

However, given the fact that this is an urgent application for which a provisional order is sought and where only a hearing on the points *in limine* was conducted, making a finding on *locus standi* would be going into the merits of the matter and denying applicant or

effectively shutting the door on any other relief that they may seek. In that regard, I can do no better than quote ZIYAMBI (JA) (As she then was) in *Madza and Ors* v *Reformed Church in Zimbabwe Daisyfield Trust and Ors*[1];-

> "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 latter 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."

Accordingly, the point *in limine* on *locus standi* is dismissed.

FINAL AND INTERIM RELIEF BEING THE SAME

Time and again, the courts have sounded warnings on interim relief sought being the same as the final relief. At the risk of belabouring the point, but still necessary to do so, I can also do no better than quote from the late CHATIKOBO J in *Kuvarega* v *Registrar General & Anor*[2]

> "The practice of seeking interim relief, which is exactly the same as 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. That 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 the proof merely of a *prima facie* case. This to my mind is undesirable especially where, as here, the applicant will have no interest in the outcome of the case on the return date." (At p193 A-C)

Nonetheless, there is nothing that prohibits a judge from having a faulty provisional order being amended though I would add a rider that this should be the exception rather than the norm. It is expected that interim relief sought should not be the same as the final relief because granting the interim relief defeats the purpose of discharge or confirmation process.

Accordingly, the point *in limine* on the final and interim relief sought being the same is dismissed.

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[1] SC 71/14

[2] 1998(1) ZLR 188

USE OF IMPROPER FORM

Rule 241 reads as follows:-

> "(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."

My reading of the rule is that the appropriate form is a combination of 29 and 29 B. The form used by the applicant is not a hybrid form. In *Marick Trading (Pvt) Ltd* v *Old Mutual Life Assurance Company of Zimbabwe and Anor,* [3] MAFUSIRE J after citing many leading authorities concluded that,

> "Clearly, where a party fails to comply with the rules there must be a plausible reason why there has been a failure to comply. In this case the attitude of the applicant was that such noncompliance must be granted by the court even though no explanation has been proffered for such failure. The applicant's counsel merely submitted that the defect was not material enough to vitiate the application. In my view this is not sufficient and on this basis alone I would dismiss the application." [4]

I however see no prejudice suffered by the respondents as they were served with the application and appeared before me for argument and in my view this is a case where I can use my discretion in terms of Rule 4C, "in the interests of justice".

Accordingly, the point *in limine* on the use of a defective form is dismissed.

DEFECTIVE CERTIFICATE OF URGENCY

GOWORA JA has described a certificate of urgency as, *"the sine qua non for the placement of an urgent chamber application before a judge."*[5] Accordingly,

> "In certifying the matter as urgent, the legal practitioner is required to apply his or her own mind to the circumstances of the case and reach an independent judgment as to the urgency of the matter. He or she is not supposed to take verbatim what his or her client says regarding perceived urgency. I accept the contention by the first respondent that it is a condition precedent to the validity of a certificate of urgency that a legal practitioner applies his mind to the facts."[6]

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[3] 2015(2) ZLR 343

[4] At page 347

[5] Oliver Mandishona Chidawu & 2 Ors v Jayesh Sha & 4 Ors SC12/13

[6] At page 6

When regard is had to the certificate of urgency filed in this matter, it can be noted that the legal practitioner did not apply their mind to the matter. There is no information as to when the need to act arise and what action the applicant took or an explanation for any delay. The certificate is the basis for the matter being placed before a judge. It is akin to a situation where customers are waiting patiently for their turn to purchase medication. From the blues, a customer jumps to the front of the queue and demands to be served. The pharmacist must be convinced that indeed this customer deserves to be served ahead of everyone else. In urgent applications therefore, it is imperative that a legal practitioner who certifies that the matter is urgent play a crucial role of assisting a judge whether or not to hear the matter as an urgent one.

Accordingly, the point in *limine* regarding the certificate of urgency is upheld.

MATTER NOT URGENT

In a judicial world full of tests and standards, one that has stood the 'test' of time is the *Kuvarega* (already cited*)* decision on what constitutes urgency.

In *Denenga & Anor* v *Ecobank Zimbabwe (Pvt) Ltd 7 Ors* HH 177-14 MAWADZE J, based upon decided cases summarised the urgency requirements as follows:

(a) It cannot wait the observance of the normal procedural and time frames set by the rules of the court in ordinary applications as to do so would render negatively the relief sought;
(b) There is no other remedy;
(c) The applicant treated the matter as urgent by acting timeously and if there is a delay to give good or sufficient reason for such delay; and
(d) The relief sought should be of an interim nature and proper at law.

In *Nixris Investments (Pvt) Ltd* v *Chinhoyi University of Technology and Anor,*[7] CHIGUMBA J stated as follows on urgency:

(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.

[7] HH-18-16

(d) Applicant gives a sensible, rational and realistic explanation for any delay in taking action.

(e) There is no satisfactory alternative remedy.

On 30 January 2018, a letter was written to ECOBANK advising the bank that the first respondent and one Maposa were no longer signatories to the school accounts. Attached to the letter was a resolution on change of signatories. It is pertinent to note that the signature of the first respondent appears together with that of Maposa and the indicated date is the 9th of January 2018. The applicant in the founding affidavit has not stated when exactly the signatures of Steyn Berejena and Daniel Senzere were removed and what action if any the applicant took in relation to the removal. There is no information in relation to the actions (if any) that the respondents took that led to the blocking of the schools accounts. A narration of events would have enabled the court to properly apply the urgency test.

Accordingly, the point in *limine* on urgency is upheld.

In view of the upholding of the points in *limine* on the certificate of urgency and on urgency, it is ordered as follows:

1. The matter be and is hereby struck off the roll of urgent matters with no order as to costs.

Chatsanga and partners, applicant's legal practitioners
Madzingira and Nhokwara, 1st and 2nd respondent's legal practitioners
Sheshe and Mutonono, 3rd respondent's legal practitioners