

EDZAI KASINAUYO  
versus  
ZIMBABWE FOOTBALL ASSOCIATION

HIGH COURT OF ZIMBABWE  
MUREMBA J  
HARARE, 25 & 27 April 2016; 6 & 10 May 2016

### **Urgent Chamber Application**

Ms *F. Mahere*, for the applicant  
*I. Ndudzo*, for the respondent

MUREMBA J: After hearing this matter I gave an *ex tempore* judgment to the effect that the matter was not urgent. I have now been asked to give the full reasons thereof and these are they.

This urgent chamber application was filed on 5 April 2016. It was placed before Ndewere J who, on 13 April 2016, endorsed that the application was not urgent. On 19 April 2016, the applicant's lawyers wrote to the registrar of this court seeking Ndewere J's indulgence so that she could allow them to address her on why they perceived the matter to be urgent. Ndewere J being indisposed, the matter was allocated to me on 21 April 2016. Consequently, I set down the matter for hearing on 25 April 2016. Both the applicant and the respondent were served with the notices of set down and their lawyers duly attended the hearing.

Before the applicant's counsel could address me on the issue of urgency, Mr. *Ndudzo*, for the respondent raised a point in *limine* objecting to me hearing the matter. It was his argument that the only judge who could hear the matter on the issue of urgency was Ndewere J since she is the one who had initially perused the application and made a determination that the matter was not urgent. He submitted that in view of the fact that Ndewere J was indisposed, the applicant's only recourse was to simply wait for Ndewere J's return, whenever that would be.

Ms *Mahere* opposed the point in *limine* arguing that applicant was seeking audience because the matter could not wait. She submitted that the suggestion by Mr. *Ndudzo* that the applicant should wait for Ndewere J's return was not realistic since it was not even known when she was going to return. She submitted that there was a great risk that the hearing on the issue of urgency would have been rendered *brutum fulmen* by the time the judge returned. Ms *Mahere* submitted that making the applicant wait for the return of Ndewere J was tantamount to punishing him for no fault of his. She submitted that since Ndewere J was indisposed another judge should hear the matter in order to safeguard the applicant's right to a fair and speedy hearing, as well as his right of access to the courts as enshrined in s 69 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013. She further argued that, that way the applicant's right to equal protection and benefit of the law which is enshrined in s 59 of the Constitution would be protected too.

What was clear to me from the arguments of both counsels was that they were in agreement that after Ndewere J had endorsed that the matter was not urgent, the applicant was entitled to seek audience with her for oral argument on the issue of urgency. I was in agreement with them. I agreed with them on the basis of what was held by Mavangira J (as she then was) in *Church of the Province of Central Africa v Diocesan Trustees Diocese of Harare* 2010 (1) ZLR 346 (H). Mavangira J in that case, upon perusal of the papers in respect of an urgent chamber application placed before her formed an opinion that the matter was not urgent. The applicant sought audience with the judge on that issue. The respondent was opposed to this arguing that the judge was now *functus officio* since she had already made a determination that the matter was not urgent. Mavangira J held that the endorsement that she had earlier on made to the effect that the matter was not urgent reflected the *prima facie* view that she formed upon perusal of the papers without hearing oral argument from the parties. She held that since she had formed this *prima facie* view without hearing oral argument by the parties she was not *functus officio*.

However, the hitch in the present case was that Ndewere J was indisposed and it was not known when she was going to be back at work. The question now was should or could another judge deal with the matter in place of Ndewere J?

After considering the counsels' submissions I arrived at the decision that I could hear this matter in place of Ndewere J. In arriving at this decision I considered that I, being a judge of equal jurisdiction, could deal with the matter. My reasons were that, firstly, Ndewere J upon perusing the applicant's papers had only formed a *prima facie* view or opinion that the

matter was not urgent. She had not heard argument by the parties. A *prima facie* view is different from a determination which is made or formed after a judge has heard full argument from both parties. So whatever were Ndewere J's reasons for deciding that the matter was not urgent could not bar me or any other judge from hearing the parties' full argument on the issue. In any case it was not as if the applicant was after seeking to hear Ndewere J's reasons for saying that the matter was not urgent. Instead, the applicant was after addressing her and convincing her to change her mind on the issue of urgency. Secondly, I considered that hearing full argument on the issue was not going to prejudice any of the parties. If anything, it was going to achieve fairness as both parties were going to be heard and given an opportunity to argue the issue. Thirdly, hearing full argument was going to safeguard the applicant's constitutional rights to (i) equal protection and benefit of the law<sup>1</sup>, (ii) a fair and speedy hearing within a reasonable time<sup>2</sup> and (iii) access to the court for the resolution of his dispute<sup>3</sup>.

The case of *Document Support Centre (Pvt) Ltd v Mapuvire* 2006 (2) ZLR 232 (H) also strengthened my conclusion. In that case an urgent chamber application was placed before a judge in chambers. Upon considering the matter, the judge formed the opinion that the matter was not urgent and made an endorsement to that effect on the application. The applicant then sought audience with the judge to argue on the urgency of the matter. However, by the time that request was received, certain developments had taken place which made it impossible for the judge to deal with the matter. The matter ended up being placed before a different judge who heard full argument by the parties on the issue of urgency and made a determination.

It was in view of the foregoing that I, on 27 April 2016, dismissed the respondent's point in *limine* and ruled that I was perfectly entitled to hear the matter. The two counsels then went on to address me on the issue of urgency.

### **The facts of the application**

Before I delve into the arguments which were made by the two counsels on the issue of urgency I feel compelled to give a brief summary of the facts forming the background to this application. The summary is as below.

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<sup>1</sup> S 56 (1) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013.

<sup>2</sup> S 69 (2) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013.

<sup>3</sup> S 69 (3) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013.

The applicant is a former professional football player who has played for the national team and for football clubs abroad. Following his retirement from playing football, the applicant was elected to be a ZIFA Executive Committee member in January 2016 in terms of the ZIFA Constitution. On 8 March 2016 he was provisionally suspended as an Executive Committee member in terms of Article 34 (n) of the ZIFA Constitution by the ZIFA Executive Committee on allegations of having been involved in match fixing activities. The applicant being of the view that the suspension had not been done procedurally, on 24 March 2016, approached this court on an urgent basis seeking *inter alia*, the setting aside of the provisional suspension. On 29 March 2016, the applicant served the respondent with that urgent chamber application. On that very day of 29 March 2016, the respondent's executive committee proceeded to provisionally expel him as an Executive Committee member. The applicant was served with the provisional expulsion letter on 30 March 2016.

In brief the letter was notifying the applicant of his provisional expulsion in terms of Article 34 (n) of the ZIFA Constitution and that as such he was being relieved of his duties as an Executive Committee member forthwith. One of the reasons given for his provisional expulsion was that he had violated the ZIFA Constitution by taking a dispute challenging his provisional expulsion to the ordinary courts in violation of Article 60 (1). The letter also stated that the applicant's provisional expulsion was subject to confirmation by the ZIFA Congress in terms of Article 36 (1) of the ZIFA Constitution.

Again the applicant was disgruntled with the provisional expulsion. This is what prompted him to approach this court with the present application on 5 April 2016, seeking the suspension of the operation of the letter of 29 March 2016 provisionally expelling him as an Executive Committee member and an interdict barring the respondent from deliberating or dealing with his expulsion pending final determination of the matter on the return date. In the final order the applicant was seeking his provisional expulsion to be declared null and void for its violations of s 56, 68 and 69 of the Constitution of Zimbabwe and Article 36 (3) of the ZIFA Constitution.

### **Urgency**

Ms *Mahere's* argument was that the matter was urgent for the reason that it was timeously filed, the applicant having been served with the provisional expulsion letter on 30 March 2016, he managed to file the application on 5 April 2016.

Ms *Mahere* also argued that the decision to provisionally expel the applicant was spurious and malicious as it was not activated by his alleged participation in the match fixing

activities, but by his approaching this court challenging his suspension. Ms *Mahere* further argued that when the applicant was provisionally expelled due process had not been followed which is a violation of s 44 of the Constitution of Zimbabwe Amendment (No 20) Act 2013 which enjoins the State, every person including juristic persons and every institutions and agencies of Government to respect, protect, promote and fulfil rights and freedoms set out in the Constitution.

Ms *Mahere* argued that due process was not followed in 2 ways. Firstly, in terms of Article 33 (3) of the ZIFA Constitution, the ZIFA Executive Committee meeting of 29 March 2016 which provisionally expelled the applicant should have been preceded by the drawing up of an agenda and sending it out to the Executive Committee members at least four days before the meeting. She argued that the fact that the respondent was only served with the urgent chamber application challenging the applicant's suspension on 29 March 2016 and made a decision to provisionally expel him on that same day was clear evidence that the provisions of Article 33 (3) were not followed. She said that no agenda had been drawn up and sent to the Executive Committee members before the meeting and as such that meeting was not legitimate. Therefore its decision to expel the applicant was of no legal force and effect.

Secondly, Ms *Mahere* submitted that when the applicant was provisionally expelled in terms of Article 34 (n) he was not afforded an opportunity to be heard which was a clear violation of Article 36 (3) of the ZIFA Constitution (the respondent's own constitution) which guarantees a person being dismissed the right to speak in his own defence. Furthermore, it was said to be a violation of s 68 of the Constitution of Zimbabwe which protects the right to administrative conduct which is impartial and substantively and procedurally fair and s 69 which protects the right to a fair hearing. Ms *Mahere* submitted that in light of this gross disregard of the principles of natural justice, the decision to expel the applicant was arbitrary and should therefore be nullified. She submitted that the decision has had adverse effects on the applicant's name and business which is his source of livelihood. In his founding affidavit the applicant stated that he is a football manager to some of the country's prolific talents. He said that due to the match fixing allegations his business and association with individuals and entities related to football were taking a knock. He said that he is a brand, and his life is reliant on his business activities in the football world. He said that it was therefore important for him to clear his name and that he could only do so if

the provisional expulsion was set aside. He said that if he did not clear his name there was a real possibility of irreparable harm befalling him.

Ms *Mahere* also submitted that the reason to expel the applicant because he had approached this court challenging his suspension in line with Article 60 (1) of the ZIFA Constitution which prohibits ZIFA members, players and officials from taking any disputes to ordinary courts, but to ZIFA, CAF, or FIFA was in violation of s 69 (3) of the Constitution of Zimbabwe which states that every person has the right of access to the courts for the resolution of any dispute. She argued that the Constitution of Zimbabwe being the supreme law of this country is supreme over the ZIFA Constitution.

Ms *Mahere* argued that in view of the above violations of the applicant's constitutional rights when he was provisionally expelled there was need for the provisional expulsion to be set aside. Ms *Mahere* submitted that the matter had to be heard on an urgent basis because the respondent was expected to convene a congress anytime in order to deal with the confirmation of the provisional expulsion and the attitude of the respondent's president clearly showed that it was a foregone conclusion that the applicant was going to be expelled by Congress. In support of this averment the applicant attached a newspaper article from *Newsday* in which it was reported that the ZIFA President, Phillip Chiyangwa was said to have held a press conference saying that the decision to fire the applicant would be officially ratified by the ZIFA Congress, adding that there was no way back for the former Caps United player. Ms *Mahere* argued that on the basis of this newspaper article there was a well-grounded apprehension that the applicant's rights were also going to be violated by the Congress and that the Congress was likely to confirm his expulsion. The applicant's counsel argued that the impending congress was therefore not a satisfactory alternative remedy to the applicant. She also submitted that whilst the ZIFA Constitution makes provision for the setting up of judicial bodies these have not been set up. She further submitted that this therefore warranted this court's intervention at this stage and treat the matter as urgent. Ms *Mahere* argued that in terms of s 85 (1) (a) of the Constitution of Zimbabwe the applicant was entitled to approach this court alleging that his rights to a fair hearing were likely to be infringed by Congress so that the respondent could be stopped right in its tracks before it went too far. She submitted that once Congress confirms the provisional expulsion which was wrongly granted that will constitute irreparable harm to the applicant.

Mr *Ndudzo* for the respondent argued that this matter was not urgent because the applicant was properly provisionally expelled in terms of Article 34 (n) of the ZIFA

Constitution by the ZIFA Executive Committee which is empowered to exercise this function. Mr *Ndudzo* argued that according to Article 36 (3) of the ZIFA Constitution the right to speak in one's defence is only available to a person who is being dismissed by the Congress and not by the Executive Committee. In other words he was saying that that right does not apply to a person who is facing a provisional expulsion before the Executive Committee but final expulsion before the Congress. He was simply saying that the right to be heard is deferred to a hearing pertaining to final expulsion.

Mr *Ndudzo* also argued that the applicant had a satisfactory alternative remedy available to him which is to appear before the Congress when Congress sits. He submitted that it is at that forum that he will be entitled to speak in his defence in terms of Article 36 (3) of the ZIFA Constitution. He submitted that in terms of Article 36 (4) of the ZIFA Constitution the ultimate decision on whether or not the applicant should be expelled does not lie with the ZIFA President, but lies with or depends on the results of the secret ballot which is taken by the Congress members. He submitted that for the applicant to be dismissed there is need for a majority vote of two-thirds. Mr *Ndudzo* argued that if the applicant manages to convince slightly above one-third of the voters he will not be dismissed and that is the remedy that is available to him. Mr *Ndudzo* further submitted that the issue of the President of ZIFA having said that the applicant is going to be fired at congress is therefore neither here nor there because the decision to fire the applicant lies with the Congress and not with the ZIFA President. He submitted that it is therefore up to the applicant to convince the Congress not to fire him.

### **The law and its application to the facts**

In *Document Support Centre (Pvt) Ltd v Mapuvire (supra)* Makarau JP @ 243 said,

“ .....the 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 in waiting for the wheels of justice to grind at the ordinary pace, the aggrieved party would have irretrievably lost the right or legal interest that it seeks to protect and any approaches to the court thereafter on that cause of action will be academic and of no direct benefit to the applicant”

She further said that in deciding whether or not the matter is urgent the court has to be satisfied that the relief sought is such that it cannot wait without irreparably prejudicing the legal interest concerned such that it will not be necessary for the court to act subsequently as the position would have become irreversible. She also went on to state that some causes of action by their very nature demand that they be heard on an urgent basis e.g. interdicts,

spoliation, stay of execution, whereas some do not warrant to be heard on an urgent basis. Examples are decrees of divorce and cases for claims for damages.

In *Boniface Denenga & Anor v Ecobank Zimbabwe (Pvt) Ltd & 2 Ors* HH 177/14 @ p 4 Mawadze J summed up the requirements of urgency as follows,

- “The general thread which runs through all these cases is that a matter is urgent if,
- (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 nugatory the relief sought
  - (b) There is no other alternative remedy.
  - (c) The applicant treated the matter as urgent by acting timeously and if there is a delay to give good or a sufficient reason for such a delay.
  - (d) The relief sought should be of an interim nature and proper at law.”

It is my understanding that for a matter to be held to be urgent the requirements which were enumerated by Mawadze J should all be satisfied. In *casu* the main reason why the applicant was saying that the matter was urgent was the fear that the respondent was going to convene Congress which he believed was going to confirm his provisional expulsion or put differently, to fire him. His fears were based on the way the Executive Committee had conducted itself in expelling him and the utterances made by the ZIFA President that his provisional expulsion was going to be confirmed by Congress. Applying the law as enumerated in the above cited cases to the facts of the matter before me I was not satisfied that the matter was urgent. Even if the applicant was alleging that there was a violation of his right to be heard and some procedural flaws when he was provisionally expelled, he still had domestic remedies at his disposal in terms of the ZIFA Constitution to challenge that provisional expulsion and have it set aside. In terms of Article 36 of the ZIFA Constitution he was still to appear before the Congress for confirmation or discharge of his provisional expulsion. The Congress is a different body from the Executive Committee and as such the applicant could not make presumptions and anticipate that his right to be heard which was violated by the Executive Committee when it provisionally expelled him was going to be violated again by Congress. The Executive Committee consists of only 8 members<sup>4</sup> whilst the Congress is composed of 82 delegates<sup>5</sup>. In any case although the Executive Committee takes part in the Congress it does not have voting rights<sup>6</sup>. This therefore means that although the ZIFA President was said to have held press conferences saying that the applicant was going to be fired by Congress, he, as an Executive Committee member together with his fellow

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<sup>4</sup> Article 32 (1) of the ZIFA Constitution.

<sup>5</sup> Article 21 (1) of the ZIFA Constitution.

<sup>6</sup> Article 21 (5) of the ZIFA Constitution.

Executive Committee members do not even have voting rights. In addition to that, for the expulsion of the applicant to be upheld there has to be a majority of two-thirds valid votes cast by secret ballot<sup>7</sup>. With all this I was convinced that there are enough measures in place to safeguard the applicant's rights at Congress. I believed that the Congress offered a satisfactory alternative remedy. The Congress is the proper platform for the applicant to present his case including highlighting the procedural irregularities that were done by the Executive Committee when it provisionally expelled him. In terms of Article 36 (3) of the ZIFA Constitution the applicant has the right to speak in his defence. The applicant said that the ZIFA Congress was going to sit anytime in order to deal with the issue of his expulsion. So his concerns were soon going to be addressed. He was therefore going to be presented with an opportunity to present his case and obtain the same relief he was seeking before me. If he presented his case well before the Congress he was going to have the provisional expulsion set aside. It was therefore illogical to me that the applicant wanted me to entertain a matter which would stop Congress from deliberating on the issue of his expulsion yet the Congress is the right forum for him to present his case and have the decision of the Executive Committee to provisionally expel him set aside. The applicant thus failed to show me the irreparable harm that he would suffer if the matter was not heard on an urgent basis and if Congress was to sit in order to deal with or deliberate on his final expulsion.

The other reason why I decided that the matter was not urgent was the nature of the relief that the applicant was seeking. He wanted a provisional order suspending the operation of the respondent's letter provisionally expelling him pending the return date on the basis that proper procedures were not followed when the provisional expulsion was made. It was my considered view that the applicant was asking me to review his provisional expulsion which was made by the ZIFA Executive Committee. By its very nature a review cannot be heard on an urgent basis. It can only be brought as a court application.

In view of the foregoing, I made a determination on 6 May 2016, that the matter was not urgent even though the application had been filed timeously, without any delay. I thus made the following order:-

- 1) The matter is struck off the urgent roll.
- 2) The applicant be and is hereby ordered to pay costs.

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<sup>7</sup> Article 36 (4) of the ZIFA Constitution.

*Mhishi Legal Practice*, applicant's legal practitioners  
*Mutamangira & Associates*, respondent's legal practitioners