

FRANK MUTEZO
and
JOYCE JAHURE
and
GOERGE MAURU
and
COLLEN BENGO
and
MARGARET CHIGWADA
and
BEATRICE TAVAZIVA
and
RACHAEL CHAGEYI
and
BLANTINA NYAMBIRA
and
EDWARD MANHUNZI
and
VIMBAI MANGULENGE
and
BEAUTY CHITUNGO
and
BLESSING HLAHLA
and
SHARON HOLLAND
and
ENERGY SANGULANI
versus
ZIMBABWE SCHOOL EXAMINATIONS COUNCIL
and
THE MINISTER OF PRIMARY AND SECONDARY
EDUCATION

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 12 MARCH 2018 AND 22 MARCH 2018

Urgent Chamber Application

T Zishiri for the applicants
Z T Zvobgo for the 1st respondent
R Hove for the 2nd respondent

MOYO J: This is an urgent chamber application in terms of rule 223 A of the High Court Rules. The rule reads as follows:

“Where a legal practitioner has certified in writing that a matter is urgent, giving reasons for its urgency, the court or judge may direct that the matter should be set down for hearing at anytime and additionally, or alternatively, hear the matter at any time or place, and in such event rule 223 shall not apply or shall apply with such modifications as the court or judge may direct.”

My reading of rule 223A does not seem to entail that a court application should be filed and then an urgent application be filed to get an order setting the other matter down urgently. I hold the view that that particular application which is being sought to be set down should be the one that is certified as urgent in terms of rule 223 as opposed to rule 244.

However, this is just a comment on the proper procedure in relation to rule 223 A, it is not an issue between the parties. The facts of this matter are that on 12 February 2018, the fourteen applicants received a whatsapp message from the headmistress of Regina Mundi High School where their minor children were enrolled and had sat for their Ordinary level examinations during November last year. In the message amongst other things, they were advised that their children had been blacklisted as they had cheated in the Examination of November 2017 and that consequently their results had been cancelled. Aggrieved with that decision they then mounted an application for review on 23 February 2018 under case number 619/18 seeking to have first respondent’s decision of cancelling the results set aside. The gist of the application for review is that the decision to cancel the results was made without the affected parties having been heard and that this violated section 3 of the Administrative of Justice Act [Chapter 10:28]. The other reason for review being that the decision to cancel the results is contrary to the provisions of section 75 of the Constitution of Zimbabwe. Section 3 of the Administrative Justice Act (*supra*) deals with the right to fair administrative justice. Section 75 of the Constitution deals with the rights to education. The basis of this application is to seek that the other application (the application for review) be heard as a matter of urgency as it affects the minor children’s rights to proceed to Advanced Level and that should happen during this school term. The respondents have raised two points *in limine* in response, they say that the matter is not urgent and that secondly there are material disputes of fact that cannot be resolved on paper.

On the merits, applicants say their children never cheated during the November 2017 O-level examinations, the first respondent says following a report of cheating at the concerned school, investigations were conducted that unearthed cheating by the affected students and they have annexed to the opposing papers their findings in this regard, that is, as to why they arrived at that conclusion and consequently took the action they took.

The misjoinder of second respondent

Before I proceed to deliberate on the points *in limine* or the merits of this application let me first dispose of the contention by the second respondent that it was wrongfully joined to these proceedings. Second respondent, the Minister responsible for primary and secondary schools pleads misjoinder in this matter. Clearly, the first respondent is an entity established through the Zimbabwe School Examinations Act [Chapter 25:18] herein after referred to as the ZIMSEC Act) section 3 thereof which reads:

“There is hereby established a council to be known as the Zimbabwe School Examinations Council which shall be a body corporate and, in its corporate home, shall be capable of suing and being sued and, subject to this Act, of performing all acts that bodies corporate may by law perform.”

First respondent is a body corporate in its own right, it has its powers and parameters as set in an Act of Parliament and is therefore an entity divorced from the Minister, although it falls under the purview of the Ministry. There was thus no need to join the Minister in these proceedings in my view.

Urgency

First respondent contends that this matter is not urgent since applicants from 12 February 2018, only acted on 23 February 2018, to file the application for review and later on 27 February 2018 to file this application. From 12 February to 27 February it's a period of about fifteen days.

This is a considerable period of time although applicants say they were waiting for the ZIMSEC national challenge on the English paper 2. The other problem is that rule 223 A provides for a court application to be certified urgent not for a separate application to be filed on urgency in my view. The problem that immediately arises on the issue of urgency is that if the

applicants considered that the application for review should be heard as a matter of urgency, then they should have filed it in terms of rule 223A, that is, it is the one that should have had a certificate of urgency affixed to it. To file an ordinary application on 23 February 2018 and then file an urgent application four days down the line gives an impression that the urgency came as an afterthought but that the applicants did not consider the matter urgent at the time of filing. However, applicants submit that the application is urgent because of the Advanced level rush for vacancies. Indeed if the matter is resolved timeously the applicants' children might make it into Advanced level classes this term if the result of the application is in their favour. However, their conduct at the material time did not exhibit urgency. There is some blunder that the applicants committed in not filing an application and exhibiting urgency at the inception. The point *in limine* relating to the applicants' tardiness in so far as urgency is concerned is not without merit. The applicants did not act with urgency when the situation arose. It follows that by virtue of their own conduct, that application must join the queue with all other applications.

The point *in limine* relating to material disputes of fact

The first respondent contends that there are material disputes of fact in the matter in that whilst applicants say their daughters never cheated in the examination, first respondent has cogent information that it is advancing in support of their decision that the applicant's children cheated. This particular issue cannot be resolved on paper. I agree with respondent's counsel on this point and whilst this point may not affect the urgency or otherwise of the application, it affects its prospects of success in the sense that if there are material disputes of fact then certainly spearheading the set down of that application will not serve any purpose as it is doomed to fail on that technical point anyway.

On the merits, this court has to look at the prospects of success of the application for review. The relief sought on review is that the decision of the first respondent be set aside *fulstop*. This will happen once the court agrees with the applicants that they were not given a fair hearing by first respondent. Whilst I will not delve into whether or not the court is likely to hold that first respondent's decision violates the constitution, I would want to point out that even

if the court would agree for argument's sake, that would not entail a release of the results by the first respondent.

I say so for a court cannot simply order that a matter where issues remain unresolved should end there, with applicant's children getting their results on the basis of a technicality and yet first respondent's findings on cheating could be correct. Even if the matter is heard, and the first respondent is found to be in violation of the right to be heard for arguments sake, which finding is highly unlikely in my view, it, the court is likely to order that first respondent does the correct thing by remitting the matter back to first respondent rather than making an order that has an effect on the entitlement of or otherwise to the results by the applicants and yet the court would be unaware of the facts relating to the aspect of cheating. I hold the view that the matter can never end without an establishment as to whether the applicants' children did cheat or not. I also hold the view that whether the applicants were properly heard or not does not rest the matter. The first respondent has availed facts from an assessment and an investigation that show prima facie that the applicants' children could have cheated. Applicants' children are facing a scenario whereby a breach of examination rules is being alleged against them and first respondent is empowered in terms of the law to investigate, make findings and consequently, take appropriate action against those found to have flouted examination regulations. That's the prerogative of first respondent. This court has no right to interfere with that process which is due process in terms of the Zimsec Act (*supra*).

This court has no tools or equipment to assess the truthfulness or otherwise of the averment by applicants that they did not cheat, on the other hand, Zimsec is so empowered, both legally and technically. Administrative bodies should be left to manage situations before them without the court's entering the fray and taking charge of situations that it is not in a position to discern. Only findings on the merits or demerits of applicants' case will rest this matter and thus rushing to deal with a technicality will not resolve it. Applicants' application for review is premised on a technicality and yet the substance of the cheating or otherwise is the crux of the matter.

I say so being alive to the order granted in the matter of *Victor Mukomeka and another v Zimsec and another* HC 1275/18 wherein the nullification of results by first respondent was

upheld although the court then gave a different approach on the re-writing of the same paper, clearly because of its punitive nature on innocent students. I am also persuaded by the inclination in the judgment of ZHOU J in *Mike Velah and Others v Minister of Primary and Secondary Education and Another* HH 124/18 which shows that the courts would not want to interfere with the findings of the first respondent lightly due to the national importance of the integrity of examinations. I also hold the view that the powers of first respondent to manage examinations and maintain their international integrity and importance, is an integral part of our society as the future of a country lies in its educational system. Allegations or findings of cheating can therefore not be taken lightly nor can first respondent's powers in relation thereto be diluted or curtailed by technical findings that may result in those that do not deserve a certain grade, riding on their dishonesty and therefore attaining fraudulently a grade or standard that they do not deserve. That would lower the standards of education in our country and yet each and every country takes pride in its youngsters as they constitute the future generation and they are tomorrow's leaders. First respondent should be allowed in my view to take all the necessary steps to safeguard our national examinations in the manner it sees fit. Examinations are of international importance and their integrity should be jealously guarded by those responsible for their management.

I accordingly hold the view that the main application has no prospects of success on the merits and consequently this application must fail on all the reasons enunciated herein.

The application is accordingly dismissed with costs.

Garikayi and Company C/o Moyo and Nyoni applicants' legal practitioners
Dube Manikai and Hwacha, 1st respondent's legal practitioners