

ALEXANDER MUKWINDIDZA  
versus  
SHADRECK SITHOLE N.O  
(In his capacity as the Chairperson of the Disciplinary  
Committee, Ministry of Primary and Secondary Education)  
and  
MINISTER OF PRIMARY AND SECONDARY EDUCATION N.O

HIGH COURT OF ZIMBABWE  
MWAYERA J  
MUTARE, 30 March 2021

### **Urgent Chamber Application**

*J. Zviuya*, for the applicant  
*P. Garwe* assisted by *T.L. Muradzikwa*, for the respondents

MWAYERA J: On 30 March 2021, after being addressed by both counsel for the applicant and respondents, and having considered documents filed of record I gave an *ex tempore* judgment and ordered that:

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

I undertook to avail written reasons in due course these are they:

The applicant approached the court through the urgent chamber book on 18 March 2021. Upon perusal of papers filed of record on 19 March 2021, I formulated an opinion that the matter was not urgent. By letter filed with Registry on 24 March 2021, the applicant sought audience to address the court. I directed that the respondents be served and set the matter down for 30 March 2021 thus prompting the hearing.

A conspectus of the background of the matter has to be put into perspective. Sometime in October 2020 the applicant was served with a notice of disciplinary hearing by the first respondent, which hearing was scheduled for 18 November 2020 arising from allegations of improper association. The applicant consulted his legal practitioners of record and they in turn requested certain specified documents to prepare for the hearing. The respondents were adamant that all documents had been served on the applicant and as such no further documents were availed. Due to the Covid 19 Pandemic the hearing was postponed indefinitely on 18 November 2020.

Further communication for documents to be availed met with the same response that documents had already been furnished to the applicant. Another set down date was availed for 10 March 2021 for hearing at Mafararikwa Primary School, Marange. 10 March 2021 coincided with the period of Relaxation of the National Lock down for containment and control of the Covid 19 Pandemic as proclaimed by government. The matter was mutually postponed to 1 April 2021. The applicant sought to be advised of precautionary measures put in place to avoid the risk of contracting Covid 19. The respondents were adamant that all documents to be used in the hearing had been availed to the applicant and that they would comply with government and World Health Organisation guidelines and that the matter will proceed as scheduled on 1 April 2021.

It is this insistence which prompted the applicant to approach the court on urgent basis seeking an interdict barring the respondents from proceeding with the disciplinary hearing on the following grounds:

1. That failure or refusal to furnish the requested documents, materials and witness statements would violate the *audi alteraim partem* rule as the applicant and, or his legal practitioners are unable to effectively represent him.
2. The failure to give assurance or disclose that there will be adequate Covid 19 preventive measures in compliance with World Health Organisation (WHO) minimum stands would bring about risk to not only applicant but his lawyers and all attendees to the risk of the deadly Covid 19 disease.

The respondents opposed the application to stop the hearing insisting that the applicant was served with all documents and materials requested and that preventative measures are in place, a position communicated to the applicant. The respondents argued that the requirements of a prohibitory interdict namely:

1. Existence of a *prima facie* right though open to doubt.
2. Existence imminent or real injury of the applicant occasioning a well-grounded apprehension of irreparable harm.
3. The absence of any other satisfactory remedy.
4. The balance of convenience, cannot be met in the circumstances of this matter.

See *Setlogelo* 1914 AD 221. The respondents filed opposition papers in which four points in *limine* were raised. The respondent counsel Mr *Muradzikwa* properly abandoned the first two points in *limine* namely that this court has no jurisdiction and that the application is frivolous and vexatious. I will not be detained by the details on the withdrawn points in *limine*.

The other point in *limine* raised relates to the application not being properly before the court for non-compliance with the rules of this court. The respondent contended that the application was not on F 29B or Form 29 as amended. The application thus failed to avail to the respondents the procedural right expected by law.

Mr *Zviuya* initially argued that the endorsement on the face of the application on right top corner “Form 29B” was sufficient compliance. He later conceded non-compliance and submitted the court was not concerned with form but substance and could condone. Worth mentioning at this stage is the fact that r 241(1) is peremptory, it states:

“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.”

In this case the urgent chamber application was not on Form 29B. The applicant counsel conceded the anomaly and sought condonation. The condonation sought is not granted for the mere ask but a proper application written or sparingly oral has to be made explaining the non-compliance and justifying such condonation. No satisfactory explanation was given for the non-compliance. See *Richard Jambo v Church of the Province of Central Africa and Ors* HH 329/13 and also *Marick Trading P/L v Old Mutual Co. Zimbabwe and Anor* HH 667/15. In this case the non-compliance with the r 241 is not the only hurdle which the applicant faces such that even if the court were to accede and condone, the application still faces the challenge of whether or not it meets the requirements of urgency contemplated by rules of this court.

It is settled a matter is viewed as urgent if the party bringing up the matter has treated the matter as urgent. The nature of relief and cause of action is central in determination of whether or not a matter is urgent. See *Document Support Centre (Pvt) Ltd v Mapuvire* 2006 (2) ZLR 240, MAKARAU J (as she then was) on p 243 stated as follows:

“Without attempting to classify the causes of action that are incapable of redress by way of urgent application, it appears to me that nature of the cause of action and the relief sought are important considerations in granting or denying urgent applications.”

See also *Gwarada v Johnson and Ors* 2009 (2) ZLR 159 wherein the court commenting on what constitutes urgency remarks as follows:

“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 factor a court has to take into account, time being of 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.” (Underlining my emphasis)

See *Anesu Gold (Pvt) Ltd v Golden Reef Mining (Pvt) Ltd and Ors* HH 17-21 and also *Seventh Day Adventist Association of Southern Africa v Tshuma and Ors* HB 213-20. In the present case the applicant is seeking to interdict respondents from carrying out a disciplinary hearing which issue started on 15 October 2020 and hearing date was set for 18 November 2020. The matter did not proceed due to the Covid Pandemic. Documents attached to the application show further communicating on the hearing on 26 October 2020. The applicant acknowledged receipt of notice in November 2020. Several letters referring to the impending disciplinary hearing were written. The cause of action in this matter arose with the notification of the disciplinary hearing in October 2020, which notice was acknowledged by the applicant by signing on the document on page 17. In fact the hearing date of 1 April was a postponement by consent of the parties. The applicant was aware of the impending hearing as early as October 2020 but he did not take action. Assuming it was during lockdown time the applicant was still aware of the impending disciplinary hearing. When the applicant attended in person in the absence of his lawyer on 10 March 2021 he was aware but still applicant did not seek redress with the court. It is common knowledge that the court operations for urgent matters were not disrupted by the national lockdown. It is common cause that essential services remained operation and indeed the Chief Justice Practice Direction 1/21 as emended buttressed the position. Clause 7 on court operations makes it clear that court operations to entertain initial remands, urgent process and applications and bail applications remained operational during lockdown. The national lockdown was relaxed effective 2 March 2021 and courts were directed to operate full throttle still the applicant did not seek redress from the courts until 18 March 2021.

The question then is considering the wording of order 32, r 244 should the matter be treated as urgent and be granted preferential treatment of skipping the roll even though the applicant has sat on its laurels and not treated the matter as urgent. The answer is definitely in the negative because the preferential treatment of a matter as urgent is not available for self-created urgency. In the case of *Kuvarega v Registrar General and Anor* 1998 (1) ZLR 188 CHATIKOBO J as he then was emphasized the fact that self-created urgency or urgency that stems from deliberate or careless abstention from action is not the urgency envisaged by the rules entitling the applicant to preferential treatment.

See also *Trippe C Pigs Candler v Commissioner General*, ZLR 2007 (1) 27 and also *Madzivanzira and Ors v Dexprint (Pvt) Ltd and Anor* HH 2455/02. In the present case the

history leading to the cause of action and the nature of relief sought fall for scrutiny when the court exercises its discretion in deciding whether or not the matter should be treated as urgent. In this case the applicant acknowledged receipt of disciplinary hearing documents as early as 26 October 2020. The applicant sought legal representation and requested further documents as early as 26 October 2020 with several follow up letters in November and December 2020. The applicant argued no favourable reply was obtained but still the applicant did not spring to action and seek the redress with the court. Instead the applicant waited for the day of reckoning for it to seek preferential treatment of the matter to be treated as urgent. In this case there is simply no basis or justification of according preferential treatment of urgency in circumstances in which the applicant did not treat the matter as urgent. In fact considering the circumstances of the matter this is a matter which can wait the ordinary hearing. The applicant did not demonstrate that it treated the matter as urgent.

The applicant even after receiving notice of hearing on 25 February 2021 just acknowledged receipt and persisted in writing letters requesting what the respondents adamantly stated they had already furnished. Such a stance by the applicant is certainly not action which would paint the matter as urgent. The sentiments of MAFUSIRE J in *Main Road Motors v Commissioner General, ZIMRA* HMA 17-17 and *Incon Alloys (Pvt) Ltd v Gwaradzimba NO and Ors* HMA 30-17 are pertinent. The Honourable Judge stated the kind of action that a litigant must take when the need to act has arisen is not just any type of action. It must be an action that is effectual in the protection of one's rights in averting the impending peril (underlining my emphasis). One wonders why the applicant if his rights were under threat failed to file the application for an interdict simultaneously with the several letters of requisition to the respondents, which letters according to the applicants were not responded to even at the time of hearing. The applicant still did not timeously take appropriate and effectual action to protect its rights. To this extent therefore the applicant has not treated its cause as urgent warranting preferential treatment. In case *Seventh Day Adventist Association of Southern Africa v Tshuma and Ors supra*, DUBE BANDA J made the following pertinent remarks commenting on what constitutes urgency:

“In the ordinary run off things, court cases must be heard strictly on first come first served basis. It is only in exceptional circumstances that a party should be allowed to jump the queue on the roll and have its matter heard on an urgent basis..... An urgent application amounts to an extraordinary remedy where a party seeks to gain an advantage on other litigants by jumping the queue, and have its matter given preference over other pending matters.....”

In this case the applicant did not treat the matter as urgent as it failed to act when the need to act arose. The applicant was slaggereed in seeking to correct the flaws if any and only sought to approach the court when the day of reckoning was nigh. The circumstances of the matter do not meet the requirements of urgency as contemplated by the rules of this court. There is no justification warranting the matter being treated as urgent.

Accordingly it is ordered that

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

*Bere Brothers*, applicant's legal practitioners  
*Civil Division of the Attorney General's Office*, first and second respondents' legal practitioners