CHARLES MASANGO
and
GLORIA MASAWI
versus
MINISTER OF PRIMARY & SECONDARY EDUCATION N.O.
and
PUBLIC SERVICE COMMISSION
and
THE DISTRICT SCHOOLS INSPECTOR, MBERENGWA N.O.
and
THE HEADMASTER, CHINGOMA HIGH SCHOOL, MBERENGWA

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 14 & 17 February 2017

Urgent chamber application

Mr *T. Midzi*, for the applicants
Mr *F. Chingwere*, for the respondents

MAFUSIRE J: This was an urgent chamber application for an interdict. I heard it on 14 February 2017 and reserved judgment.

Evidently the application was prepared without regard to the elementary requirements for an interlocutory interdict. Even the argument on urgency was tenuous.

The applicants were husband and wife. They were teachers at Chingoma High School, Mberengwa District, Midlands Province ["***Chingoma***"]. Between them they had clocked twenty six years of continuous service at the school: the first applicant, the husband, having done ten years, and the second applicant, the wife, sixteen years. These are appreciable lengths of service by all accounts. Ordinarily you do not just uproot someone like that from their station against their will without very good reasons. The applicants were uprooted.

A problem arose between the applicants and a fellow teacher at the school, a lady. She complained of prolonged sexual harassment or abuse by the first applicant. All three were in the same department. The second applicant was the head. She got entangled, undoubtedly driven by marital interests. The complainant also raised multiple complaints against the second applicant. She reported, among other things, that the second applicant had stopped supervising her work. She said the second applicant was sending her stressful telephone

message. She said on one occasion the second applicant had hit her with an elbow. On another, she had spat in her face.

The school convened a disciplinary enquiry. The applicants were found guilty. A uniform penalty was imposed against both. It was threefold: a fine of $200 each, to be recovered from the salaries; a transfer from Chingoma to any school within the district; and a reprimand.

The disciplinary proceedings were concluded in November 2016. The outcome was communicated to the applicants by letters dated 13 January 2017. However, these were only served on the applicants on 30 January 2017. The respondents argued that that was when the clock began to tick if the applicants wished to apply on an urgent basis.

In February 2017 the respondents set in motion the process to transfer the applicants in execution of the sentence. Among other things, standard term transfer forms were served on them. But the reason stated on those forms was patently incorrect, namely that the transfers were pursuant to some request previously made by the applicants. In the urgent chamber application, the applicants initially pounced on this mistake. However, Mr *Midzi*, who appeared for them, eventually conceded that the mistake was not material.

The applicants would also complete assumption of duty forms. The new school, Vubwe Secondary School ["***Vubwe***"], was some 100 kilometres away from Chingoma.

The applicants were aggrieved by both the disciplinary process and the outcome. They decided to appeal to the Labour Court. Against conviction they would challenge the propriety of the disciplinary proceedings, which to them was a complete nullity by reason of the process having been conducted way outside the mandatory statutory period. As for the sentence, they would argue that it was draconian and that it induced a sense of shock.

Pending appeal, the applicants would simultaneously file the urgent chamber application to stop the transfers.

That manifestly was the intention. But it seems things did not quite go according to plan. The urgent chamber application was only filed on 9 February 2017. As for the appeal to the Labour Court, it was not until Monday, 13 February 2017 that it was finally filed, i.e. the day before the hearing. The applicants blamed the Registrar of the Labour Court for the delay.

The delay in filing the appeal did not cause any immediate problems. However, the apparent delay in launching the urgent chamber application did. The period between the applicants' receipt of their sentence on 30 January 2017 and the filing of the application on 9

February 2017 was not explained. Not unexpectedly, the respondents pounced on this and took the point *in limine*. I reserved judgment and opted to hear the merits.

The proceedings had to be adjourned briefly. It seemed the situation on the ground had shifted somewhat. Among other things, whilst Mr *Midzi* was insisting that the applicants had not yet shifted to Vubwe, Mr *Chingwere*, for the respondents, maintained that not only had they in fact shifted, but also that two other new teachers had since been drafted to replace them at Chingoma. So the purpose of the brief adjournment was to enable the legal practitioners, as officers of the court, to ascertain the correct position on the ground. They did.

It transpired that the applicants had since signed the assumption of duty forms and had assumed duty at Vubwe the day before the hearing. It was said the fourth respondent, Chingoma's Headmaster, had actually been pressing the applicants to remove their belongings from the school house to pave way for the new teachers.

Mr *Midzi's* strongest argument, both on paper and in oral submissions, was that the disciplinary proceedings were a complete nullity. The applicants had challenged them. Until the outcome was known, it was wrong for the respondents to purport to execute the sentence of transfer. It would be a breach of the applicants' constitutional rights of access to the courts and to have their dispute determined fairly. If they succeeded on appeal after they had already been transferred, any remedy would be a *brutum fulmen*.

Throughout the hearing I had to implore the parties repeatedly, Mr *Midzi* in particular, to systematically address the requirements for an interlocutory interdict as they applied to this case.

For what it is worth, the requisites for an interlocutory interdict are:

1 a *prima facie* right, even if it be open to some doubt;
2 a well-grounded apprehension of irreparable harm if the relief is not granted;
3 that the balance of convenience favours the granting of an interim interdict;
4 that there is no other satisfactory remedy;
5 that there are reasonable prospects of success in the merits of the main case.

see *Setlogelo* v *Setlogelo*[1]; *Tribac [Pvt] Ltd* v *Tobacco Marketing Board*[2]; *Hix Networking Technologies v System Publishers [Pty] Ltd & Anor*[3]; *Flame Lily Investment*

[1] 1914 AD 221
[2] 1996 [1] ZLR 289 [SC]
[3] 1997 [1] SA 391 [A]

Company [Pvt] Ltd v *Zimbabwe Salvage [Pvt] Ltd and Anor*[4] and *Universal Merchant Bank Zimbabwe Ltd v The Zimbabwe Independent & Anor*[5].

After full argument on the merits I reserved judgment. Here now is my judgment on both the point *in limine* and on the merits.

[a] **Urgency**

The respondents charged that the applicants had slept on their rights. Quoting from *Kuvarega v Registrar – General & Anor*[6] and *Econet Wireless [Pvt] Ltd v Trustco Mobile [Pty] & Anor*[7], the respondents argued that 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, it cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the Rules.

The respondents argued that the need to act had arisen on 30 January 2017. The delay to 9 February 2017 had not been explained. Therefore, the matter ought not be treated as urgent and must therefore be dismissed on that basis.

Mr *Midzi* argued that there was no real delay. The dates bandied about by the respondents had to be viewed in context. Applicants were rural teachers. There were great distances between their school and the lawyers' offices in Zvishavane, a town about 100 kilometres away. There were also great distances between their school or the lawyers' offices and the Labour Court Registry in Gweru; and between their school and the High Court Registry at Masvingo. Given that several documents had to be procured from various places and from various offices, and given that affidavits had to be drafted and signed by people far away, and given that it was processes for two different courts that were being prepared at the same time, the delay was neither fatal nor inordinate. Mr *Midzi* stressed that the delay was a mere seven working days.

In *Econet Wireless [Pvt] Ltd v Trustco Mobile [Pty], supra*, the delay was three weeks. The applicants [respondents on appeal] had been based in Namibia. Their Counsel of choice was based in South Africa. The matter was proceeding in the Zimbabwean High Court. The applicants had to brief lawyers on highly technical matters. Both this court, on

[4] 1980 ZLR 378
[5] 2000 [1] ZLR 234 [H]
[6] 1998 [1] ZLR 188 [H]
[7] 2013 [2] ZLR 309 [S]

first instance, and the Supreme Court, on appeal, accepted that the explanation for the delay had been reasonable. The matter was treated as one of urgency.

The applicants' situation herein is not quite comparable. However, nothing is ever cast in stone. Every case depends on its own set of facts. Given that applicants were teachers at a rural school; that they had to cover appreciable distances to go and brief their lawyers; that it had been necessary for the lawyers to prepare draft affidavits and run them past the applicants before having them commissioned; and given the distances to be covered in filing documents at two different courts the Registries of which were in two different towns, almost 200 kilometres apart, I considered it exceedingly harsh to non-suit the applicants by reason of a mere seven day delay. I did accept Mr *Midzi's* submissions "from the Bar".

Therefore, I conclude that the matter was indeed urgent.

[b] ***Prima facie* right**

This was probably a border line case. A teacher gets employed by the Public Service knowing full well that he or she may be transferred at any time. No member of the Public Service, or any other employee for that matter, may have the right to be permanently stationed at one place, unless their contracts of employment expressly said so.

Mr *Midzi* said in the case of *Taylor v Minister of Higher Education & Anor*[8] it was held that professional employees of long standing, holding senior posts, should not be transferred without account being taken of their personal situation and wishes. *In casu*, he pointed to the applicants' combined twenty six years of service at Chingoma, and to the fact that the second applicant was a head of department.

However, *Taylor's* case is manifestly an inapposite precedent. Therein, the court was concerned with a transfer that was being executed without observance of the *audi alteram partem* rule of natural justice. Members of the Public Service, like Mr Taylor had been, could be transferred even without their consent. But the Supreme Court held that "without their consent" did not mean the same as "without a hearing".

In casu, there was a hearing. It was not just a hearing to seek the members' reaction to the intended transfer. It was a disciplinary hearing on charges of misconduct. The applicants were found guilty. The transfers were part of the sentence.

However, despite all that, I am prepared to accept that the applicants had a *prima facie* right not to be transferred from their station of twenty six years on the basis of a

[8] 1996 [2] ZLR 772 [S]

disciplinary process that could turn out to have been a complete nullity. It could be a nebulous right. But the right sought to be protected by an urgent chamber application needs not be a clear one. It may be open to some doubt. I consider that the applicants' situation herein fitted the bill.

Therefore, on *prima facie* right, as the first requirement for an interlocutory interdict, the decision is in favour of the applicants.

[c] **A well-grounded apprehension of an irreparable harm**

Under this head there ought to be [1] a fear or an apprehension of harm that is [2] well- grounded, judged objectively, that is to say, what a reasonable man, in Latin, a *diligens paterfamilias*, would consider harmful or perilous or prejudicial, and [3] that the fear or the apprehension must be of a peril or a harm or prejudice that will be irreversible if the court does not intervene. Of this the head-note on *Document Support Centre [Pvt] Ltd* v *Mapuvire*[9], summarising the judgment of MAKARAU J, as she then was, says:

> "Urgent applications are those where, if the courts fail to act, applicants may well be within their rights to suggest dismissively to the court that it should not bother to act subsequently, as the position would have become irreversible to the prejudice of the applicant. The issue of urgency is not tested subjectively. It is an objective one, where the court has to be satisfied that the relief sought is such that it cannot wait without irreparably prejudicing the legal interest concerned."

On the same point, GILLESPIE J, in *General Transport & Engineering [Pvt] Ltd & Ors v Zimbabwe Banking Corporation Ltd*[10] and *Dilwin Investments [Pvt] Ltd v Jopa Enterprises Co Ltd*[11] said:

> "A party who brings proceedings urgently gains considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. For instance where, if it is not afforded, the eventual relief will be hollow because of the delay in obtaining it."

Beyond the need to protect their perceived constitutional rights, the applicants did not explain what harm exactly they stood to suffer, and most importantly, how any such harm could be said to be irreversible, if the transfers were not stopped. For example, apart from

[9] 2006 [2] ZLR 240 [H]
[10] 1998 [2] ZLR 301 [H]
[11] HH 116/98

their lengths of service, there was not a word about what else there was at Chingoma that was not there at Vubwe. The nearest Mr *Midzi* said on this was that the applicants had never been to Vubwe and that therefore they did not know what lay in store for them there! But you do not found a cause of action on something that you do not even know whether or not it exists. You cannot really say I stand to suffer an irreversible peril when you cannot even spell out what that peril is.

Other than the fine of $200 which could be restored if successful on appeal, the applicants were not going to suffer a reduction in salaries. They were not being demoted. Admittedly, the second applicant could well lose being head of department. But this was a mere in-house administrative arrangement at Chingoma, perhaps through its Head, the fourth respondent herein. It had nothing to do with the second respondent, the actual employer.

Asked by myself what exactly those constitutional rights were the breach of which would be irreversible were the applicants to succeed on appeal, Mr *Midzi* could only vaguely refer to the right to a fair hearing and rights to administrative justice. That was tenuous. Except in some exceptional circumstances which do not concern this case, there is no question that a breach of a constitutional right, or any right for that matter, is justiciable. But the applicants had been tried before a disciplinary committee. They had been unhappy with the outcome. They had appealed. The appeal was pending. They appreciated that the appeal did not suspend the judgment of the disciplinary committee. So they brought this urgent chamber application. But before they did, there was nothing stopping the respondents from executing the sentence of the disciplinary committee. And if the appellants succeeded before me, execution would be stopped. If they succeeded on appeal after the transfers, they could always be reversed. It might be inconvenient. But it could not be said to be impossible.

So I did not see what constitutional rights of the applicants that were being flouted and what irreversible harm they would suffer. Therefore, this point is decided in favour of the respondents. And that really should be the end of the matter. But I also consider the remaining requirements for an interdict.

[d] **Balance of convenience**

Not being chattels it would be wrong for the applicants to be shunted from one school to another, and back again, as the judicial process was underway. What would be ideal would

be to allow the judicial process to run its full course whilst the applicants stayed put until their fate was finally determined.

Unfortunately for the applicants, the status *quo* had changed materially. Whether due to pressure or fear, by the time of the hearing they had assumed duty at the new school. Children at Vubwe looked forward to being taught by them. The authorities there looked forward to confer responsibilities on them. Not only that, but other teachers had already replaced them and assumed duty at Chingoma. They had assumed responsibilities. Thus, the ground on which the application had been based had shifted appreciably.

Of course, that is not to say this court cannot order a reversal. But it would be a whole lot inconvenient for too many people, some of them unconnected to the dispute. A reversal might well spark further litigation, thereby causing more inconvenience even to the courts. The applicants were largely to blame. That initial delay from 30 January 2017 to 9 February 2017, even though condoned, came back to haunt them.

Accordingly, this point is decided in favour of the respondents.

[e] **No other satisfactory remedy**

Mr *Midzi's* argument was that once the breach of the applicants' constitutional rights was allowed to subsist for any time longer, nothing done afterwards could ever restore them back to their original position. But as I have demonstrated above, the alleged breach of constitutional rights is really an illusion. All that had happened to the applicants, or would happen, could be reversed if their appeals succeed. That is a remedy. Among other things, their transfers could be reversed. The fines could be refunded. The reprimands could be expunged from their disciplinary records. Perhaps, only the days they would lose being away from Chingoma would not be restored. But this, to me, is not the kind of prejudice contemplated by the law. It is fanciful. It does not constitute a legal interest.

Therefore, this point is also decided in favour of the respondents.

[f] **Prospects of success on appeal**

In my recent judgment in *Tetrad Holdings Limited v Master of the High Court & Anor*[12] I said, at p 9:

> "Weighing the prospects of success in any given case always poses problems. The court has to leap forward and temporarily sit in judgment over the pending review application. But that is unavoidable."

I still hold the same view. I have to temporarily peek into the merits of the case before the Labour Court and express my view on the prospects of success. That view can only be a *prima facie* one. The matter might completely turn on its head after full argument. But to express a view is an avoidable duty.

In my view, the applicants' appeal in the Labour Court has bright prospects of success. Among other things, the disciplinary committee convicted on very shaky evidence. It is true that in spite of the use of criminal law terms like "charged", "convicted", "guilty", "sentence", and the like, disciplinary proceedings are civil in nature. The standard of proof required to grant or refuse relief is "balance of probabilities" rather than "beyond a reasonable doubt".

However, after having gone through the two records of proceedings of the disciplinary committee that were produced by consent, I am not satisfied that the complainant's allegations were proved. Even if they were proved, I am not satisfied that they were so cogent as to found, let alone sustain, the offences with which the applicants were charged. Furthermore, it seems most probable that the disciplinary proceedings were conducted well outside the prescribed mandatory period and that, as such, they are liable to be set aside. Finally, to transfer a head of department and her husband, both of whom had rendered uninterrupted service for such lengths of time over such nebulous charges, seemed manifestly unjust. In my view, unless there was more that was not borne out by the record, this was a matter crying out for nothing more than mere counselling of the parties involved.

However, these remain my cursory views of the matter. The Labour Court may not share them. But I would decide this particular point in favour of the applicants.

[g] **Conclusion**

[12] HH 898-15

This application fails largely on account of the failure by the applicants to show the harm they stood to suffer and in what way it would be irreversible, if indeed it existed. It also fails in that as a matter of fact, what they sought to prevent had already happened by the time of the hearing. In other words, the horse had already bolted. It was too late to close the stable door.

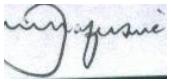
[h] **Costs**

The general rule is that costs follow the event. The loser bears the winner's costs. However, it is also the rule that costs are entirely in the court's discretion. The discretion is exercised judiciously and not whimsically.

In this case, despite this setback, the applicants may have been more sinned against than sinning. Apart from anything else, the sentence meted out on them, and the fact that it was being executed, were such that it was reasonable for them to approach the court to stop it. Therefore, no one should blame them for having come to court. It would be exceedingly harsh to saddle them with the costs of the application.

In the final analysis, the application is dismissed with no order as to costs.

17 February 2017



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