

DISTRIBUTABLE (53)

EDWARD TAWANDA MADZA & OTHERS

v

(1) THE REFORMED CHURCH IN ZIMBABWE DAISYFIELD TRUST (2) THE REFORMED CHURCH OF ZIMBABWE (3) NAISON TIRIVAVI (4) THE DUTCH REFORMED CHURCH

**SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA, HLATSHWAYO JA
HARARE, MARCH 7, 2014 & SEPTEMBER 29, 2014**

T Mpofu, for the appellant

T Magwaliba, for the first and second respondents

F Girach, for the third respondent

ZIYAMBI JA: The appellants, on 21 August 2013, brought an application in the High Court on a certificate of urgency seeking a provisional order in the following terms:

1. It is hereby ordered and declared that the management of Eaglesvale School vests in the Management of the Board of Governors of Eaglesvale School and the School Development Committees of the High School and Junior School respectively.
2. The First and Second Respondents are not empowered to dissolve the Management Board of Governors and the School Development Committees of the High School and Junior School and any such acts are declared to be unlawful.

3. The unauthorised payment of any money from the school to the First and Second Respondent and or any of their officers is unlawful.
4. Consequently the First, Second and Third Respondents be and are hereby restrained and interdicted from interfering unlawfully in the Applicants management of the administrative and financial affairs of Eaglesvale School.
5. The First, Second and Third Respondents are ordered to pay the costs of this application.

INTERIM RELIEF GRANTED

1. Pending the final determination of this matter, the First and Second Respondents be and are ordered forthwith not to interfere and or involve themselves in any manner in the administration and or finances of Eaglesvale School.
2. The Board of Governors of Eaglesvale School and the School Development Committee shall continue to manage the school and its finances.
3. Third Respondent is ordered to take instructions concerning the administration and finances of school from the Applicants and not from the First and Second Respondents.
4. The Applicant and or its legal practitioners be and are hereby authorised to serve this provisional order on the Respondents.

The learned Judge before whom the matter was placed dismissed the application with costs on the grounds that the appellants had no *locus standi* to bring the application and, further, that the matter was not urgent. Against this judgment the appellants have appealed on grounds, *inter alia*, that the court erred on both grounds. It was prayed on appeal that the judgment of the court *a quo* be set aside and substituted with an order granting the provisional order sought with costs.

THE BACKGROUND FACTS

In 1984 the Dutch Reformed Church formed and registered a non-profit making company under the name Daisyfield Trust. The company was established as a not-for-profit welfare company in terms of the Companies Act. The purpose of the Daisyfield Trust was to establish and to ensure oversight of a Christian ethos for the schools established or falling under the Trust according to Dutch Reformed Church values, and generally to maintain a Christian character. Eaglesvale School (previously Bothashof School) was brought under the oversight of the Trust for the aforesaid reason and purpose.

Sometime in 2010, a decision was taken by the Dutch Reformed Church to hand over the Trust to the Reformed Church of Zimbabwe. With the authorization of the Minister of Justice the articles of association of the Daisyfield Trust were altered to accommodate the change of ownership and, on 15 March 2013, by special resolution of the Daisyfield Trust, its name was changed to THE REFORMED CHURCH IN ZIMBABWE'S DAISYFIELD TRUST. I will refer to it hereinafter as "the Trust". Following the above, the oversight of the school then moved to the Reformed Church of Zimbabwe who then became the trustees of the Trust.

Up to 12 July 2013, the first to the eighth appellants were members of the Board of Governors responsible for the management of Eaglesvale School. The ninth and the tenth appellants are members of the School Development Committees of the Junior and Senior schools, respectively. It appears from the opposing papers that on 12 July 2013 a letter was written by the Board of Trustees addressed to the third respondent as follows:

“Att: Mr N Tirivavi

Eaglesvale School Management Board

12 July 2013

RE: DISSOLUTION OF EAGLESVALE SCHOOL MANAGEMENT BOARD

The above matter refers.

You are hereby notified that the Reformed Church in Zimbabwe’s Daisyfield Trust Board of which you have been a board member, has been dissolved with immediate effect.

It has come to the attention of the Reformed Church in Zimbabwe’s Daisyfield Trust that the School Management Board did not follow instructions from the board of trustees as written in the letter to you dated 21 June 2013. For avoidance of doubt, the letter instructed the School Management Board to:

1. Reinststate Mr. Tirivavi back to his work as the suspension was unlawful.
2. Give Mr. Tirivavi all his salary and benefits from the date of suspension.

The Reformed Church in Zimbabwe’s Daisyfield Trust regrets that to this day, the Headmaster has not been given his dues and his office is still locked and blocked, thereby hindering the smooth running of the school. It would seem from the occurrences pertaining to various issues at the school that the school management board is not willing to cooperate or work with the trustees.

Therefore the board of trustees has been left with no option but to dissolve you as the school management board. This means your membership to this board ceases forthwith. However, you are notified that if you are still interested to be part of the new board to be set up, you should submit your application to the board of trustees by the end of the day of Monday 15 July 2013”.

It is not clear on the papers as to whether or not the letter was brought to the attention of the appellants but it is not disputed that the appellants at some stage thereafter

came to know of the fact that an Interim Board of Governors had been appointed by the trustees. Thereafter a situation then allegedly pertained where instructions were being given to the administrative staff by both boards of governors and the headmaster was taking instructions from the “Board of Trustees” and not from the appellants. The third respondent Naison Tirivavi is the headmaster.

THE APPLICATION

The appellants averred that the urgent problem and reason for the application is that:

“The new trustees are running havoc and disrupting the management of the school. Unfortunately, they are also abusing school funds and resources for personal gain. Until recently the reasons for the conduct of the RCZ and its appointed trustees, whilst still disruptive, were not clear. Sadly it is now the clearer and urgent that the reason for this conduct is *inter alia* to take control of finances unlawfully and to plunder them.”

They averred that the trustees had lifted the suspension of the headmaster on charges of misconduct while the charges against him were still pending and attached vouchers to show that within one month, that is to say, during the period 19 June, 2013 to 19 July 2013, the first to third respondents had looted some \$80 000 from the school coffers for their own gain and without the knowledge of the appellants.

They claimed that it had never been the practice for trustees to draw money from the school as evidenced by the fact that one Mr Van Vuuren the former trustee of the Trust under the management of the Dutch Reformed Church had never drawn or demanded money from the school throughout his term of office. The role of the Trust, they stated, was to bring help whether monetary or otherwise to the school and not to plunder its resources. They had grave concerns that the respondents were trying to access the bank accounts which

have always fallen under ‘the guardianship of the Board and the School Development Committees’. They alleged that they wrote to the Trustees advising them that their attempt to dissolve the Board was void. However, that letter does not form part of the record and details of the date or contents thereof cannot be ascertained. They alleged, further, that the interim board had taken control of the finances of the school and were making payments to the Trustees, for their services, in a manner which caused alarm to the appellants. They attached to their papers a number of vouchers which they say caused them to fear that the funds of the school were being mismanaged to the personal benefit of the Trustees. For the above reasons they felt the need for an interdict to be granted as a matter of urgency.

The application was opposed by the respondents who contended that the matter was not urgent. The Board, they said, had been dissolved on 12 July 2013 and the appellants knew, as at that date, that an interim board had taken over the management of the school. It follows that the new administration would have access to the school’s bank accounts and finances. Accordingly, the appellants had not made out a case for the matter to be given preference on the court roll by being accorded an urgent hearing. In the respondents’ opinion the matter ought to have been referred to the ordinary roll. In any event, the appellants had no *locus standi* to make the application since they had not shown that they represented the Board. No resolutions or other forms of authority were produced to the court which would satisfy it of the *locus standi* of the appellants to bring this application.

THE ISSUES

At the hearing, a number of preliminary points were raised. The two which formed the basis of the decision were that the matter was not urgent; and that the appellants had no *locus standi* to make the application.

URGENCY

The appellants claimed that it was their discovery that money was being fleeced out of the school's finances which gave rise to the urgency and not the fact that the Trustees had authorised other persons to run the school. In particular, they claimed that what triggered the application was their discovery, on the 15th August 2013, of a number of vouchers which indicated that the school's finances were being misappropriated by the respondents. These vouchers date from 19 June 2013 to 19 July 2013.

The learned Judge was of the view that the urgency was created by the appellants since the chaos which existed at the school predated the alleged misappropriation of funds and the appellants ought to have known that the new Board would seek access to the finances and bank accounts of the school.

Indeed, the appellants were quite vague on the reasons for the urgent application. They do not give the date when the problems began to surface with the Trustees. They mention that the Trustees had reinstated the headmaster whom they had suspended even while the suspension order was extant. Their allegations boiled down to the fact that the Trustees were interfering with their management of the school yet they are silent on the dates of occurrences of these problems. It appears from the respondents' opposing papers that the headmaster was allegedly reinstated sometime in June 2010. In short, the appellants failed to provide in their affidavits sufficient detail from which the learned Judge could form the opinion that the matter merited an urgent hearing. We do not find any impropriety in the learned Judge's exercise of his discretion in this regard.

However, having concluded the matter was not urgent, the proper course would have been to remove the matter from the roll of urgent matters to allow the appellants, if so minded, to place the matter before the High court on the ordinary roll for determination. The order of dismissal was improper in the circumstances.

The main question faced by a Judge presented with an ‘urgent application’ is to decide whether or not to give priority to the application by dealing with it on an urgent basis. In arriving at a decision on this issue he or she is called upon to exercise discretion. Such discretion must be exercised judicially taking into account the factors urged in favour of, and against, an urgent hearing.

If, on perusal of the papers, the Judge comes to the conclusion that the matter is urgent enough to merit an urgent hearing, then he or she conducts a hearing and gives such order as he thinks fit. But if the conclusion is reached, however, that the matter is not urgent, he or she must refuse to hear the application and remove it from the roll, in which event the applicant has the option of enrolling his matter for hearing on the ordinary roll of court applications.

It is a contradiction in terms to dismiss a matter on the twin bases that it is not urgent and that the applicant has no *locus standi* for the latter basis indicates that a decision on the merits of the application has been made in which event the applicant is barred from placing the matter on the ordinary roll for determination. The effect of the dismissal on the latter basis is that the applicant is put out of court and is deprived of his right to have the matter properly ventilated in a court application or trial. Where, however, the matter is struck

off the roll for lack of urgency, the applicant, if so advised, may place the matter on the ordinary roll for hearing.

The learned Judge, in giving his reasons for finding that the matter was not urgent, made certain findings of fact which involved the merits. For example, he found that the appellants' Board was dissolved on July 12, a fact of which the appellants claim they were unaware, and that the appellants had not established *locus standi* to act for the Board or to seek the remedy sought in the draft provisional order. Those issues went to the heart of the matter. In proceeding to determine them and to make those findings of fact, the court misdirected itself.

LOCUS STANDI

The issue of *locus standi* raises a dispute of fact which is capable of resolution by the production of further evidence by the parties, if so minded. It falls to be resolved upon consideration of the merits after all the evidence which the appellant is entitled, and wishes, to produce has been placed on record. The insufficiency of evidence contained in the founding affidavit is not in itself fatal to the establishment of *locus standi* since that deficiency can, in given circumstances, be remedied by further evidence. Because of the confused manner in which this application was dealt with by the court *a quo*, the appellant was deprived of an opportunity to adduce, if it so wished, evidence which would establish its *locus standi* to bring the application.

RELIEF SOUGHT

It was submitted by Mr *Mpofu* that if the appeal found favour with this Court then it should grant the provisional order sought as a remittal would cause hardship to both parties.

As stated above, we are not persuaded to interfere with the trial court's finding on urgency and the issue of *locus standi* has not been resolved on the papers. This Court is always reluctant to decide matters at first and last instance although it is quite possible that it may do so in exceptional circumstances. This is because it is preferable to have the benefit of the reasoning of the lower court and that way an appellant is not deprived of his right to appeal and, in the exercise of this right, to place before this Court for consideration, a different view from that of the court *a quo*. We do not, in the circumstances, consider this to be a case where this court can make the final decision at first and last instance.

COSTS

The appeal has partially succeeded in that this Court has found that the order dismissing the application was improper. The appellants are therefore entitled to their costs of this appeal.

Accordingly it is ordered as follows:

1. The appeal succeeds in part.
2. The judgment of the court *a quo* is altered to read as follows:

“The matter is not urgent. It is removed from the roll.
The applicants shall pay the costs of this application”
3. The respondents shall pay the costs of the appeal

GARWE JA: I agree

HLATSHWAYO JA: I agree

Dube, Manikai & Hwacha, appellant's legal practitioners

Sarotoga Makausi Law Chambers, first and second Respondent's legal practitioners

Kantor and Immerman, third Respondent's legal practitioners