

MIKE VELAH  
and  
ALBERT NYAMURONDA  
and  
JOSEPH KURAI PEDZAYI  
and  
BRENDA HATINAHAMA  
versus  
THE MINISTER OF PRIMARY & SECONDARY  
EDUCATION  
and  
ZIMBABWE SCHOOL EXAMINATIONS COUNCIL

HIGH COURT OF ZIMBABWE  
ZHOU J  
HARARE, 7 March 2018

**Urgent Chamber Application**

*S. Chamuka* with him *Ms N. Hatinahama*, for the applicants  
*Ms B Shava*, for the 1<sup>st</sup> respondent  
*T. Mpofu*, for the 2<sup>nd</sup> respondent

ZHOU J: The four applicants are parents of minor children who wrote Ordinary Level examinations in November 2017. The examinations are managed by the second respondent, a body corporate duly established by and in terms of s 3 of the Zimbabwe School Examinations Council Act [*Chapter 25:18*]. The results for the November 2017 examinations were released by the second respondent on 23 February 2018. When the applicants and/or the children they represent attended at St David's Bonda Secondary School, which was their examination centre, to collect the results they were informed by the authorities there that their results had been withheld by the second respondent on grounds of alleged cheating. The precise dates on which the withholding of the results was communicated to the applicants is not clear from their affidavits. Be that as it may, what is evident is that the applicants then instituted the instant urgent chamber application on 2 March 2018. At the commencement of the hearing the fourth applicant notified that she was withdrawing from the matter. Three applicants persisted with the application. The application is opposed by both respondents. Before

hearing submissions on the merits of the application I heard argument on the objections *in limine* taken by the respondents.

The first respondent objected to his joinder on the grounds that his responsibility is only to give policy guidance to the second respondent, and he has no role in the making of the decision of the first respondent which is sought to be impugned. Mr *Chamuka* for the applicants readily conceded that the first respondent was improperly joined to the application. The concession was properly made. The decision which is sought to be challenged is administrative, and the first respondent is indeed not involved in its making. The second respondent, as provided for in s 3 of the Zimbabwe School Examinations Council Act is a body corporate capable of suing and being sued in its corporate name. The objection *in limine* pertaining to improper joinder of the first respondent is therefore upheld.

The second respondent also objected *in limine* to the determination of the matter on the merits on 5 grounds. These are:

- ‘(1) that the application is invalid for want of compliance with the provisions of r 241,
- (2) that the matter is not urgent,
- (3) that the relief sought is incompetent for being final in its effect,
- (4) that the applicant are seeking review through an urgent chamber application rather than through a court application as required by the High Court Rules, 1971 and
- (5) that there are material disputes of fact which cannot be resolved on the papers.

On the question of urgency the application was filed within 7 days after the results were released by the second respondent. While the applicants do not give the precise dates on which they were notified of the withholding of the results and do not explain what they were doing in the 7 or so days prior to the filing of this application, I do not think that in the circumstances of this matter a period of 7 days deprives the matter of its urgency. The application was filed about 5 days before the date upon which the urgency appears to be founded which is the 7<sup>th</sup> of March 2018, the date on which enrolment for Form 6 was due to commence. The applicants did not therefore wait for the day of reckoning to arrive. They acted expeditiously in the circumstances.

On the question of the non-compliance with the proviso to r 241 (1) the complaint is that the chamber application ought to have been in Form 29 with the necessary adjustments. Mr *Chamuka* conceded the non-compliance and moved condonation of the non-compliance

by invocation of the powers reposed in the court or judge in terms of r 4C. While there are judgments which suggest that the non-compliance with r 241 renders the application fatally defective, I hold a different view. If this was the only defect complained of I would have considered whether there are indeed good grounds for the non-compliance to be condoned, especially as the respondents were served with the applicants' papers and had the opportunity to file opposing papers in the case of the second respondent. But this matter can be disposed of easily on the other points *in limine*.

The first insurmountable hurdle for the applicants is the relief which they seek. The relief sought is final not just in its form and substance but in its effect. This court has in many judgments warned against the undesirability of seeking final relief through an urgent chamber application under the guise that it is interim relief. Quite apart from the procedural requirement that this kind of relief should be sought by way of review as an ordinary court application as required by order 33 r 256, if the relief was granted as sought its consequences would be irreversible should the provisional order be not confirmed. The interim relief that the applicants seek is that the decision to withhold the applicants' results be set aside, and for the applicants' results to be confirmed and released. Mr *Chamuka* understandably was unable to make any meaningful submission on how that kind of relief could be granted as interim relief. On that ground alone, the relief which the applicants seek is incompetent and this court cannot grant it other than with the consent of all the parties to the dispute. The application thus fails on that basis.

The further point taken is that there are material disputes of fact which cannot be resolved on the papers. The dispute relates to whether there is indeed evidence which establishes that the applicants' children had access to the examination question papers or parts thereof prior to the date and time of writing the examination. The applicants make the allegation that their children did not cheat and never admitted to accessing the examination question in advance of the date of the examination. The respondents, on the other hand, have placed before this court cogent facts and in some instances evidence which point to cheating. Although the fourth applicant did not give any reason for withdrawing from the application one cannot ignore the possibility that the decision may have been influenced by evidence of her cellphone texts conversation with her daughter. That conversation suggests she secured the examination questions for the daughter prior to the date of examinations. The second respondent has also through its internal procedures presented findings which if proved

at the trial would mean that the applicants' children were guilty of the misdemeanour alleged. These are matters that would need to be tested through a trial.

The nature of examinations and their bearing on the credibility and integrity of a system of education are matters of national importance. It is therefore necessary that where the integrity of a country's system of education is exposed to being questioned the authorities responsible for examinations be allowed to act in the interests of protecting that integrity. In this case the court would be aiding illegal conduct if it was to ignore the findings made by the second respondent through its investigations. Those findings cannot be rejected via the procedure of a court application.

The court has a discretion as to the future course of proceedings instituted by way of court application where there are material disputes of fact. In the present case the applicants were always aware or ought to have realised the existence of the disputes of fact. Further, when the issue of disputes of fact is taken together with the relief sought as considered above, it is only appropriate that the application be dismissed.

In the result, It is ordered that:

1. the first respondent's objection *in limine* to its joinder be and is hereby upheld with costs.
2. In relation to the second respondent, the application be and is hereby dismissed with costs.
3. The costs referred to in paragraphs 1 and 2 hereof shall be paid by all the applicants, including the fourth applicant, jointly and severally the one paying the others to be absolved.

*Magaya-Mandizvidza Legal Practitioners*, applicants' legal practitioners  
*Dube, Manikai & Hwacha*, 2<sup>nd</sup> respondent's legal practitioners