RAY MUZENDA

and

RANGANAI MUPAKATI

and

DAVID CHIMBWANDA

vs

CHISEKO SIMANGO

and

NATIONAL ASSOCIATION FOR SCHOOLS DEVELOPMENT
ASSOCIATIONS AND COMMITTEES (NASDAC)

and

AFRICAN BANKING CORPORATION OF ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 1 AUGUST 2018 AND 1 FEBRUARY 2019

Urgent Chamber Application

J. Kadoko for applicant
E.T. Muhlekiwa for 1st and 2nd respondents
L. Manyika for 3rd respondent

MAWADZE J: I reluctantly acceded to the request to provide written reasons for the order I had granted in this matter on 1 August 2018 after hearing arguments from Counsel. The reason for these was two fold. Firstly, I had given detailed *ex tempore* reasons for the order granted and indicated that if full written reasons were required such a request should be made timeously. The request was only made some three months later on 17 November 2018. Secondly, the request was being made by the respondents in whose favour I had made the order. It was not apparent to me why a successful party would require full reasons for an order in their favour, moreso, when they acknowledge that detailed *ex tempore* reasons were given. Further the delay of three months was never explained. Be that as it may, I now provide the full written reasons as follows;

The 1st applicant claims to be the President of the 2nd Respondent known as National Association for Schools Development Associations and Committees (NASDAC). The 2nd applicant is the Organising Secretary of the said NASDAC the 2nd respondent. The position of the third applicant is not clearly articulated but presumably he is an employee of Hartzel High School, which school had a labour related dispute with its employees. Apparently, this dispute was resolved and Hartzel High School agreed to pay certain amounts of money to its employees through the 2nd respondent NASDAC. The 2nd respondent is an umbrella organisation of various school development associations and Committees in Zimbabwe. It has a bank account with the 3rd respondent, African Banking Corporation Zimbabwe Limited (ABC). The 1st and 2nd applicants were signatories to that bank account.

The 1st respondent is the Secretary General of the NASDAC, the 2nd respondent.

A power struggle has erupted amongst the members of the 2nd respondent (NASDAC) which includes its executive members being 1st applicant, 2nd applicant and 1st respondent. This dispute is now subject of litigation before this court in Case Number HC 313/18 in which 1st and 2nd applicants seek a declaratory order nullifying their suspension from NASDAC.

On 1 August 2018 after hearing submissions in this urgent chamber application from Counsel, I deemed this matter not to be urgent and removed it from the roll of urgent matters. I further ordered the applicants to pay the costs.

The facts which apparently led to the urgent chamber application are as follows;

On 28 June 2018, the 1st respondent called for a meeting of the NASDAC wherein certain allegations of financial impropriety were levelled against the 1st and 2nd applicants in how they handled the funds held in an account by the bank being the 3rd respondent. At that meeting certain resolutions were passed which included *inter alia* the suspension of the 1st and 2nd respondents from being signatories to the NASDAC account held by the 3rd respondent (ABC bank). The 1st and 2nd applicants are apparently challenging the legality of that meeting and consequently the resolutions passed at that meeting before this court in HC 313/18.

Meanwhile one of the resolutions suspending the 1st and 2nd applicants as signatories to the NASDAC account held with ABC bank was transmitted to the bank. The bank was asked to place a caveat of "no debit" on that account to allow a proper auditing of financial affairs of

the NASDAC. In essence, the 1st and 2nd applicants can not therefore access the funds held in that account as they have been suspended as signatories to that account and a "no debit" caveat placed on that account. This is what has prompted the 1st and 2nd applicants to approach this court through the urgent chamber book seeking an order for the upliftment of their suspension as signatories to that account and of the "no debit" caveat.

The basis advanced by the 1st and 2nd applicants for the interim relief sought is that the resolution barring them to access the said funds was improperly made. Further, they argue that the money held in that account which is now beyond their reach belong to 3rd parties like the 3rd applicant and other workers who are to be paid who include Hartzel High School workers who had won an out of court settlement with the school amounting to $11 047.30. As already said the interest of the 3rd applicant in this urgent chamber application is not clear and was never articulated. Probably the 3rd applicant was simply joined to sanitise issues raised by 1st and 2nd applicants.

The 1st respondent and 2nd respondent opposed this application and took a number of points in *limine.* The 3rd respondent being the Bank indicated that they have no interest in the matter and are prepared to abide by whatever decision is made by the court.

Before the hearing I attempted to nudge the parties to find a way to ensure that the ordinary workers of the NASDAC and other 3rd parties are not prejudiced by the raging dispute involving the applicants and the other members of NASDAC executive members. The parties initially agreed to find a win win solution but later indicated that they were poles apart hence I proceeded to hear the matter the same day.

I need not be detained by all the points is in *limine* taken by the 1st and 2nd respondents in this matter. Suffice to mention that there is merit in the point in *limine* taken in respect of the defective nature of the certificate of urgency. I am not sure why legal practitioners continue to flout the rules of this court in relation to certificates of urgency. R 244 of the High Court Rules 1971 deals with urgent chamber applications. The requirement for a certificate of urgency is provided for under R 242 (2) (b) of the said rules. The question of what constitutes a proper certificate of urgency has been dealt with by this court in a plethora of cases. See *General Transport and Engineering (Pvt) Ltd* vs *Zimbabwe Banking Corporation Ltd 1998* (2) ZLR 301 (H). What is disheartening however is that many legal practitioners still do not apply their

minds to what constitutes a proper certificate of urgency. *In casu* the certificate of urgency is not only badly drafted but it falls far short of disclosing the basic reasons why this matter should be heard on an urgent basis. I pointed this out to counsel for the applicants. Nonetheless I invoked Rule 4C of the High Court Rules 1971 in order to deal with the broader issues in this matter.

What I failed to understand in this matter is the alleged urgency. To compound matters, the interest of the first and second applicants in the relief sought is not apparent from the papers. Why do they want to access the funds urgently and what is the prejudice 1st and 2nd applicants are personally suffering? Even *Mr. Kadoko* for the applicants was hamstrung to explain this simple issue. As regards the third applicant, other than that he is simply joined as a party to these proceedings his interest in the relief sought is not articulated in the papers at all. In short, all the applicants as per the papers filed, could not explain the urgency in this matter, let alone the prejudice they would suffer. Such an omission can not be condoned by invoking Rule 4C of the High Court Rules 1971 as it goes to the nub of what constitutes urgency.

The *locus classicus* of *Kuvarega* vs *Registrar General & Anor 1998* (1) ZLR 188 at 193 (H) deals with what constitutes urgency in matters of this nature. See also *Document Support Centre Ltd* vs *Mapuvire 2006* (2) ZLR 240 at 243 C – D; *Gifford* vs *Muzire & Ors 2007* (2) ZLR 131 (H); *Bonface Denenga & Anor* vs *Ecobank (Pvt) Ltd & 2 Ors* HH 177/14.

A party who seeks to jump the queue, as it were, should be able to clearly explain why he or she should be accorded such special attention by this court. This is clearly lacking in this matter. The applicants have not shown how the relief sought would be rendered nugatory if they follow the normal procedure and time frames provided by the rules of this court in ordinary court applications. As already said, the 1st and 2nd applicants could not even specify what interest they have in accessing this account on an urgent basis. As for the 3rd applicant, it is not clear if he truly has no other remedy let alone how the uplifting of the no debit caveat personally affects him. Further the applicants have not even shown that they themselves treated this matter as urgent. As regards the relief sought, it is clear that the interests of the 1st and 2nd applicants are different from those of the third applicant. The third applicant probably wants an unspecified amount of money which may be held by the bank whereas the 1st and 2nd applicants do not explain why they need to access that account on an urgent basis. Needless to

also state that the *locus standi* of the 1st and 2nd applicants in this matter is questionable as they are apparently under suspension from their positions in the affairs of the 2nd respondent NASDAC.

I have no doubt therefore that this matter fails to meet the requirements of urgency contemplated by the rules of this court. This is precisely why I proceeded on 1 August 2018 to remove this matter from the roll of urgent matters and caused applicants to pay the costs.

Mwonzora and Associates, legal practitioners for the applicants.

Muhlekiwa Legal Practice, legal practitioners for 1st and 2nd respondents.

Dube – Banda Nzarayapenga, legal practitioners for the 3rd respondent.