

JOROME OKEKE  
versus  
CHIEF IMMIGRATION OFFICER

HIGH COURT OF ZIMBABWE  
MTSHIYA J  
HARARE, 22-23 March 2012, 26 March 2012,  
29 March 2012 and 4 April 2012

Advocate *F Mahere*, for the applicant  
*R. Hove*, for the respondent

MTSHIYA J: This is an urgent application filed by the applicant on behalf of Ezenwafor Patience Onyeka, a minor child aged 16 years (the minor girl child) seeking the following relief:

**“TERMS OF FINAL ORDER SOUGHT**

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

- a) The decision of the immigration officer to deny the extension of Ezenwafor Patience Onyeka’s temporary permit is hereby stayed pending the hearing and determination of the application for review.
- b) This order shall remain in operation notwithstanding the noting of an appeal.
- c) Respondent must pay the costs of this application.

**INTERIM RELIEF**

Pending determination of this matter, the applicant is granted the following relief:

1. Respondent and all those acting through him are interdicted from causing the arrest and/or detention of Applicant and/or Ezenwafor Patience Onyeka and/or the deportation of Ezenwafor Patience Onyeka pending the hearing and determination of the application for review.”

On 26 March 2012 the above relief was amended, through leave of court, to read as follows:

**“TERMS OF FINAL ORDER SOUGHT**

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

- a. The decision of the immigration officer to deny the extension of Ezenwafor Patience Onyeka’s temporary permit is hereby stayed pending the hearing and determination of the application for review.
- b. This order shall remain in operation notwithstanding the noting of an appeal.
- c. Respondent must pay the costs of this application.

**INTERIM RELIEF**

Pending determination of this matter, applicant is granted the following relief:

1. Respondent and all those acting through him are interdicted from causing the arrest of applicant in connection with the facts arising from the application for review in HC2958/12 pending the hearing and determination of the application for review.”

The above relief was dictated by a supplementary affidavit sworn to by the applicant on 21 March 2012. The affidavit was not formally filed in court but was merely presented at the hearing without opposition. The supplementary affidavit reads as follows:

“I JEROME OKEKE hereby make oath and say that:

1. The facts hereunder are true and correct according to the best of my knowledge and belief. Where I rely on legal contentions, I do so on the advice of my legal practitioner, which advice I believe to be correct.
2. I make this affidavit in my capacity and further to the founding affidavit made in this application.
3. This further affidavit has been necessitated by further developments that have occurred since this application was filed.
4. In particular, Ezenwafor Patience Onyeka left Zimbabwe on 18 March 2012 and is currently in Nigeria.
5. Representative of respondent continue to attend upon my home at Borrowdale Brooke Estate in search of me. On 20 March 2012, I received a telephone call from my gardener informing me that four armed police had attended upon my residence at about 0230 hours in search of me. The officers were led by Detective Murimbo.
6. In response to this attempt to arrest me, I approached respondent through a letter drawn by my legal practitioners dated 20 March 2012, a copy of this letter is attached hereto and marked “C1”. This letter was consequent to a

telephone call that had been made by my legal practitioners to the offices of respondent wherein an undertaking was made to furnish the offices of respondent with all information that was required of me. I addressed a similar letter to the Officer-In-Charge (CID Law and Order) at Harare Central Police Station, a copy of which is attached and marked "C2".

Prior to this application, namely on 8 March 2012, the applicant had filed an urgent application (HC 2711/12) on behalf of the minor girl child for the following relief:

**“TERMS OF THE FINAL ORDER SOUGHT**

That you show cause why an order in the following terms should not be made;

1. First respondent, his officials and/or assigns be interdicted from arresting, detaining or deporting Ezenwafor Patience Onyeka with passport No. A03296082 from Zimbabwe till finalization of applicants' applications for the inclusion of Ezenwafor Patience Onyeka as his dependant and the other one for her exemption from being deported from Zimbabwe both filed with the Chief Immigration Officer and Co-Ministers of Home Affairs on the 6 day of March 2012 respectively.

**INTERIM RELIEF**

Pending the return day, it is hereby ordered that:

1. First respondent shall extend days of stay of Ezenwafor Patience Onyeka with Passport Number A03296082 pending finalization of first applicant's two applications filed with the Chief Immigration Officer and Co-Minister of Home Affairs respectively.”

The application was placed before me on 9 March 2012. I went through the application and made the following endorsement(s) on it:

“Matter does not meet the requirements of urgency:

- a) applicant has since 20/10/11 been aware of her situation/predicament
- b) applicant knew her stay would require extension from 25/2/12.
- c) applicant admits to remaining in the country illegally.
- d) applicant only started seriously addressing the matter on 5/3/12.”

On the same day on which I made the above endorsement(s), the applicant's then legal practitioners (Messrs Hamunakwadi, Nyandoro & Nyambuya) had written to my clerk in the following terms:

"We write this letter at the instance of our client of the above reference matter. We have since been advised by the Registrar that our client's matter has been allocated before His Lordship Justice MTSHIYA for his perusal and consideration. We have however been occasioned to write this letter by new circumstances which makes the case very, very urgent in that despite the fact that our client has the present matter seized within the domain of the court; first respondent's office is pressing upon our client to have the young girl deported forthwith.

This will clearly prejudice our client's rights and his application would be of academic and of empty standing. In the circumstances; we humbly implore this Honourable Court to regard our matter exceedingly urgent for we believe that our client has an arguable case and this matter cannot wait not to be heard today. We therefore ask your office to place this letter before His Lordship MTSHIYA for appropriate advice and direction.

We submit that the above is in order and we are guided accordingly."

As already stated above, I had refused to have the matter set down because of lack of urgency. However, on 14 March 2012, the applicant, again on behalf of the minor girl child and through different legal practitioners, (Messrs Mtombeni, Mukwasha Muzawazi & Associates) filed this urgent application. The application was again placed before me and I made the following endorsement(s) on it:

- "1. Matter is not urgent; and
2. Notwithstanding the review application filed on 14/03/12, there is nothing that persuades me to change what I said in HC2711/12 (ie an application by the same applicant on the same subject). In the meantime I want to believe the review application has also been placed before the law enforcement arms of the state."

The review application referred to above was attached to this application. The relief sought therein reads as follows:-

"It is ordered that:

1. The decision of the immigration officer, Mr Charamba, is hereby set aside.

2. Ezenwafor Patience Onyeka's temporary permit is hereby extended pending the determination of applicant's decision to first respondent to include her as one of his dependents on his residence permit in terms of s 16(1)(b) of the Immigration Regulations.
3. Respondent pay the costs of this application".

The matter did not end there.

On 16 March 2012 the applicant's new legal practitioners, Messrs Mtombeni, Mukwasha Muzawazi and Associates, addressed a letter to the Registrar, for the attention of my clerk, in the following terms:

"We respectfully request that you place this letter before His Lordship, Justice MTSHIYA.

We refer to the above urgent chamber application which was filed with the High Court on 15 March 2012.

We note that pursuant to perusing the papers in respect of this urgent chamber application, His Lordship is of the view that no urgency was disclosed and that His Lordship has endorsed the papers accordingly.

We seek leave to present oral argument before His Lordship on this point as we are of the view that His Lordship may be persuaded to revisit his view on the matter. As held in *Church of the Province of Central Africa v Diocesan Trustees, Diocese of Harare* 2010 (1) ZLR 346(H), the endorsement that the matter is not urgent reflects the *prima facie* view of the court on the papers without the benefit of oral argument from the parties. Until the matter has been fully argued orally and a determination made thereafter, His Lordship is not *functus officio* and can hear oral argument on the issue of urgency.

We are happy to appear before His Lordship forthwith to present oral argument on the issue of urgency."

I acceded to the request and directed that the matter be set down for 23 March 2012. On the set down date, Mr *Zuze*, from the instructing firm of legal practitioners, applied for a postponement because Advocate *Mahere*, who had been instructed, was engaged elsewhere. The application was not opposed and I allowed it. I then postponed the matter to 26 March 2012.

On 26 March 2012 I heard oral arguments from both Advocate *Mahere* for the applicant, and Ms *Hove*, for the defendant. I then postponed the matter, to 29 March 2012, pending the filing, on or before that date, of heads of argument by both parties.

The applicant duly filed his heads of argument on 27 March 2012, followed by supplementary heads of argument on 30 March 2012. I only received the respondent's heads of argument late in the morning on 30 March 2012. However, the said heads from the respondent appear to have been filed on 28 March 2012 and served on the applicant on 29 March 2012 through Advocates Chambers

Before the parties presented oral arguments on 26 March 2012, the following documents had also found their way into this case. These are:-

1. Respondent's opposing affidavit filed on 22 March 2012; and
2. Notice of opposition – filed on 23 March 2012 but relying on opposing affidavit already filed on 22 March 2012.

The issue before me right now is to determine whether or not this application (i.e HC 2959/12) is urgent. In making a determination on that issue, I must, as far as is possible, avoid delving into the merits of the matter.

It is clear from all the applications referred to above that in his founding affidavits, the applicant specifically states that he filed the applications on behalf of the minor girl child with a view to regularizing the minor girl child's illegal stay in Zimbabwe as from 25 February 2012.

Admittedly, in making the applications the applicant sought to drag in the issue of his own personal liberty as shown *in casu* from both his founding affidavit and the relief sought – particularly from the import of the amended provisional order. In para 12 of his founding affidavit the applicant states:

- “ 2. Applicant is likely to be arrested and charged for assisting the minor child to remain in Zimbabwe on the face of a decision that is grossly irregular and is the subject of an application for review.
3. Immigration officials are already searching for me in order to cause my arrest and detain the minor child. They have since attended upon my home and workplace in order to so detain me.
4. There is a real risk and possibility that my rights and those of the minor child as amplified in the application for review will be violated irremediably if the effect of the decision is not suspended on an urgent basis pending the hearing and determination of the application for review.”

Supporting her argument with a number of authorities, Advocate *Mahere* for the applicant, stated that the matter was urgent because the applicant's liberty was at stake mainly because of his failure to pay a bribe. In her opening statement in the applicant's Heads of argument filed on 27 March 2012, she states:

“These heads of argument are filed in support of an urgent chamber application which seeks to safeguard applicant from the rash and unreasonable interference with his liberty by respondent. It is submitted that the office of respondent cannot improperly, on the back of malice and corruption, deny the minor child who was being looked after by applicant an extension and then use this as a basis to arrest him for harboring the minor illegally.” (my own underlining)

The above statement creates the impression that this application was filed by the applicant on his own behalf solely to protect his own liberty. That, as already shown, is not the correct position. The application was filed on behalf of the minor girl child.

Ms *Hove* for the respondent submitted that the issue of the liberty of the applicant should be delinked from the main application which he made on behalf of the minor girl child. I agree.

As already stated this application and the other applications referred to above were dictated by the need to regularize the minor girl child's illegal stay in Zimbabwe. That is what created the purported urgency. The minor girl child, as confirmed by the applicant in his supplementary affidavit, has since removed herself from the jurisdiction of this court. It is also curious enough that the applicant only 'learnt' about the minor girl child's departure. This is so because on 20 March 2012 the applicant's then legal practitioners, Messrs Puwayi Chiutsi Legal Practitioners advised the respondent as follows:

“Most importantly, however, our client was not harbouring the minor, we attach hereto an affidavit as annexure 'A' obtained by our client indicating that the minor child had run away from our client's house several days before she left, this can be independently verified.”

In their submissions, both parties' counsel referred me to relevant authorities on the issue of urgency. Advocate *Mahere* correctly cited the case of *Kuvarega v Registrar General and Anor* 1998 (1) ZLR 188 (H) where, in part, CHATIKOBO J said:

“What constitutes urgency is not only the imminent arrival of the day of reckoning. A matter is also urgent, if at the time the need to act arises, the matter cannot wait.”

My endorsement on this application on 15 March 2012 indicating that the matter is not urgent was based on the guiding principles on the issue of urgency such as those spelt out in the *Kuvarega* case, *supra*. My position is even further strengthened now by the fact that the minor girl child, on whose behalf the application was made, left the Zimbabwe on 18 March 2012. That completely removes whatever urgency might have attached to the application made on her behalf.

I totally agree with Advocate *Mahere* that the applicant's liberty should not be interfered with without due process. However, in the circumstance of this case I find the attempt by the applicant to confuse the application he filed on behalf of the minor girl child with his own agenda. He claims to do so purely on the reasoning that the facts arising from the application for review are the cause of his intended arrest. He also brings in the alleged issue of corruption which, if at all it happened, he must have been aware of when he filed the first urgent application on 8 March 2012. He remained silent.

He states in his own affidavit in the review application that the evil called corruption became evident to him in February 2012. He only chose to reveal it in these papers on 13 March 2012 – notwithstanding the fact that he believed that failure to pay a bribe was the reason for his failure to help the minor girl child.

Surely and in line with the principles in *Kuvarega*, *supra*, that, in my view, was the time to act. The first urgent application filed on 8 March 2012 was silent on that yet the applicant believed that if he had acquiesced, the minor girl child's visa would have been extended. My view is that a crisis requiring urgent attention had arisen even as early as 20 October 2011.

The applicant, instead of dragging the issue of his own liberty into an application which he has categorically stated that he is filing on behalf of the minor girl child, is, in



my view, fully entitled, if he indeed believes that his liberty is being illegally threatened, to independently file an application on his own behalf to protect his own liberty. The applicant's attempt to link his own issue(s) to a matter whose purported urgency he knows has fully disappeared, is not acceptable. The main purpose for which he filed this application, as can be discerned from the original provisional order, has been overtaken by events.

This application, as implied in the applicant's heads of argument, is not predicated on seeking to safeguard the applicant "from the rash and unreasonable interference with his liberty by the respondent." It is basically an application which was made on behalf of the minor girl child – the purpose being to regularize her illegal stay in Zimbabwe as from 25 February 2012 when her Visa certificate expired. The review application clearly confirms that position.

In view of the foregoing, my finding is that this application is not urgent and cannot therefore be allowed to jump the queue.

The application is dismissed with costs.

*Mtombeni, Mukwasha, Muzawazi and Associates* , applicant's legal practitioners  
*The Civil Division of the Attorney General*, respondent's legal practitioners