TAFIRENYIKA HUNDE
and
LUCAS SIBANDA
and
FUNGAI MURAGA
and
TODD SHONHE
and
GODWIN MAROVANIDZE
and
BEE SITHOLE
versus
MRS M.N. MOTHOBI, N.O.
and
NURSES COUNCIL OF ZIMBABWE
and
DR O. MOYO, N.O.

HIGH COURT OF ZIMBABWE
MWAYERAJ
HARARE, 02, 06 & 11 November 2015

Urgent chamber application

Ms *C Tongai*, for the applicants
R Kunze, for the respondents

MWAYERA J: The applicants' approached the court on 28 October 2015 on a certificate of urgency. Upon considering the matter the judge caused the matter to be served and set down for hearing on 2 November 2015. As an interim relief the applicants sought the first, second and third respondent to be ordered and directed to allow the applicants register and sit for their final examinations for Clinical Training Course scheduled for 2, 3 and 4 December 2015. Further the applicants sought that they be allowed to attend the revision block commencing on 2 November 2015 to 13 November 2015. In the final order the applicants sought that the respondents be directed to mark examinations written on 2, 3 and 4 December 2015 in terms of the regulations. The background to this matter is as follows:

The applicants registered with the Nurses Council of Zimbabwe through Chitungwiza

Central Hospital to study for qualification as Clinical Officers in terms of Clinic Training Regulations, 2009, which regulation was passed in terms of the Health Professions Act, [Chapter 27:19]. The applicants commenced study in March 2013 and were to cover The Clinical Officer Course in 2 years. The programme was designed in modular form for theory and practical instructions. The modules being Medicine, Behavioural Science, Radiology, Surgery, Orthopaedics, Anaesthetics, Obstetrics, Gynaecology, Family Planning and Community Medicine.

Sometime in 2014, the applicants together with other students were divided into groups of three per the co-ordinator one Dr Kusotera's directives. In terms of the existing procedure the applicants were divided into groups and seconded to various districts. The applicants were attached to District Medical Officers who supervised the research project that was undertaken in the 6 week period per the course module. The research project was handed over to the course co-ordinator. It was after the research was handed in and graded that the respondents gave a directive that they no longer accepted group research but individual research. The directive came with an ultimatum that those who did not submit individual projects would be barred from writing exams. In desperate desire to complete the course the applicants submitted one week research project instead of 6 weeks per course module. The project was not supervised by a clinical officer or medical officer neither did the directive to redo the project come from the course co-ordinator but from the respondents. The project was again not marked by the medical doctor or co-ordinator or by the second respondent. The applicants were advised that because of failure to pass that one practical research programme they were not eligible to register and write exams on 22 October 2015 and 2-4 December respectively. The applicants were barred from attending revision block which will assist in ensuring they pass the final exams. The applicants argued that they are barred from writing exams despite having successfully completed all other components of the course. The research which the respondent unilaterally revisited banning group research for individual research was just imposed without adequate notice to the detriment of the applicants'. The decision to bar the applicants from registering for examination was only communicated on 21 October 2015 when registration was on 22 October 2015. The applicants contented that such unilateral decision by the respondents to depart from the normal and regular procedure of grading research and barring students from writing their exams over alleged failure of one course was detrimended to the applicants. The respondents's directive had devastating effects

on the applicants who had an interest and legitimate expectation to write the final examination. The applicants presented argument that the nature of relief sought and the cause of action should be pivotal in consideration of whether or not the matter was urgent. The applicants argued that the matter was urgent and that the relief sought ought to be granted on urgent basis. The applicants relied on the reasoning expressed by Makarau JP (as she then was) in *Document Support Centre (Pvt) Ltd* v *T.F Mapuvire* HH 117/2006.

In that case the Hon Makarau JP commended on *Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 188 decision by Chatikobo J. I do not read Makarau J's decision in the *Document Support Centre (Pvt) Ltd* to be redefining the requirements of urgency but I read it to be buttressing and aligning what constitutes urgency as given in Kuvarega case. Of course the circumstances of each case come into crucial play when the court exercised it judicious discretion in deciding whether or not a matter is urgent, bearing in mind of course that the exercise of judicial discretion is limited by maintaining what has been decided as far as its just and possible. Makarau JP commented the *Kuvarega* case (*supra*) as follows:

> "I understand Chatikobo J …… 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 inwaiting 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 …….. it appears to me that the nature of the cause of action and relief sought are important considerations in granting or denying urgent applications"

These remarks resonate well with sentiments by Paradzai J (as he then was) in *Dexprint Investments (Pvt) Ltd* v *Ace Presley and Investments (Pvt) Ltd* HH 120 – 02 where in the learned judge stated that :

> "For a court to deal with a matter on urgent basis, it must be satisfied of a number of important aspects. The court had laid down the 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 that on urgent basis."
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> Further,……..
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> "It must be also be clear that the applicant did on his own part treat the matter as urgent. In other words if an applicant does not act immediately and waits for doomsday to arrive, and does not give 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 urgent basis."

The central question is whether or not the matter can wait. If the answer is in the

affirmative that the matter cannot wait for waiting would occasion irreparable damage then the court ought to be inclined more in favour of granting the relief provided when the need to act arose. The party sprout to action or if there was delay there is reasonable explanation for such delay. The settled requirements of urgency can be briefly outlined as follows

1. whether or not when the need to act arose the party sprout to action
2. whether or not the matter can wait for ordinary set down without occasioning irreparable harm
3. whether or not the nature of relief sought is one which can wait without causing irreparable harm
4. whether or not the cause of action is one which can wait without occasioning irreparable harm
5. whether or not the balance of convenience favours the granting of the relief sought.

In the present application it is clear from the first and second respondent's opposing affidavit that there was an administrative challenge of the recruitment of students inclusive of the applicants. There was no agreement between Chitungwiza Central Hospital and the second respondent, Nurses Council of Zimbabwe para 3 respondent's affidavit and annexures A and B respectively. Later on the second respondent acceded to have the training and came in to give students qualifying exams para 8.2.

This acceptance of students training in my view, confirmed the recruitment by Chitungwiza Hospital and whatever administrative hiccup would not have to be visited on the students. The applicants' having been given a directive that the group research was no longer acceptable sought redress and was directed to submit individual projects which they did in a week for a project set by regulations to be undertaken in 6 weeks. The applicants were advised that they could not register on 21 October when registration was on 22 October. The respondents did not refute this in their opposing affidavit and during the hearing the respondent's counsel whisked away the point by saying it was an unsubstantiated allegation. That aspect was quite central for it propelled the applicants into action since they were barred from registering for the final exam and also attending revision block. The applicants then approached the court to seek redress on urgent basis. From the time the directive was issued that the applicants' were not to be considered for submission of the marked and graded project, the applicant did not sit on their laurels. They engaged domestic remedies and submitted themselves to handing in individual research. When they were advised that they

were barred from registering on 21 October when registration was on 22 October in face of revising from 2 – 13 November and exams 2 – 5 December 2015 immediately they approached the court on urgent basis. Given the circumstances of the case that the applicants' are caught in between administrative wrangles, that the applicants' have been diligent and took action when the need to act arose, that the applicants will suffer irreparable harm if not allowed to attend block revision sessions and if not allowed to sit final examinations. Clearly the requirement of urgency as contemplated by the rules of this court have been meet.

In any event even on merit the applicants stand to suffer irreparable harm if redress is not given on urgent basis. The respondents will not suffer any prejudice because by allowing the applicants to revise and sit final exams for those courses they passed the second respondents will not be compelled to issue out diplomas until the applicants will have passed the outstanding research project (an issue falling for determination given the administrative anomalies).

It is apparent from the submissions that the respondent's decision to suddenly switch from the group research undertaken for 6 weeks per the Regulations Module to individual research undertaken in a week was not only irrational but grossly unreasonable. The decision appeared to have been motivated by administrative differences between the second respondent and Chitungwiza General Hospital. This administrative problem if allowed unjustifiably to prevail would occasion irreparable harm to innocent parties in this case the students.

In the case of *Mugumbate Kenneth and others* v *The University of Zimbabwe* HH 183-14 Mafusire J made pertinent observations when he outlined circumstances under which an administrative body's decision can be interfered with for being manifestly wrong and in clear breach of contract. In the *Mugumbate Kenneth* case *supra* the court set aside the Administrative Body's decision and substituted it with its own decision on the basis that referring the matter back to the Administrative Body was viewed a waste of time that would further delay and prejudice the applicants. The court also held that the extent of bias or incompetence by the Administrative body was such that it would be unfair to force the applicants to submit to the same jurisdiction. Also the court concluded it was in as good a position as the administrative body to make the decision. In this case the court set aside the respondent, UZ's decision to unilaterally change the Post Graduate Diploma to a Diploma.

Although the facts of Mugumbate Kenneth are not exactly the same as facts of the present case the principles enunciated are equally applicable given the unilaterally decision by

the administrative body to bar students from revision classes and writing exams. In the present case I am persuaded by the applicant's argument that they had a legitimate expectation to register and write final exams for the subjects which they had passed. The cases of *Administration Transvaal and Ors* v *Traub and Ors* 1989 (4) SA 731, *Metsola* v *Chairman Public Service commission and Anor* 1989 (3) ZLR 147 and *Taylor* v *Minister of Education and Anor* 1996 (2) ZLR 772 are instructive. The cases illustrate that were the parties have a legitimate exception such cannot be unfairly and unreasonably interfered with more so in clear violation of the principles of natural justice. The decision midstream, to disregard the 6 weeks research was sudden without consultation with adverse repucations. Given the legitimate expectation and violation of the *audi alteram partenum* principle the applicants are likely to suffer irreparable harm which requires urgent redress. The respondents on the other hand will not suffer any prejudice by allowing the applicants to register, revise and undertake exams for the courses passed that is the non-controversial courses.

The balance of convenience favours granting of the provisional order.

Accordingly it is ordered that:

INTERIM RELIEF GRANTED

1. Pending the final determination of this matter the first, second and third respondents be and are hereby ordered and directed to allow the and permit applicants to register and sit for their final examinations for Clinical Training Office Course on 2, 3 and 4 December 2015.
2. The decision of the first and third respondents barring the applicants from writing above examinations be and is hereby set aside.
3. The applicants be allowed to attend revision block set to commence on 2 November 2015 to 13 November 2015.

TERMS OF THE FINAL ORDER

1. The 1st, 2nd and 3rd respondents be and are hereby ordered and directed to mark examinations written on the 2nd, 3rd and 4th of December for Clinical Training Officers in terms of the regulations and supply.
2. The 1st and 2nd respondent shall pay the costs of this application on an attorney and client scale, jointly and severally one paying the other to be absolved.

Takundwa & Company, applicants' legal practitioners
Chihambakwe & Mutizwa, respondents' legal practitioners