

ROBYN HUTCHINGS
versus
SAINT JOHNS COLLEGE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 14 & 18 November 2013

Urgent chamber application

T. Mpofo for the applicant
E. Matinenga for the respondent

MAFUSIRE J: This was an urgent chamber application. Upon reading it my instinctive reaction was to frown upon the notion that all other business in the busy schedule of the judiciary could be suspended over a mere school leavers' dance or party. At first impression it seemed such an inconsequential pre-occupation which should not warrant the attention of the machinery of State. However, for a school and its student body the dance must be a serious matter. Such an event may be an integral part of its life and for its students as well. For sixth formers in particular an event like that, I believe, assumes greater significance. It may only happen once in their lifetimes. Among other things, it is an occasion to bid farewell to friends and staff. It is an occasion to reminisce over events in the last six years. It is an emotional occasion. I believed the applicant when he said it was a life time event to celebrate and commemorate the many memories and friendships of the last six years. So I decided to treat the matter as serious and as urgent.

The applicant was in upper six at the respondent school. In the urgent chamber application against the school he sought a final order in the following terms:

1. That the administrative action of the respondent's authorities be declared unlawful, void and of no effect.
2. That a final interdict be granted against the respondent, ordering it to accord applicant the normal status granted to any other student and alumni member once applicant had left the respondent institution at the end of 2013.

3. That a final interdict be granted restraining the respondent from punishing applicant without the observance of due process.
4. That respondent pays applicant's costs on a legal practitioner and client scale.

Pending the determination of the final relief the applicant sought the following interim order:

- i. That the respondents and its employees, agents and assigns be interdicted from interfering with applicant's usual rights as a student at the respondent institution.
- ii. **That within 48 hours the respondent and its employees, agents and assigns be ordered to accept payment and the registration of the applicant and his invitees for the leavers' dance to be held on 22 November 2013.**
- iii. That the respondent and its employees, agents and assigns be ordered not to hinder applicant's access to the respondent's academic and social facilities, **specifically access to the leavers' dance** and to normal academic functions.
- iv. That respondent pays costs on a legal practitioner and client scale.

The highlighted portions of the interim order sought constituted the gravamen of the relief sought.

Applicant's case was that all upper sixth students were now on study break. They would not be attending regular lessons. The school would be holding a leavers' dance on 22 November 2013. That was some fifteen days away from the date when he had filed his application. He had been barred from attending that dance. He had come to the school on 30 October 2013 to pay for the dance. He had been in the company of a friend. Both he and his friend had not been in school uniform. But so had been yet another student. The school bursar had accepted payment from that other student. She had declined to accept payment from the applicant and his friend. They had been referred to the director of the sixth formers. He was

also the deputy headmaster at the respondent school (hereafter referred to as “**the deputy head**”).

The deputy head would also not accept applicant’s payment. He had demanded to know why applicant had not been in school uniform on that day and why he had been absent on the two school events that had been held on 16 and 17 October 2013. These events had been the leavers’ assembly and the prize giving and speech night respectively. Applicant had told the deputy head that on 17 October 2013 he had been to South Africa to attend an interview for a flight course. The deputy head had allegedly retorted in foul language and had dismissed applicant’s story as “bullshit”. Applicant had immediately dialled his mother for her to speak to him. However, the deputy head had declined to talk to her.

Applicant felt unfairly treated. He felt that fellow students who also had not been in school uniform had been allowed to pay for the leavers’ dance. According to him they being on study leave the wearing of school uniform was no longer compulsory. Also according to him the two events on 16 and 17 October 2013 had not been compulsory events, at least according to the school calendar that had been issued out at the beginning of the year.

When the deputy head would not speak to his mother on the phone the applicant had gone away to fetch her. However the respondent’s authorities had refused to meet with her without an appointment. The appointment had promptly been made for the following day. On that day applicants’ parents had held a meeting with the headmaster and the deputy head. The applicant had not been called into that meeting. In his founding papers applicant gave no details of what had transpired at that meeting except to say that his mother had emerged from it very frustrated.

Applicant felt his rights had been violated. His case was that he had not been charged with any offence. Yet he was already being punished. He recalled an incident later when he had come to the school for an academic filming exercise in fulfilment of his academic studies. Soon after the filming he had been escorted off campus by one of the teachers. He had felt like he was being treated like a dangerous criminal or a vermin that could contaminate the society. It was on that basis that the applicant filed the urgent chamber application for the relief set out above.

Applicant’s major ground of complaint was that the respondent had violated the rules of natural justice. It was meting out the most severe punishment without having charged him

with any offence, let alone affording him the chance to be heard. The school had a code of conduct. Applicant alleged that the respondent had violated it.

The respondent opposed the application. Through an affidavit deposed to by the headmaster the respondent listed a series of misdemeanours by the applicant, including insolence and rudeness, and his unexplained failure to attend the two events on 16 and 17 October 2013. The respondent said that contrary to applicant's assertion, those events had been compulsory. That they in deed had been compulsory had been communicated by the headmaster on several days at assembly. Furthermore, e-mails to that effect had been sent to applicant's parents. Then on 24 October 2013 an e-mail had been sent by the school to applicant's parents seeking an explanation for applicant's absence on those events. There had been no response from the applicant or his parents. So in order to elicit a response an instruction had been issued that the applicant would not be allowed to attend the leaver's dance until he had explained his absence on the two days. No payment from him would be receipted for the dance.

With regards the events of 30 October 2013 when applicant had come to pay for the dance, respondent highlighted an example of dishonesty by the applicant. It averred that after the deputy head had declined his payment applicant had gone back to the bursar's office and had lied that he had now been allowed to pay. The bursar had checked with the deputy head. Applicant's lie had promptly been exposed.

Respondent also highlighted that the applicant had not been registered with the school for any regular advanced ("A") level courses except for a non-examinable sports fitness course called ETA (Exercise Teachers Academy) and the Cambridge International Diploma in Business. These were not graded at the same level as "A" level subjects. The applicant would not be barred or hindered from completing whatever remained of his schooling component. However, the leaver's dance was purely a privilege, not a right. The school had the right to withdraw it because of applicant's conduct. His parents had signed a document, among other things, pledging applicant's commitment to be bound by the school rules. They had failed to explain applicant's absence on the two days. It was only from the urgent chamber application that the respondent had learnt for the first time of the applicant's alleged trip to South Africa on 17 October 2013. The absenteeism on 16 October 2013 had remained unexplained. The school calendar issued at the beginning of the year was not the only source of information on compulsory events. During the meeting on 30 October 2013 between the

headmaster, the deputy head and applicant's parents, a document tabulating applicant's violation of the school rules had been read out to them.

Respondent sought the dismissal of the application with costs *de bonis propriis* because, it said, it should have been apparent to applicant's legal practitioners that the applicant had had no basis for approaching the court for the remedy which he sought.

Those were the two versions of the case. I had to decide which to believe, or which was the more probable. But the nub of the matter was whether the respondent had violated the *audi alteram partem* rule of natural justice (hereafter referred to as "**the *partem* rule**") in the way it was treating the applicant. Related to that was the question whether or not it was a right that had accrued to the applicant, as a student at the respondent's institution, to attend or participate in social functions or cultural events such as the leaver's dance. Or was the attendance at, or participation in, such events a mere privilege that the school could withdraw at any time? All in all did the applicant have a legitimate expectation that he would be allowed to attend or participate in such events or a legitimate expectation that before the school could withdraw his right to attend he ought to have been given a chance to make representations.

The issues were ably canvassed and ventilated by battle hardened counsel for the applicant, Mr *Mpofu*, and an old war horse Mr *Matinenga* for the respondent. I express profound gratitude for their assistance.

Mr *Mpofu* argued that the applicant's entitlement to attend and participate in the school leavers' dance was a right and not a mere privilege; that the bundle of privileges for sixth formers had clearly been set out in the code of conduct and that the leavers dance had not been one of them; that what the applicant sought was a temporary interdict in terms of which, in relation to the requirement to prove a right, the applicant needed only to prove a *prima facie* right as opposed to a clear right and that the punishment being meted out by the respondent to the applicant was so disproportionate to the alleged misdemeanours.

Mr *Matinenga* countered that what the applicant sought was an order of *mandamus*. As such he was required to prove a clear right, not merely a *prima facie* right; that in no way could the attendance or participation at an end of year leavers' dance amount to a clear right but that it was merely a privilege which could be withdrawn at any time in appropriate circumstances; that the list of privileges in the code of conduct was by no means exhaustive; that a formal hearing was not the only means by which the *partem* rule could be observed since there were several other ways that this could be achieved depending on the exigencies

of the matter; that in this case the respondent had sought an explanation for the applicant's absence at the two functions in question without getting any response and that there was nothing disproportionate in the measures taken by the respondent as they meant to elicit the outstanding explanation. Mr *Matinenga* expressed the fear that if the court were to intervene in this matter it would severely complicate matters of discipline for the school.

In my view, applicant's case is slightly different from the plethora of cases in which concepts like the *partem* rule, legitimate expectation and interdict were considered. Applicant's case is *sui generis*. In the large majority of cases the courts would be considering a bundle of rights in relation to employment situations or in relation to strictly commercial agreements. *In casu* it is the bundle of rights of a school child vis-à-vis his school. The relationship was a tripartite one involving the school, the child and the parents. As I observed earlier the event at the centre of the dispute might be relatively unimportant compared to the busy life in commerce and industry. But in a school situation I imagine it to be part of the life and blood. It is from that angle that I approached this matter.

The *partem* rule holds that a man shall not be condemned without being given a chance to be heard in his own defence. The rule is so basic to jurisprudence that, as EBRAHIM J said in *Dube v Chairman, Public Service Commission & Anor* 1990 (2) ZLR 181 (H), it is often termed a rule of natural justice. In *Taylor v Minister of Education & Anor* 1996 (2) ZLR 772 (S), GUBBAY CJ stated at p 780A – B:

“The maxim *audi alteram partem* represents **a flexible tenet** of natural justice that has resounded through the ages. One is reminded that even God sought and heard Adam's defence before banishing him from the Garden of Eden. **Yet the proper limits are not precisely defined**” (my own underlining).

The *partem* rule implores public officials, judicial and quasi-judicial officers, and really anyone entrusted with the power to make decisions or the power to take action affecting others adversely, to exercise such powers fairly. In the case of *Kanonhuwa v Cotton Co of Zimbabwe* 1998 (1) ZLR 68 (H) the rule was extended to the realm of private contracts between a private individual and a private entity. In all cases fairness is the overriding consideration.

The legitimate expectation doctrine is an extension of the *audi alteram partem* rule. Although it is now finding expression in statutes, for example s 3 of the Administrative Justice Act, [*Cap 10:28*], in my view it is a product of judicial activism meant to fill up a lacuna in the law; see the reference to the 1988 American Journal of Comparative Law (by

Prof Robert E Riggs) in the case of *Administrator, Transvaal and Ors v Traub and Ors* 1989 (4) SA 731.

In England, in the 1990s LORD DENNING MR, in the case of *Schmidt and Anor v Secretary of State for Home Affairs* [1969] 1 All ER 904 (CA), at p 909 coined it as follows:

“... an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, **or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say**” (emphasis added).

In South Africa, in the 1980s, the doctrine was adopted in *Traub's* case above. CORBETT CJ, after an examination of the authorities in England, Australia, New Zealand and elsewhere, said at p 760:

“The question which remains is whether or not our law should move in the direction taken by English law and give recognition to the doctrine of legitimate expectation, or some similar principle. The first footsteps in this direction have already been taken in certain Provincial Divisions (see the case quoted above). Should this Court give its *imprimatur* to this movement; or should it stop the movement in its tracks?”

Later on, at p 761D, the learned chief justice answered the question as follows:

“In my opinion, there is a similar need in this country.”

In Zimbabwe, in the 1990s, the doctrine was adopted in the case of *Health Professions Council v McGowan* 1994 (2) ZLR 392 (S) and subsequent others such as *Taylor, supra*, and *Kanonhuwa, supra*. In *McGowan's* case GUBBAY CJ stated as follows at p 334:

“In short, the legitimate expectation doctrine, as enunciated in *Traub*, **simply extended the principle of natural justice** beyond the established concept that a person was not entitled to a hearing unless he could show that some existing right of his had been infringed by the quasi-judicial body... **Fairness is the overriding factor in deciding whether a person may claim a legitimate entitlement to be heard...**”(emphasis added).

See also *Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S), per McNALLY JA, at p 21C - D.

As observed by the Supreme Court in *Taylor's* case above, the *partem* rule, and in my view, its extension, the doctrine of legitimate expectation, **are flexible tenets**. Their proper

limits are not precisely defined. In my view, a formal charge that is followed by a formal hearing and culminating in a formal verdict and a formal penalty are not always absolute prerequisites. As Mr *Matinenga* put it, the exigencies of the matter determine the situation. In *Taylor's* case, the court made the following remark at p 778A – B:

“I did not understand Mr *Nherere* to suggest that in this sort of case **there was need for a hearing in any formal sense, that is, an oral hearing.** All that was required and sought by the appellant was simply an opportunity **to submit written representations;** to be able to put his side of the story with regards to the transfer affecting him” (my own underlining).

At page 784 in *Taylor's* case the learned chief justice went on say:”

“PICKERING AJ was at pains to stress that fairness is the true guide to the circumstances in which a public official is required to afford a hearing. It is this concept, he said, that operates as a limiting factor to ensure that the legitimate expectation doctrine does not stray beyond its proper bounds. I am in respectful agreement that it is helpful to look at the situation from the stand point of fairness and reasonableness” (emphasis added)

In the present case the applicant maintained that the two events on 16 and 17 October 2013 which the respondent complained he bunked off were not compulsory events. He attached the school calendar for support. On that calendar applicant had highlighted only two events which were marked compulsory for upper sixes. These were some public speaking competition and some driver awareness talk.

I am persuaded by Mr *Matinenga's* submissions. The school calendar could not have been the exclusive source of information on what events would be compulsory at the school and what would not be. In any event, not only was there an averment in the affidavit of the school headmaster that he had on several days announced at assembly that the two events had been compulsory, but also there were e-mail that the school had sent to applicant and his parents to that effect. The one e-mail was on 14 October 2013. The relevant portion read:

“Half term starts on Thursday 17 October – lessons will end at 31h15 as usual on this day. The College Speech Night is in the evening, 17h 30 for 18h00, in the school hall. Interested persons and prize winners’ parents are most welcome to attend as well as leavers’ parents. Forms 3, 4, L6 and U6 students should attend, in number ones” (my emphasis).

The reference to “*number ones*” in the above e-mail was a reference to a type of uniform. Mr *Mpofu* interpreted the e-mail to mean that what had been compulsory had been the wearing of the number ones and not the attendance of the listed streams. This is absurd.

The e-mail was clear as to whose attendance was optional. It was optional only for interested persons and the parents of the prize winners. Attendance by students in the streams singled out was compulsory. Not only did those students have to attend, but also they had to be in their number ones.

The second e-mail had been sent to the parents of the upper sixes. In respect of the applicant it was addressed to him. It had been sent out on 15 October 2013. In the body of that e-mail was repeated reference to the speech night which was described as the traditional climax of their schooling. The last paragraph read as follows:

“Please note that lessons for U6 will stop at break time this Wednesday and students will leave the campus after the Leavers’ Assembly. They will not be required to attend school on Thursday the 17th, except to come back for the Speech Night at 17:30” (my underlining).

In my view, it was clearly the substance of the e-mail that upper sixes had to attend the leavers’ assembly and the speech night. For that reason the school was breaking early on 16 October and closing completely on 17 October.

It is my finding that applicant had manifestly been in breach of the school rules. The respondent had been entitled to discipline him. However, before it had done so, it had called for an explanation. This had been ignored. The school had then taken measures. But this had been in an effort to get that response. It had withheld applicant’s entitlement to attend the leavers’ dance. That had been the only event of significance still remaining for the applicant at the school. I find no fault in the measures taken by the respondent. That had been what the exigencies of the situation had demanded. Applicant had spurned the opportunity that he had been afforded to explain his absenteeism. In the circumstances the application fails on this basis.

The application also fails on another ground. I am satisfied that a student’s attendance at the dance in question was a mere privilege that the school could withdraw at any time. It seems plain from cases such as *Council of Civil Service Unions and Others v Minister for the Civil Service* [1988] 3 All ER 935 (HL), cited in *Traub’s* case at p 756, that the classification of a benefit as a right or as privilege is not necessarily the sole criterion for determining one’s legitimate expectation to be heard in any given case. A regular practice may give rise to a legitimate expectation. For example, in the case of *O’Reilly v Mackman and Others and Other Cases* [1982] 3 All ER 1224 (HL), also cited in *Traub’s* case at p 757, it was considered that the granting of remissions of sentences under the prison rules may not be a

matter of right but of indulgence but that a prisoner may nonetheless have a legitimate expectation based on his knowledge of what the general practice is that he would be granted the maximum remission as a reward for discipline.

However, from the many authorities on the doctrine of legitimate expectation one of the major concerns has been its imprecise limits. The courts have been careful not to leave it too loose. Whilst accepting that the law has to reach out and come to the aid of persons who may be prejudicially affected by certain decisions, CORBETT CJ, at p 761F - G in *Traub's* case, concluded as follows:

“... whereas the concepts of liberty, property and existing rights are reasonably well defined, that of legitimate expectation is not. Like public policy, unless carefully handled it could become an unruly horse. And, in working out, incrementally, on the facts of each case, where the doctrine of legitimate expectation applies and where it does not, the Courts will, no doubt, bear in mind the need from time to time to apply the curb.”

In the case of *Foreman & Another v KLM Royal Dutch Airlines* 2001 (1) ZLR 108 (H), this court, GWAUNZA J (as she then was), held that the doctrine of legitimate expectation had no application where the perceived rights were in fact mere privileges. Where the employer had withdrawn the employees' privilege of flying the employers' airline at reduced rates, the court held that there had been no obligation for the employer to have afforded the employees a hearing before rejecting their application for the enjoyment of that benefit.

Mr *Mpofu* sought to distinguish the *KLM Royal Dutch* case from the instant matter on the basis that in the *KLM Royal Dutch* case the flying benefit had clearly been marked in the employees' conditions of service as a privilege in respect of which the employer had clearly spelt out could be withdrawn unilaterally, but that in the present case the respondent had listed in its code of conduct what the privileges were which could be enjoyed by the sixth formers and that the leavers' dance had not been one of them. Therefore, he argued, there was no basis for the court to read into the code of conduct what had clearly been excluded.

On pages 42 to 45 of the respondent's code of conduct, under the heading “6th Form Privileges”, was a list of 15 privileges. The code repeatedly provided that the privileges were not rights and that they could be removed or revoked at any time by the headmaster or the deputy head. In deed there was nothing written about the leavers' dance.

However, whilst I recognised the force of Mr *Mpofu's* argument, I did not believe that it settled the matter. It seemed evident that the leavers' dance was a tradition in the school. .

To me that was the import and essence of the present application. I consider that in the code of conduct privileges and traditions were accorded the same status. At the end of the list of privileges on page 46 of the code was this inscription:

“It is essential that all privileges **and traditions** reinforce and add to the ethos of the school. **If it is deemed that they do not they will be done away with.** If any ‘tradition’ takes hold in the school which in any way belittles, disrespects or embarrasses another member of the school or the image of the College in any way, it will be banned with immediate effect” (my emphasis).

I am satisfied that the respondent had an unfettered discretion to withdraw the applicant’s entitlement to attend the leaver’s dance without a formal hearing. It was no more than a mere privilege for sixth form leavers.

The *partem* rule was undoubtedly the major ground of applicant’s case. But in case I am wrong in my conclusions on that point I am of the view that applicant failed to satisfy one of the requirements for an interdict. Mr *Mpofu* argued that what the applicant sought was simply a temporary interdict in which case he only had to prove a *prima facie* right as opposed to a clear right. Though conceding that what was being sought was a mandatory interdict counsel argued that it was not an order of *mandamus*. He submitted that a *mandamus* is a remedy sought against public or quasi- public bodies. The respondent was neither of these.

In the circumstances of this case the distinction sought to be drawn by counsel is, in my view, one without a difference. The requirements for a *mandamus* are the same as those of a mandatory interdict. These were summarised by GUBBAY CJ in the case of *Tribac (Pvt) Ltd v Tobacco Marketing Board* 1996 (1) ZLR 289 (SC). At p 291 the learned chief justice had this to say:

“An application for a *mandamus* **or ‘mandatory interdict’, as it is often termed**, can only be granted if all the requisites of a prohibitory interdict are established. See *Lipschitz v Watrus NO* 1980 (1) SA 662 (T) at 673C – D; *Kaputuaza and Another v Executive Committee of the Administration for the Hereros and Others* 1984 (4) SA 295 (SWA) at 317E. These are:

1. A clear or definite right – this is a matter of substantive law.
2. An injury actually committed or reasonably apprehended – an infringement of the right established and resultant prejudice.
3. The absence of a similar protection by any other ordinary remedy. The alternative remedy must (a) be adequate in the circumstances; (b) be ordinary and reasonable; (c) be a legal remedy; and (d) grant similar protection.

The *locus classicus* of the cases which sets out these criteria is, of course, *Setlogelo v Setlogelo* 1914 AD 221 at 227. See also, *PTC Pension Fund v Standard Chartered Merchant Bank Zimbabwe LTD and Another* 1993 (1) ZLR 55 (H) at 63A – C” (my underlining)

In an application for a temporary interdict the applicant needs only show a *prima facie* right. That right may be open to some doubt. With regards to this requirement in particular MALABA JA, as he then was, said in the case of *Airfield Investments (Private) Limited v The Minister of Lands, Agriculture and Rural Resettlement & Ors* 2004 (1) ZLR (SC):

“There are, however, requirements which an applicant for interim relief must satisfy before it can be granted. In *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267A – F, CORBETT J (as he then was) said an applicant for such temporary relief must show:

- (a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or if not clear, is *prima facie* established though open to some doubt;
- (b)
- (c)
- (d)

In the applicant’s draft order the right to attend the leavers’ dance was part of the interim order sought. However, one looks at the substance of the relief sought and the exigencies of the matter rather than the form. Despite applicant’s coining the relief as interim, to me it was undoubtedly a final relief that was being sought. This is so because either the dance would happen and the applicant would attend, or it would happen and the applicant would not attend. Once the dance was held and done with that would be the end of the matter. Whatever would happen or not happen would be the final thing. There would be no question of any coming back on the return day to confirm anything.

The final order sought by the applicant was, in my view, unrelated to the substance of the application. No case for it was properly made out.

The applicant was supposed to demonstrate a clear right to attend the dance. In my view he failed to do so. Therefore, the application also fails on this ground.

With the view that I have taken on the *partem* rule and the issue of the interdict, I have found it unnecessary to consider the rest of the submissions by counsel.

In the premises the urgent chamber application is hereby dismissed with costs. However, I found no basis for the respondent’s prayer for costs *de bonis propriis* against the

applicant's legal practitioners. There was no discernible infraction in the manner they took up applicant's cause and prosecuted his case.

Sawyer & Mkushi, legal practitioners for the applicant
Gill, Godlonton & Gerrans, legal practitioners for the respondent