WILLARD KANYASA
versus
PETERHOUSE BOYS HIGH SCHOOL
and
GEORGE TIMOTHY MAKINGS

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 22 July & 17 August 2022

Urgent Chamber Application

TG Mboko, for the applicant
T Nyamasoka, for the respondent

MAXWELL J:

DECISION

Applicant is the biological father of a minor child who is a lower sixth student at first respondent. First respondent is a private school which belongs to an association known as the Association of Trust Schools. The second respondent was appointed to preside over a disciplinary hearing for the applicant's minor son.

Applicant alleges that during the first week of June 2022, he and his wife were called by the school rector who advised them that their son had been expelled after an altercation with the House Master. They pleaded with the authorities to reconsider the position taken to no avail. However after pointing out that no disciplinary hearing had been held and therefore the expulsion was illegal, null and void, they were allowed to leave their son behind.

On 14 June 2022 they were called for a hearing before the school lawyer. They objected to the hearing as it was unprocedural and the hearing was adjourned. On 28 June 2022 they were again called for a hearing before second respondent. After seeking legal advise, their lawyers wrote to the rector pointing out that there is no procedure in the Disciplinary Code that allows for an independent chairperson. Applicant stated that in terms of the Disciplinary Code, a disciplinary hearing can only be conducted where expulsion is anticipated. He further stated that the school

responded to the letter from his legal practitioners on 30 June 2022 stating that the hearing proceeded and a verdict is pending.

On 5 July 2022 applicant filed the present application on an urgent basis seeking an interim order couched in the following terms:

> **"TERMS OF THE FINAL ORDER SOUGHT**
> That you show cause to this Honourable Court why a Final Order should not be made in the following terms:
> (1) The Disciplinary Hearing conducted by the 2nd Respondent in respect of Tatenda Kanyasa be and is hereby declared null and void.
> (2) The 1st Respondent be and is hereby ordered and interdicted from harassing, barring the student, Tatenda Kanyasa from attending to both academic and extra curriculum activities.
> (3) The 1st Respondent be and is hereby ordered to pay costs on an ordinary scale."
>
> **INTERIM RELIEF GRANTED**
> Pending the final determination of this application, the applicant is granted the following relief:
> (1) The respondent be and is hereby interdicted from expelling the minor child, namely Tatenda Kanyasa pending the determination of the court.
> (2) |Respondents be and are hereby ordered to pay costs on an ordinary scale."

The Urgent Chamber Application was set down for 12 July 2022. The parties appeared for the hearing and requested for time to discuss with a view to settle out of court. The matter was deferred to 22 July 2022. As a sign that the discussions were not fruitful, a notice of opposition was filed by the first respondent. The opposing affidavit was deposed to by the rector. He raised three points *in limine* which are considered below.

(1) **<u>That the matter is not urgent</u>**

He argued that applicant and the minor child were invited to a formal hearing on 4 June 2022 through a letter dated 9 June 2022. The notice advised them that an independent chairman will chair the hearing. He argued that if applicant had reservations about the appointment of an independent chairperson, this was the time to act, but he did not. The rector stated that applicant attended the hearing of 14 June 2022, presented his objections to the second respondent and walked out before any deliberations could be made.

On 28 June 2022 applicant brought a letter from his legal practitioners demanding that the hearing should not proceed until the issues raised in the letter are attended to. He walked away before the hearing started despite advice that he should attend it. The disciplinary hearing proceeded and applicant was notified of that fact by letter dated 30 June 2022. The rector stated that applicant did not approach the court for redress by 30 June 2022.

Mr *Nyamasoka* submitted that applicant did not treat the matter as urgent but simply took a position to frustrate the disciplinary process and therefore does not deserve to jump the queue.

Mr *Mboko* submitted that the need to act arose on 30 June 2022 when the rector informed applicant that despite the objection made the disciplinary process would proceed. In actual fact, Mr *Mboko* was wrong to say on 30 June 2022 applicant was advised that the disciplinary process would proceed. The letter of 30 June 2022 notified the applicant that the disciplinary process had proceeded.

In my view the need to act arose on receiving the letter of 30 June 2022. Respondent seeks to argue that notice of the hearing warned that the hearing would proceed even if the applicant and minor child did not attend. Counsel for applicant indicated that applicant's failure to attend was due to a belief that domestic remedies would be pursued after delivering the letter from his legal practitioners.

In the circumstances of this case, I am persuaded that the need to act arose on receipt of the letter of 30 June 2022. Second respondent had been notified that applicant had sought legal representation. The legal practitioners had raised an objection to the hearing. Previously an objection had been raised and the hearing was adjourned. In my view there was need to advise applicant's legal practitioners that the hearing would proceed despite their objections. In para 6 of the opposing affidavit, the following statement appears:

> "Applicant did not approach this Honourable Court for redress even by the 30th of June 2022 when I advised applicant that the hearing will proceed per Annexure "F" attached to the application." (underlining for emphasis)

Annexure "F" did not advise applicant that the hearing "will proceed." It would have been a different situation if it did so as that would mean that the advice was being given before the hearing proceeded. Annexure "F" clearly advised applicant that the hearing proceeded. Applicant was therefore being advised after the fact. For that reason, applicant acted with urgency after being notified that his objection had been disregarded and the hearing proceeded.

The first point *in limine* has no merit and is therefore dismissed.

(2) **That applicant waived his rights to challenge the disciplinary process and outcome by walking out of the two sittings**

The rector submitted that applicant by his own making elected to relinquish the opportunity to controvert any evidence he may have been led to challenge in that regard. In his view applicant

does not have audience to appear before this Honourable Court and is therefore non-suited. Mr *Nyamasoka* referred to the case of *Bere* v *JSC & Ors* SC 366/20 and that of *Chitzanga* v *Chairman Public Service Commission & Anor* 2000 ZLR 201 and prayed that the matter be struck off the roll.

In response Mr *Mboko* indicated that applicant and his wife were invited as observers therefore their presence or absence would not change anything. He pointed out that the observer status was contrary to the provisions of the disciplinary code.

Mr *Mboko*'s submission that the observer status is contrary to the provisions of the code of conduct is borne out by the record. On p 23 of the record the sequence of the disciplinary hearing includes:

> "iii. The pupil's parents will be asked to submit any relevant information pertinent to the case.
> ……
> v. The pupil, his/her parents …….will be asked to present any mitigating evidence."

I understand that to mean that the parents are supposed to be active participants in the proceedings. They were not invited to be active participants but observers. They therefore could not have waived rights which had not been afforded to them.

In *Barclays Bank of Zimbabwe Limited* v *Binga Products (Pvt) Ltd* 1984 (1) ZLR 76 it is stated that:

> "In the case of waiver, the onus is strictly on the party claiming that waiver has taken place. He must show that the other party, with full knowledge of his right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention of enforcing it."

I find that *in casu* the parents had not been invited to participate in the proceedings but to merely observe, therefore they cannot be said to have waived the right to challenge the proceedings. Their status as observers distinguishes them form the applicants in the *Bere* case (supra) and the *Chitzanga* case (supra). In the *Barclays Bank of Zimbabwe Ltd* Case (supra) reference is made to the case of *WJ Alan & Co. Ltd* v *El Narr Export & Import Co.* (1972) 2 ALL ER 127 (CA) in which LORD DENNING MR stated:

> "The principle of waiver is simply this: if one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so. See *Plasticmoda Society Per Azioni* v *Davidson (Manchester) Ltd* (1952) 1 Lloyd's Rep 527……."

In *casu* first respondent had not proceeded with the hearing after the objection of 14 June 2022 by the applicant. By 28 June 2022 applicant had engaged legal practitioners who again raised an objection. One would have expected first respondent to have engaged the legal practitioners to indicate that the prior conduct of not proceeding after an objection would not follow. The first respondent proceeded without notice to the applicant or his legal practitioners, in circumstances where the legal practitioners were not advised that their letter would be disregarded.

I therefore find no merit in the second preliminary point raised.

(3) **That the application was prematurely filed**

The rector stated that the second respondent is yet to issue his recommendations upon which he will pronounce his final decision. As the disciplinary process is not yet complete it is not yet ripe for any challenge. In his view applicant is attempting to pre-empt the process and frustrate proceedings. He submitted that applicant had not exhausted domestic remedies. Mr *Nyamasoka* submitted that no exceptional circumstances exist to warrant the court to interfere in unterminated proceedings. He referred to *Bvunzawabaya* v *Commissioner of Police* 2008 (1) ZLR 108 and *Chikusvu* v *Magistrate Mahwe* HH 100/15.

In response Mr *Mboko* stated that a diligent litigant does not wait for the pronouncement of the verdict in an unprocedural hearing. He referred to the case of *Zvandasara* v *ZRP High School & Anor* HH 63/17.

One of the requirements for securing an interdict is the existence of prejudice or injury committed or reasonably apprehended. The letter of 30 June 2022 notified the applicant that the Disciplinary Hearing proceeded and the chairman will provide the judgement in due course. The interim relief sought is that the first respondent be interdicted from expelling the minor child pending the determination of the court. The question that begs for an answer is whether or not it was reasonable for applicant to apprehend the expulsion of the minor child. The answer is in the code of conduct. On p 22 of the record, under formal disciplinary meeting, it is stated:

> "A formal disciplinary meeting will take place if there is a reasonable likelihood that the pupil concerned may be excluded/expelled from Peterhouse." (underlining for emphasis)

I am persuaded that there is reasonable apprehension that the minor child may be expelled from first respondent. I therefore find the application to be properly before the court.

The points *in limine* have no merit and are dismissed.

MERITS

On the merits, Mr *Mboko* submitted that the application meets the four requirements for the granting of an interdict. The requirements are:

- a *prima facie* right
- prejudice/injury committed or reasonably apprehended,
- no other remedy, and
- balance of convenience.

See *Tribac (Pvt) Ltd* v *Tobacco Marketing Board* 1996 (2) ZLR 52. He submitted that the *prima facie* rights are the right to education enshrined in s 81 of the constitution of Zimbabwe, the right to administrative justice enshrined in s 68 and the right to a fair hearing enshrined in s 69 of the same constitution. He further submitted that there is prejudice in that there have been persistent flouting of the procedure provided in the code of conduct. He highlighted that the minor child is already being excluded from attending school activities. He further remedy and the balance of convenience favours the granting of the relief sought

In response Mr *Nyamasoka* gave the background of the matter and stated that applicant appreciated that his decision to relocate to Zimbabwe was being rebelled against by the minor child and that the rebellion was in the form of disregarding authority and not complying with the expectations of first respondent. He justified the non-compliance with the code of conduct on the basis that it was in the interest of justice. He submitted that other remedies exist in the Education Act [*Chapter 25:04*]. He also submitted that the relief sought is incompetent as it seeks to give the applicant or the minor child an unfair advantage that excluded the administrative process.

First respondent does not dispute that the code of conduct does not provide for the appointment of an independent chairperson. Mr *Nyamasoka* sought to justify an independent person had to be appointed. There is therefore *prima facie* non-compliance with the code of conduct giving applicant a basis for impugning the disciplinary proceedings. That a formal disciplinary hearing was carried out confirms the possibility of the minor child's expulsion from first respondent if regard is had to the code of conduct. In *Webster* v *Mitchell* 1948(1) SA 1186, a *prima facie* right is proved where the facts as set out by the applicant are taken together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether having

regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. It is further stated, in that case.

> "If serious doubt is thrown on the case of the applicant, he could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to "some doubt." But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief." (underlining for emphasis)

Mr *Mboko* submitted that the first respondent would not be prejudiced if the relief being sought is granted. He referred to the fact that only two weeks of class is left in this term. Mr *Nyamasoka*'s response was to point out the effect of the order on the rest of the rest of the pupils at the school.

I am persuaded that in the circumstances of his case, interim relief is warranted.

Applicant sought costs on an attorney and client scale. I am not persuaded that they are warranted in this case. The draft order will therefore be amended to reflect costs on an ordinary scale.

Consequently, the application is allowed and the interim relief is granted with an amendment on the costs to be on an ordinary scale.

Mboko T.G Legal Practitioners, applicant's legal practitioners
Atherstone & Cook, first respondent's legal practitioners