

GEORGE TIMOTHY KNIFE  
(In his capacity as the natural guardian of Tyrees Knife)  
versus  
RIVERSIDE COLLEGE  
and  
JOHNSON MABVUMBE  
(In his capacity as the Principal of Riverside College)

HIGH COURT OF ZIMBABWE  
MWAYERA J  
MUTARE, 15 AND 25 March 2021

### **Urgent Chamber Application**

*B Majamanda*, for the applicant  
*C Chibaya* assisted by *C Mukwena*, for the respondent

MWAYERA J: The applicant approached the court through the urgent chamber book on 11 March 2021. The applicant sought the following order.

#### “TERMS OF THE FINAL ORDER SOUGHT

1. That the decision of the respondents to expel applicant’s son namely Tyrees Knife from school be and is hereby declared null and void and of no force or effect as it was arrived as a result of procedural impropriety.
2. The applicant’s son be and is hereby allowed to remain a student at the 1<sup>st</sup> respondent while at the same time attending his lessons without any form of hindrances from the respondents.
3. The respondents be and are hereby ordered to pay costs of suit on attorney and client scale.

#### INTERIM RELIEF GRANTED

Pending determination of this matter, the applicant is granted the following relief:

It is ordered that:

1. The 1<sup>st</sup> and 2<sup>nd</sup> respondents be and are hereby interdicted from barring the applicant’s son from entering school premises and classes of the 1<sup>st</sup> respondent for purposes of continuing with his form four studies.
2. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents be and are hereby interdicted from convening any form of disciplinary hearing against the applicant’s son.
3. That the respondents who oppose this order shall pay costs of this application on a legal practitioner client scale.”

The respondents opposed the application. In opposing papers the respondents raised points *in limine* and addressed on merit.

The brief facts of the matter are that, on 30 December 2020 the respondents by letter headed “Exclusion letter for Tyrees Knife” addressed to the applicant excluded the minor from the college. The exclusion was pursuant to communication of alleged misdemeanours involving drinking of beer on campus and insulting teachers and sexual misconduct at school by the applicant’s child and his girlfriend which included kissing in front of other pupils. The invitation of the applicant to the private college to discuss the matter was not honoured culminating the exclusion letter per the circular from the Ministry of Education. (Circular Minute p 35 paras 3 and 4 refers)

Exclusion entails removal of a pupil from a school by the head for reasons in the best interests of either the child, parent or school. A pupil so excluded may reapply for admission into any other registered school without reference to the Regional Director. Expulsion on the other hand entails ejection or removal from the school system on account of misconduct of a serious nature. A pupil so expelled cannot be readmitted to the same school or another without prior approval of the secretary for Education, Sports and Culture. In the present case the applicant’s son was excluded from the first respondent. The applicant responded to the exclusion letter on 31 December 2020 through his lawyers of record requesting details on whether or not a disciplinary meeting had been conducted and further threatening legal action in the courts of law if the exclusion letter was not retracted. There was no further action until the filing of the urgent chamber application on 11 March 2021. It is worth noting that the first respondent is a private school and that online lessons were in progress from 4 January up to 15 March 2021 when schools were formerly to resume one on one school sessions per government directive after the relaxation of the national lockdown imposed to contain Covid 19 in terms of SI 183/2020 as amended. The applicant’s son was not undertaking online lessons as submitted by counsel for the respondent Mr *Chibaya* and not contested by Mr *Majamanda* for the applicant.

Considering the facts of the matter there is need for this court to inquire into the urgency of this application. It is settled a matter is urgent if it is one which cannot wait for resolution through ordinary normal court process. This denotes that the matter should be of such nature that preferential treatment gaining considerable advantage over other matters is justified. See *Delwin Investments (Pvt) Ltd t/a Formscap v Joppa Engineering Co (Pvt) Ltd* HH 116/98. The nature of relief sought and the cause of action fall for scrutiny in colouring the matter as urgent

or not urgent. See *Document Support Centre P/L v Mapuvire* 2006 (2) ZLR 240. In this case the cause of action arose on 30 December 2020 when a letter of exclusion of the applicant's child was issued. The applicant threatened legal action through lawyers in a letter dated 31 December 2020, and headed "EXPULSION LETTER, TYREES KNIFE" but did not put the words into action. The national lockdown did not bar the applicant from approaching the High Court to file review or urgent chamber application as it is common cause the courts were operational. The Chief Justice Practice Direction 1/21 as amended is instructive. Clause 7 on court operations is clear that the court operations to entertain initial remands, urgent process and applications and bail applications remained operational during the lock down.

The applicant's legal practitioner was alive to this and was also alive to the exclusion of the applicant's child and that the latter was not participating in online lessons. The applicant sat on its laurels and only filed an urgent chamber application simultaneously with a review application on 11 March 2021. The rules do not envisage self-created urgency as constituting urgency requiring preferential treatment. When the need and duty to act arose on 30 December 2020 even when online lessons started in January 2021 the applicant did not seek redress. The applicant without any explanation for the delay now seeks to purport to clothe the inaction with urgency. Even when court resumed normal operations on 2 March the applicant did not take action but only waited for the day of reckoning and approached the court on 11 March 2021. The applicant did not treat the matter as urgent at all and thus cannot seek for redress on urgent basis for want of meeting the requirements. The case of *Kuvarega v Registrar General and Another* 1998 (1) ZLR 188 is instructive. It was elaborately stressed that what constitutes urgency is not only the imminent arrival of the day of reckoning but that a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. Also see the case of *Madzivanzira and Ors v Dexprint (Pvt) Ltd and Anor* HH 245/02. The court demonstrated that a party seeking relief on urgent basis ought to demonstrate that the party itself treated the matter as urgent. In this case the applicant's behaviour falls short of treating the matter with urgency despite the fact that from as early as 30 December 2020 the applicant and counsel Mr *Majamanda* were aware of the cause of action which ought to have propelled the applicant into action.

The nature of the cause of action and relief sought in this case are important considerations in granting or denying the urgent application. The exclusion and not expulsion of the applicant from school on 30 December 2021 does not meet the requirements of urgency.

This is particularly so when one considers the nature of relief sought by the applicant. The applicant is seeking to stay the exclusion pending nothing. In fact the applicant despite crying for the right to be heard in the provisional order seeks to bar the respondents from conducting the disciplinary hearing thereby tainting the genuineness and or prospects of success of the impending review. Despite drawing Mr *Majamanda's* attention to the fact that the provisional order sought is reflective of a final order as it seeks to bar disciplinary hearing counsel insisted the order is competent as he anticipated, and speculated disciplinary proceedings might be prejudicial to his client. The inaction by the applicant when the exclusion occurred, the lack of explanation for the delay, the lack of diligence and not treating the matter as urgent and the incompetent relief being sought by the applicant are factors which display that the application is not urgent.

Further compounding the applicants' problems is the fact that the certificate of urgency which in terms of r 244 is a condition precedent to an urgent chamber application requires a lawyer who certifies a matter as urgent to do so from an informed position having applied his mind to the matter. See *General Transport and Engineering (Pvt) Ltd and Ors v Zimbabwe Banking Corporation (Pvt) Ltd* 1998 (2) ZLR 30. See also *Oliver Mandishona Chidawu and Ors v Jaysen Shan and Ors SC 12/3*. In the present case the lawyer Mr *Muraicho* in certifying the matter as urgent appears not to have carefully applied his mind as clearly the national lockdown and closure of schools was not a bar to the applicant to approach the court to seek redress on what he viewed as unprocedural and unfair exclusion of his child from school. The applicant's duty to act arose on 30 December when communication of the child's exclusion was effected and applicant replied on 31 December 2020 threatening going to court. Further the court was not closed for urgent matters during the national lockdown. Counsel in certifying the matter as urgent also assumed the applicant's child had been expelled from school yet the child had only been excluded and in terms of Ministry of Education Regulations the applicant's son after exclusion would retain the right to enrol at any other school without prior approval of the Ministry of Education Sports and Culture. The basis of certifying the matter as urgent was therefore premised on the wrong assumption that the child had been expelled and that the indefinite closure of schools due to the Covid 19 pandemic lockdown meant the applicant could not access the courts. It is for these reasons that I hold the view that counsel in certifying the matter as urgent did not properly apply his mind. The point *in limine* on certificate of urgency being defective is upheld.

The last point *in limine* raised on citation of the second respondent was conceded and by consent the citation was amended to reflect second respondent was being sued in his official capacity as the principle of the first respondent.

It is apparent that the application is fraught with irregularities which the respondent counsel has aptly raised as points *in limine*. The applicant filed this application through the urgent chamber book while the application is defective for none compliance with r 241 which makes it peremptory for the application to be accompanied by F 29B. See *Zimbabwe Open University v Mazombwe* 2009 (1) ZLR 10 and also *Marick Trading (Pvt) Ltd v Old Mutual Life Assurance Company of Zimbabwe (Pvt) Ltd* HH 667/15. Rule 241 (1) of the Rules of this court states:

- “1. A chamber application shall be made by means of an entry in the chamber book and shall be accompanied Form 29 B 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.”

In the present case the applicant’s application was not on form No. 29 or 29 B. The applicant’s counsel did not comply with rules of this court as is expected but was quick to casually request the court to condon the non-compliance during the hearing. The words of GUVAVA J (as she then was) in *Richard Itayi Jambo v Church of the Province of Central Africa and Others* HH 329/13 emphasise and highlight the need to follow the rules of this court. The court stated as follows;

“This court has stated in a number of judgments that parties are obliged to comply with rules where there is non-compliance the applicant must apply for condonation and give reasons for such failure to comply with rules. (See also *Jansen v Avacalos* 1993 (1) ZLR 216 (SC)).

In this case the applicant’s legal practitioner made no effort to comply with this rule despite the fact that the point was raised in the respondent’s opposing affidavit. The request to the court to condone the non-compliance was made cursorily at the hearing as if the grant of such condonation is always there for the asking”

*In casu* the applicant’s counsel’s attitude was that even in the absence of satisfactory explanation for non-compliance with the rules, the court must condone and proceed to entertain the matter under the auspice of r 4C which allows departure from rules and directions as to procedure. It should be emphasised that r 4C is by no means a tool for allowing parties to abrogate from the duty and obligation to comply with rules but it is only resorted to in order to satisfy and fulfil the interests of justice.

Had the non-compliance on use of the forms been the only anomaly and applicant properly sought indulgence explaining the none compliance, the court maybe would have considered it a minor infraction and proceeded to entertain the matter. However, the whole matter is pregnant with defects. The circumstances speak loudly of the matter being self-created urgency. All the points *in limine* by the respondent are valid and sustained. Having made a finding that the matter is not urgent and that the whole application is premised on a wrong notion of the applicant's child having been expelled yet the child was excluded I find no reasons why I should proceed to the merits. Suffice to say the matter is not urgent.

The application does not meet the requirements of urgency as contemplated by the rules of this court. There is justification in awarding costs especially when one takes into account the applicant counsel's lack of diligence and argumentative stance even on the obvious.

Accordingly it is ordered that:

1. The matter is struck off the roll.
2. The applicant shall bear the costs.

*Khupe and Chijara Law Chambers*, applicant's legal practitioners  
*Chibaya and Partners*, respondents' legal practitioners