BRIGHT JERRY EFE
(In his capacity as natural guardian to Jerry Efe
And in his personal capacity)
versus
THE PRINCIPAL DIRECTOR OF IMMIGRATION
and
THE MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 19, 21 & 25 April 2016 and 20 July 2016

Urgent Chamber Application- Immigration Act [*Chapter 4:02*]

MUSHORE J: The applicant, a Nigerian national, is the father and natural guardian of Jerry Efe. The minor child's mother, who was a Zimbabwean national, is deceased. The minor child is aged 16 years. Up until the applicant's wife passed away, the applicant enjoyed rights to residence in Zimbabwe by virtue of his civil union with the minor child's mother *per* s 15 (1) of the Immigration Act *[Chapter 4:02]*. According to the applicant, after his wife passed away, he was granted residence permits on compassionate grounds by the Department of Immigration. So from 2002 until January 2015 the applicant in some way or another remained in Zimbabwe on a legal basis. On 15 February 2016, the applicant was approached by officials from the Department of Immigration who were enquiring about his residential status and when the officials perused the applicant's passport, they discovered that the applicant did not have the requisite permit allowing him to reside in Zimbabwe beyond the 26th January 2015. In fact the applicant had failed to regularise his stay in Zimbabwe beyond that date. He was arrested and on 29 March 2016 he was prosecuted and pleaded guilty to a contravention of s 29 (1) as read with s 29 (a) of the Immigration Act *[Chapter 4:02]*. He was sentenced to a deportation order and accordingly he was remanded in custody pending his deportation. He filed the current urgent application for a stay of execution on 14 April 2016 seeking the following relief:

"**INTERIM RELIEF SOUGHT**

That pending the return day, the Applicant is granted the following relief:

1) The respondents named herein b and are ordered to immediately release JERRY BRIGHT EFE from incarceration.

SERVICE OF PROVISIONAL ORDER

That leave be and is hereby given to the applicant's legal practitioners or the Sheriff or his Deputy to attend to the service of this order forthwith upon the respondents in accordance with the Rules of the High Court."

According to the applicant his *locus standi* to bring the application is premised on s 81 (3) of the Constitution of Zimbabwe *[Amendment (No. 20) Act, 2013]* which reads:

"**81 Rights of children**

(1) Every child, that is to say a boy or a girl under the age of 18 years, has the right-

…….

…….

…….

(d) to family or parental care, or to appropriate care when removed from the family environment

…….

……

(2) A child's best interests are paramount in every matter concerning the child,

(3) Children are entitled to adequate protection by the courts, in particular by the High Court as their Upper Guardian."

The provisional relief which the applicant seeks therefore is that he be released from custody pending the Department of Immigration resolving his application for a permanent residence. The application itself as presented to me was for a stay in execution. The relief prayed for is unrelated to a prayer for a stay in execution. Thus the first impression I had when perusing the papers as they stand was that they are not in order.

This is the first of many problematic issues in this application. In fact this case has been so poorly prosecuted I feel the need to write a judgment dealing with the catalogue of errors with which I have been forced to deal with. The applicant's counsel was so intent upon the matter proceeding, even overlooking the poor state of the papers, which forced me to widen my perspective in the broadest manner possible; particularly because I was dealing

with the rights of a minor. This is a summary of unusual and excessively unprocedural events which took place after the case was filed with this court.

The application for a stay in execution was filed in this court on 14 April 2016 and landed with me on Friday the 15th April 2016. I convened a hearing on Tuesday 19th April 2016 and the parties appeared before me. The respondent's counsel was not prepared and had not as yet taken instructions and accordingly I stood the matter down to the 21st April 2016 in order to grant the respondents time within which to take instructions. The parties reconvened in my Chambers on 21 April 2016 and in the circumstances that the application was vigorously opposed, argument ensued. When the parties' counsel were arguing, I pointed out that the application was ill-fated because there was no basis to grant a stay because the criminal conviction of the Magistrates Court was extant and therefore the conviction stood in the way of applicant's right to secure a release from custody. It was then that the applicant's counsel asked that the matter be withdrawn from the roll. Thus the matter was withdrawn from the roll by consent and one would have thought that that was the end of that.

I was both surprised and frankly disconcerted to see that the applicant had re-presented the matter in a manner I can only describe as bringing a case in "through the back-door", by writing a memorandum the following day, that being the 22nd April 2016, to the Judge President requesting that the matter be placed before either the Judge President himself or the Duty Judge. The Judge President caused the matter to be dealt with by me by a memorandum dated the Thursday the 22nd April 2016 and accordingly I re-enrolled it for hearing once again on Monday the 25th April 2016 despite the fact that the parties had previously withdrawn the matter by consent from the urgent roll. Thus applicant was taking "a second bite of the cherry" *[colloq]*. The applicant's counsel boldly advised that there was now a 'constitutional application in the same court' which I understood to have been filed well before the application for a stay of execution. I only came to realise later that the 'constitutional application' had been filed after the application for a stay of execution. The case number references bears this out. The stay of execution is filed under HC 3960/16 and the application for a declaratur is filed under HC 4172/16. I imagine that the constitutional application [HC 4172/16] was meant to make up for the deficiency to the applicant's case, which I had pointed out to the parties during the hearing of the 21st April 2016, and that the applicant's counsel had used my remarks to file a constitutional application and then approach the Judge President afresh.

In other words it seems that the applicant had created a "basis" for seeking the grant of a stay by filing an application for a *declaratur* on 21 April 2016, well after (in actual fact a week after) he had first filed the application for an urgent stay in execution. I can only describe the type of temerity displayed by applicant's counsel as blatant abuse of court processes and the court itself. This conduct deserves censure and will not be tolerated. However, I decided to give the parties the opportunity to present written submissions so that I could determine whether or not there may well be good reason for applicant's counsel's pugnaciousness, and I have found none.

The facts in this matter are that the applicant was still married to his wife when she passed away. Up to the time of her death, the applicant enjoyed a right to reside in Zimbabwe by virtue of his marriage to a Zimbabwean citizen. Immediately after his wife passed away on 22 October 2016 he was given compassionate residency so as to provide financial support for himself and his minor child and to that end the applicant enjoyed the right to reside in Zimbabwe up until the 26th January 2015. According to the applicant he has applied for a permanent residency, whilst it is the respondents' version that no such application is pending. Be that as it may the fact remains that *de facto* the applicant has no legal right to remain in Zimbabwe. The effect of their being a pending application for residency does not mean that those rights have been automatically conferred to the applicant. I am not sure what to make of the applicant's conduct after the 26th January 2015, save to state that since the time that his compassionate temporary residency last expired, the applicant did nothing to regularise his stay in Zimbabwe, save to entertain a hope that someday he would become a permanent resident. I remain convinced that he knew very well that it was up to him to ensure that his remaining in Zimbabwe was lawful and that is why he pleaded guilty to having contravened s 29 (1) as read with section 29 (2) of the Immigration Act *[Chapter 4:02]*. The conviction is extant and at the time that the applicant filed the current application, he had not appealed against it. I do not understand how it is that the applicant expect this court to just ignore a criminal conviction in the Magistrates Court for failing to or rather "overlooking" following the law and thereafter reward him for his disregard of the law by ordering that he be released from a prison. That obviously cannot happen.

Turning to the application itself, the application for a stay of execution was not urgent. The applicant was first approached by the department of Immigration on 15 February 2016. He filed this application on 14 April 2016 which was after the elapse of two months and would have been well aware the implications of not having the required temporary permit

given that up until the 26th January 2015 he had ensured that he had some type of status whilst he awaited the purported application he had made some ten years ago for permanent residency. In between the 26th January 2015 and the date when he was approached by persons from the Department of Immigration on 15 February 2015 he did not feel the need to ensure that his stay in Zimbabwe was lawful and it is in stating that fact that one cannot escape the inexorable viewpoint that he has been the author of the predicament he finds himself in today. The authorities are very clear on the need to take decisive and urgent action which would translate to a cautionary intention to avert disaster in protecting one's rights, real or perceived to be real. In *Kuvarega* v *Registrar-General General and Anor* 1998 (1) ZLR 188 (H) Chatikobo J had this to say:

> "What constitutes urgency is the need to the imminent rival of the day of reckoning; a matter is urgent if at the time to at the need arises; the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules."

Although the applicant was not represented at the time his guilty plea was entered into the record, by all accounts he would have been well aware of the need to act when the immigration officials attended on him on 15 February 2016. His failure to act (after the immigration officials established from his passport that he had no permit), is such a 'careless abstention from action' and it is hardly surprising therefore that he pleaded guilty to the charge when it was put to him in the criminal prosecution.

I have not been favoured with any reasonable explanation for the delay. The applicant knew he had traversed the law and accordingly and properly pleaded guilty. I can only infer from his conduct in filing the current application that he regrets pleading guilty at the Magistrates' Court having realised that the law will take its inevitable course and that he will be deported. He has no rights to residence real or imagined. The explanation given by applicant's legal practitioner, which apparently explains why applicant chose to file this application eight days after his conviction and sentence went like this:

> "URGENCY
>
> 1. My mind turns to the question of urgency. On a perusal of the record, it is clear that the deportation order was granted on the 29th of March 2016. The application is brought 12 days after the fact. Ordinarily the question of a delay would arise. But in this case the delay can be explained. Applicant's father was a self-actor in the Magistrates Court when he was convicted and sentenced. He was immediately placed at Harare Remand Prison.
>
> 2. He pleaded guilty in the Magistrates Court and this shows that he did not have full knowledge of his rights at law. Having been convicted and incarcerated, no one was

> aware of his whereabouts until members of the Nigerian community who include friends made several enquiries about his whereabouts. That is only when they were advised that he had been incarcerated. This was some six days later etc."

The above narration does not take into account the applicant's failure to act when he apprehended that there would be trouble aeons before his conviction. It fails to take into account the fact that his incarceration was rendered swiftly due to a guilty plea. In the past, applicant had always ensured that he had some permit or another. I am still in the dark as to whether applicant has a reasonable explanation for his failure to regularise his stay since the 26th January 2015 and also why he took no action after the 15th February 2016 although he must have reasonably expected not to get off scot –free for saying in Zimbabwe without a permit. There is no reason for this matter to be deemed urgent.

Irreparable harm.

I see no harm that would be occasioned by the applicant taking this matter up with the local authorities whilst he is out of Zimbabwe. Clearly the department of Immigration has the right to deport applicant *ex facto*. That fact is inescapable. The fact of his engaging in a legal battle from within or outside Zimbabwe will not shorten the time within which it will take to determine this matter.

Prospects of success.

If the applicant expects this court to ignore his criminal conviction and at the drop of a hat, and order that he be released, he is gravely mistaken and outlandishly optimistic. Whether he intended to plead guilty or not, the fact remains that his stay in Zimbabwe has been without a permit since 26th January 2016. If the applicant is expecting this court to be moved by his facile attempts to cling to his child's coattails to invoke some type of sympathy with this court, then he is astonishingly naïve.

An attempt has been made to somehow invoke this court's powers of review and to call to question whether or not the applicant is being been properly treated by the Department of Immigration by being arrested, incarcerated and deported whilst his application for residency is pending. However even if that application is pending at the Department of Immigration, nothing has stood in the way of applicant ensuring that he had a temporary visa. By all accounts, the applicant just neglected to apply for a temporary visa. I agree with the respondent's counsel when he carried this point across fluently in his heads of argument stating as follows:

"2……..

a) Permanent Residency is predicated firstly on statutory criteria, and in the hindsight, in pursuance of the general public interest is concurrently predicated on satisfying administrative criteria as opposed to merely drawing the same on the premise of an incapacitated dependant's citizenship"

Returning to the minor child's constitutional rights, s 81 (d) provides a right to parental care and where that cannot be accomplished to appropriate care when removed from the family environment. I agree with respondents that all of the constitutional provisions encapsulating the minor child's rights *insofar* as the applicant apprehends they will be infringed will not be affected in the circumstances that the applicant is deported. They remain sacrosanct. The minor child is in appropriate care at present; and in any event, the alterative family care has been necessitated by the applicant's past delinquency and his current dilemma. Further, I am persuaded by the respondent's submission that the applicant's parental care can indeed take place from outside Zimbabwe and is not confined to within Zimbabwean borders. Accordingly the applicant's case is without merit.

I feel the need to deal with the heads filed by the parties so as to clarify issues and address all aspects as they have been placed before me. As I mentioned earlier, the application which was placed before me was one for a simple stay of execution, with an unrelated prayer for the release of the application from custody. The heads which have been filed by applicant's counsel are for completely different relief. The argument occurring in the heads bears no relation to the application itself, but it is in the exercise of the fullest extent of judicial patience that I will now proceed to point out the procedural irregularities as they appear in the Heads filed.

The issue of an interdict rears its head in the heads of argument filed by the applicant. The application itself was for a stay in execution and then the prayer for relief in the application was for the applicant to be released. I simply find it befuddling that the heads are unrelated to the application itself. The second part of the argument in applicant's heads is for a declaration of rights. I am equally confounded by what seems to be an application for a *declaratur* being introduced through the Heads of Argument. The Heads filed by the applicant therefore are of little use to me in this application.

In summary and *ex simpliciter,* I re-iterate that this court is not able to interfere with the minor child's rights to residency, citizenship and parental or appropriate care. A failure on

my part to entertain this matter and or to deny the relief sought will not compromise the existence of those rights enjoyed by the minor child.

The respondents have asked for costs to be awarded to them on a higher scale. Whilst they may, as a matter of fact, be entitled to a higher award of costs, there is little point in venturing into this area with the applicant being in custody awaiting deportation, and taking into account that his counsel has appeared for him *pro bono*. In any event, I have gained the impression that applicant appears to be a man whose tendency is to capitalise on human empathy for financial sustenance, and would most likely be delinquent in meeting any costs.

Thus there being no urgency, and because the relief sought by the applicant is so far-fetched and without basis, the application is hereby dismissed with costs.

Chadyiwa & Associates, applicant's legal practitioners