JUSTICE ZVANDASARA
versus
ZRP HIGH SCHOOL
and
J.M. CHINGONZOH

HIGH COURT OF ZIMBABAWE
TAGU J
HARARE, 24 January and 1 February 2017

URGENT CHAMBER APPLICATION

E Samundombe, for applicant
K Chimiti, for respondents

TAGU J: This application was filed through an urgent chamber book. The circumstances were that sometime in December 2016 the applicant's son who is a form four pupil with the first respondent was alleged to have committed some acts of misconduct which were *inter alia* theft of a text book and $21-00 from a fellow student. In the same month the applicant's son was taken to court whereupon arrival the second respondent was asked to produce the evidence that the applicant's son had stolen the book in question titled "The Uncertainty Of Hope". The second respondent failed to substantiate his allegations and summer saluted claiming that in fact it was a different book. The Area Public Prosecutor at Rotten Row Magistrate Court in his wisdom declined to prosecute the innocent boy and advised that the minor should return to school. The second respondent in his wisdom or lack of it, reacted by crafting an additional charge against the applicant's son. The applicant in an effort to maintain peace though the alleged theft was never proved paid the alleged $21-00. The second respondent would not have any of it but insisted that the minor be prosecuted. Due to the differences between the applicant and the second respondent the matter was again referred for Pre-Trial Diversion and the Pre Trial Diversion Officer in a letter dated 9 December 2016 addressed to the second respondent requested that the minor be readmitted back into first respondent school. The applicant then paid the full and necessary fees for the minor to attend school at the beginning of the first term in 2017 with the express knowledge of the second respondent. On 11 January 2017 the applicant unsuspectingly took his son to

school as normal only to be advised to wait for the second respondent before resuming classes. The second respondent then clandestinely issued the applicant with a letter titled suspension of TINOTENDA ZVANDASARA. The applicant believes that the second respondent's desire to disregard the Pre-Trial Diversion process which is a legal court process is actuated by malice. He felt that the reaction of the second respondent is apparent that he is determined to disadvantage the minor where he had paid full school fees and the child had been exonerated of any wrong doing contrary to the provisions of s 4 of the Education Act [*Chapter 25:04*] in particular s 2 which states –

> "(a) Subject to subsection (5), no child in Zimbabwe shall-
> (b) Be refused admission to any school or,
> (c) Be discriminated against by the imposition of onerous terms and conditions in regard to his admission to any school….on the grounds of his race, tribe, place of origin, national or ethnic origin, political opinions, colour, creed or gender…"

To support his feelings that the second respondent is malicious and hard hearted towards the minor child he attached annexure "F" which is another letter written by the second respondent purporting to extent the minor child's suspension to 24 January 2017 under unclear and very irregular circumstances. This jolted the applicant to approach this court on an urgent basis because the minor who paid his fees and is supposed to write his final examinations at the end of this year is missing out on lessons while other students are learning. His views were that the allegations against his child are so minor such that there is no justification whatsoever for the respondents to take such drastic action other than clear malice.

The applicant is now seeking the following relief-

> **TERMS OF FINAL ORDER SOUGHT**
> Pending the finalization of this matter the following relief is granted-
> 1. That the Respondent's purported suspension of the Applicant's son be declared null and void.
> 2. The Respondents to pay costs in the event that they opposed this application
>
> **INTERIM RELIEF GRANTED**
> (a) 1. The respondents be and are hereby ordered to forthwith admit TINOTENDA ZVANDASARA back into class immediately upon being served with this application.
> (2) That pending the return date, the respondents be and are hereby ordered not to institute any disciplinary proceedings against TINOTENDA ZVANDASARA arising from the allegations listed in ANNEXTURE "B' above.
> (3) That the ZRP be and are hereby ordered to arrest the Respondent's and any other person acting through them and bring them before the court for contempt of court in the event that they do not comply with the terms of the interim order."

At the hearing of the matter Mr *Chimiti* raised two points *in limine*. The first point was that the application before this court was fatally defective for non- compliance with r 241

(1) of the High Court Rules 1971. His argument was basically that the applicant used Form 29 B instead of Form 29. He referred the court to the cases of *David Mapurisa Jack and two Others* v *Lloyd Takudzwa Mushipe and Others* HH318-15 and *Marick Trading (Private) Limited* v *Old Mutual Life Assurance Company of Zimbabwe (Private) Limited and Sheriff for Zimbabwe* HH 667/15. The second point *in limine* was that the matter was not urgent because it was pre- maturely filed when the applicant was supposed to receive a determination detailing the fate of the minor today.

The points *in limine* were opposed by the applicant who submitted that the application was properly before the court and was extremely urgent due to the conduct of the second respondent.

AD FORMS

I find the first point *in limine* to be of no merit. R 241 clearly states that:

> "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 casu the applicant elected to use Form 29 B. I found no error at all in the use of Form 29 B. What the counsel for the respondent failed to appreciate was the fact that the authorities he relied on dealt with a situation where none of the Forms were used. Totally different Forms from the ones prescribed by the rules had been used hence the applications were struck of the roll. In any case in terms of r 229 C the use of one Form instead of another does not in itself constitute sufficient ground for dismissing the application, it being necessary for a court or a judge to conclude that some interested party has thereby suffered prejudice which cannot be remedied by directions for service on the injured party, with or without an order of costs. See *Open University* v *Mazombwe* 2009 (1) ZLR 101.

The first point *in limine* is dismissed.

AD URGENCY

What the respondents are saying is that the applicant should have waited for the outcome of the administrative process that was to be delivered on the day the matter was heard. What the respondents failed to appreciate was that after the applicant's son had undergone Pre Trial Diversion and a request had been made to readmit the child into the

school there was no point in issuing further suspensions after they accepted the child's fees. What prompted the applicant to institute the current proceedings was the fact that the child having been suspended from attending school lessons from 11 January 2017 to 17 January 2017, the child was again further suspended from 17 January 2017 to 24 January 2017. In my view this constituted cause of action resulting in this application being filed on the 20 January 2017. What constitutes urgency has been succinctly expressed by CHATIKOBO J in the famous case of *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188 at p 193 where he said-

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

In my view to wait until 24 January 2017 would tantamount to what is normally called "urgency which is self -created". Cause of action arose on 17 January when the period of suspension was extended. I therefore rule that there is urgency in this matter and the second point *in limine* is dismissed.

AD MERITS

Without repeating what I said by way of brief facts, what is clear is that certain misconduct charges were levelled against the applicant's son as far back as December 2016. No evidence was produced to substantiate those allegations. The minor was cleared of all wrong doing by the Pre Trial Diversion Officer. The child never accepted any wrong doing. Those that are alleged to have offended admitted their guilty. The book in question was found in the possession of another student who sought to implicate the applicant's son. In all fairness there is high probability that the child who was found in possession of the book is the one who stole it but sought to shift blame on the applicant's son. Even if it is true, which I doubt that he took the book in question, that book has been recovered from a totally different student. Further to show insensitivity on the part of the second respondent when the applicant in an endeavour to keep peace paid the $21-00 allegedly stolen from another student, the second applicant was keen to suspend with the view of dismissing the child from school. The only crime that this child committed was to exercise his constitutional rights to deny that which he did not do. The second respondent in my view must have felt offended by the behaviour of the child. He wanted to assert his powers and expected the innocent child to swallow hook, line and sinker what- ever the second respondent was alleging. Even if the child transgressed, the misconduct is of such a minor nature that did not warrant continued

suspension. What is clear is a high handedness exercise of power which is not expected from such a highly educated person who is fit to be a parent himself. I agree with counsel for the applicant that what is exhibited in this case are personal attitudes of the second respondent who only wanted his views to prevail even where there was no evidence. It will be regretted if the board that is to meet will stoop so low and come with a verdict to expel the child on such flimsy grounds. No amount of misbehaviour by students is condoned but the decision to be made has to be rational and not be based on some hidden agenda. I say so because the zeal with which counsel for the respondents wanted matter to wait decision of the 24 January 2017 speaks volumes about the intended outcome. It is much ado about nothing. I have a feeling that while this case is pending the respondents may be proceeding with the disciplinary hearings. If that is the case, which I hope it is not then the respondents would be in contempt of this court.

Having heard the submissions by both counsel and reading documents filed of record this is a proper case were the relief being sought should be granted.

In the result the application is allowed and the interim relief as per draft order is granted.

Samundombe & Partners, applicant's legal practitioners
Civil Division of the Attorney – General, respondents' legal practitioners