TONDERAI DOMBO
versus
VICE CHANCELLOR, UNIVERSITY OF ZIMBABWE
and
UNIVERSITY OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 20 September 2017 & 27 September 2017

Urgent Chamber Application

Miss V Tavaziva & N Munetsi, for the applicant
J P Mutizwa & T L Mapuranga, for the respondents

MUREMBA J: This is an urgent chamber application for a *mandamus* which is being brought in terms of s 4 (2) (a) and (c) of the Administrative Justice Act [*Chapter 10:28*] and s 68 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

The applicant is a Zimbabwean citizen who completed a Bachelor of Arts Degree in June 2016 and passed with a 2:1 degree class at the University of Zimbabwe. In the same year of 2016 he did a special honours degree and again obtained a 2:1 degree class. He went on to apply for a Masters of Arts in War and Strategic Studies programme for the semester commencing August 2017, but the first respondent denied him admission to the university. The applicant avers that he had a legitimate expectation that he would be admitted to the university as he is qualified for the programme. In addition to that, he avers that it is his constitutional right to further his education and to pursue a career of his choice. He avers that the first respondent denied him admission without giving any reasons for such administrative conduct in breach of s 3 of the Administrative

Justice Act [*Chapter 10:28*] and s 68 of the Constitution. The applicant avers that the first respondent only proferred the reasons for the denial after the applicant had filed an urgent chamber application, which reasons are a breach of the elements of administrative justice namely lawfulness, rationality, fairness, consistency and good faith. He further avers that the first respondent's actions are a breach of the applicant's fundamental rights and freedoms enshrined in ss 51, 56, 64 and 75 of the Constitution. He wants the first respondent's administrative decision to be set aside. He also wants to be compensated for the breach of his fundamental rights in terms of s 85 of the Constitution as well as for the trauma and stress he suffered. The relief he seeks is as follows:

"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. That the interim relief granted be and is hereby confirmed.
2. That the first respondent's actions of rejecting the applicant's application for a Masters of Art in War and Strategic Studies at the University of Zimbabwe be and is hereby set aside.
3. That the first respondent's actions of rejecting the applicant's application for a Masters of Arts in War and Strategic Studies at the University of Zimbabwe is declared unlawful and contrary to s 3 of the Administrative Justice Act [*Chapter 10:28*] and s 68 of the Constitution of Zimbabwe.
4. That the respondents, jointly and severally, the one paying the other to be absolved pay US$20 000 being general damages as compensation for the pain and suffering inflicted upon the applicant as a result of the first respondent's unlawful administrative conduct.
5. That costs of suit on an attorney and client scale be paid by the respondents.

Terms of the Interim Order Granted

Pending determination of the final order, the applicant is granted the following relief:

1. That forthwith, the first and second respondents be and are hereby ordered to admit and register the applicant as a student in the Masters of Arts in War and Strategic Studies Programme at the University of Zimbabwe within two days of the granting of this order and, that the first and second respondents are barred and interdicted from doing anything that may prevent or frustrate the applicant's admission, failure of which, the Sheriff is

authorised to sign all such papers that may be deemed necessary to register the applicant as a student as aforementioned.

Service of the Order

1. The provisional order shall be served on the respondents by the applicant's legal practitioners or their employees.

In response, the respondents filed a notice of opposition and an opposing affidavit raising a number of points *in limine* which are as follows.

(i) The matter is not urgent.

(ii) The applicant must exhaust internal remedies.

(iii) The matter is not a *mandamus* but it should be an application for a review. However, during the hearing the respondents abandoned this point in limine.

(iv) The interim relief is substantially the same as the final relief.

(v) There has been a misjoinder of the first respondent.

The matter is not urgent

The respondents averred that firstly, studies commenced on 21 August 2017 yet this application was only filed on 18 September 2017, almost a month has gone by since the commencement of the programme for which he seeks to be admitted. The matter is no longer urgent. Secondly, the respondents averred that the certificate of urgency accompanying this application seems to be a supporting document on the merits of the matter rather than a dispassionate view on the urgency of the matter. It talks about the injustices the applicant is facing, but has not dealt with the reasons why the legal practitioner executing it believes that the matter is urgent.

In response the applicant averred that the first semester for the programme commenced on 21 August 2017 and it is on that date that he was advised by the admissions office that his application was rejected by the first respondent. On 23 August 2017 he wrote a letter to the first respondent requesting for the reasons why his application was refused. On 8 September 2017 he then filed an urgent chamber application similar to the present one. It was heard in this court on 12 September 2017 under HC 8275/17 by CHITAPI J. The applicant averred that CHITAPI J took note of a preliminary point which was to the effect that the applicant ought to have brought the matter as a review application in terms of order 33 r 256 of the High Court Rules, 1971 and insisted

on this point to the extent that his (applicant's) legal practitioners withdrew the application in order to take stock of the judge's comments. The applicant's legal practitioners, who believed that the application they had made for a *mandamus* was correct, then went on to file the present application on 18 September 2017. The applicant averred that he will suffer irreparable harm if the matter is not heard on an urgent basis in that his life and studies are put on hold in that he cannot plan and work on anything else which requires a Masters' degree and he cannot apply for doctorate studies next year in 2018 which is the period he has chosen.

The applicant averred that there is no satisfactory alternative remedy for him because this is the only means by which the first respondent's unlawful actions can be reversed and his fundamental rights can be protected. The applicant averred that the first respondent should be ordered to admit and register him for the Masters programme forthwith so that he does not continue to suffer irreparable harm and lose out on important lectures whilst the first respondent continues to breach his fundamental rights.

A matter is urgent if it cannot wait to be resolved through a court application and if there is a risk of irreparable harm to the applicant if it is not determined urgently. See *Mutarisi* v *United Family Intl Church & Anor* 2012 (2) ZLR 434 (H). For an urgent chamber application in which the applicant is legally represented, a certificate of urgency is the *sine qua non* for its placement before a judge. In determining whether or not the matter is urgent the judge is guided by the legal practitioner's statements in the certificate as to the urgency of the matter. See *Chidawu & Ors v Shah & Ors* 2013 (1) ZLR 260 (SC). In the certificate of urgency, the legal practitioner must state his own personal belief in the urgency of the matter upon applying his mind to the facts and circumstances of the matter. See *KHB Ests (Pvt) Ltd & Anor* v *Pambukani & Anor* 2011 (2) ZLR 223 (H). The legal practitioner must explain why he believes that the situation is urgent. Where there has been a delay in bringing the application to court, the certificate of urgency or the founding affidavit must explain the delay. Law not being an exact science, whatever the length of the delay, if a reasonable or credible explanation is given, the delay should not detract from or defeat the urgency of the matter. See *Trustco Mobile (Pty) Ltd and Anor* v *Econet Wireless (Pvt) Ltd & Anor* 2011 (2) ZLR 258.

In *casu* as was correctly submitted by the respondents' counsel, Mr. *Mutizwa* the certificate of urgency accompanying the application is very inadequate for the legal practitioner who executed

it did not give reasons why he believes that the matter is urgent. Instead, it only chronicles the injustices the applicant is facing at the hands of the first respondent which information alone does not assist the court in making a determination on whether or not the matter is urgent. Moreover, there was a delay of almost a month in filing the present application. Before that a similar application had been made and filed on 8 September 2017 after the applicant had learnt of the rejection of his application on 21 August 2017. The application was made 2 weeks later. No explanation was given either in the certificate of urgency or in the founding affidavit for that delay except it being explained that the applicant had written a letter to the first respondent requesting for the reasons why his application was refused on 23 August 2017. It was not explained what was happening between 23 August 2017 and 8 September 2017 which caused the delay of 2 weeks in filing the application. Furthermore, it was not explained why if the matter was urgent, the applicant's legal representatives chose to withdraw it before CHITAPI J. That the judge was of the view that the matter should have been brought as a review application did not call for the applicant's lawyers to withdraw the matter and to relaunch the same application 6 days later. Disagreeing with the judge's sentiments during a hearing should not make a party withdraw their case if they believe in it, more so if they consider the matter to be urgent. A party is entitled to insist with their argument and ask for a judgment in the matter. Should the party not be happy with the judgment, they can take it up on appeal.

Withdrawing a matter which had initially been delayed in being brought to court and bringing it back a week later with no explanation whatsoever for that further delay in bringing back the matter like what happened in the present case defeats the urgency of the matter. Neither the certificate of urgency nor the founding affidavit explain why there was a further delay of 6 days in refiling the application after it had been withdrawn. This conduct by the applicant shows that the applicant himself did not treat the matter as urgent. There is therefore no reason for the court to treat it as an urgent matter. Besides, the applicant did not successfully show that if the matter is not heard on an urgent basis he will suffer irreparable harm. That the applicant's life and studies have been put on hold, that he cannot plan on anything else and that he will not be able to apply for doctorate studies next year as he had projected does not constitute irreparable harm. An inconvenience yes it is, but certainly not irreparable harm because he can always do his masters in future. I thus uphold the point *in limine* that the matter is not urgent.

The applicant must exhaust internal remedies

The respondents averred that the refusal of the applicant's application for admission at the university by the first respondent is not final for it is subject to ratification by the Council of the second respondent which is yet to meet on 28 September 2017 as provided for in terms of s 8 (5) of the University of Zimbabwe Act [*Chapter 25:16*]. The respondents averred that therefore this application has been made prematurely. They contended that the applicant was even advised of this position in the respondents' opposing papers in HC 8375/17 which was withdrawn. In response Ms. *Tavaziva* for the applicant submitted that s 8 (5) of the University of Zimbabwe Act does not provide a remedy to the applicant for it does not provide that he can approach the Council and force it to set aside the decision of the first respondent.

Section 8 (3) (b) of the University of Zimbabwe Act reads

> "(3) Subject to subsections (4) and (5), the Vice-Chancellor may—
> (*a*) ……
> (*b*) subject to section *five*, prohibit the admission of a student or any person to the University;……."

Section 8 (5) goes on to read

> "(5) Any action taken by the Vice-Chancellor in terms of subsection (3) shall be subject to ratification by the Council."

It is clear from these provisions that the first respondent's decision not to admit the applicant to the University is not final. It is subject to approval or confirmation or validation by the Council. The Council is said to be meeting on 28 September 2017. Where domestic or internal remedies are capable of providing effective redress in respect of a complaint, a litigant should exhaust the domestic remedies first before approaching the courts unless there are good grounds for not doing so. See *Mhanyami Fishing & Tpt Co-op SOC Ltd & Ors* v *Dir-Gen Parks & Wildlife Mgmt Authority & Ors* 2011 (1) ZLR 555 (H). *In casu* the applicant did not show that they were good grounds for him not to await the convening of the Council on 28 September 2017 before approaching this court. Miss *Tavaziva*'s submission that s 8 (5) does not provide that the applicant can approach the Council and force it to set aside the first respondent's decision does not make much sense. The Act does not have to authorise the applicant to approach the Council and force it to set aside the decision of the first respondent. Section 8 (5) shows that when the Council meets it automatically considers each and every application which was turned down or refused by the

first respondent before ratifying it. The provision states that *any action* by the first respondent *shall* be subject to *ratification* by the Council. This means that the Council is obliged to consider all applications which were refused by the first respondent and decide whether or not to uphold the first respondent's decision. It is therefore not necessary for any of the applicants who were turned down to approach the Council and ask it to set aside the decision of the first respondent. From the way the provision is worded it appears that the Council is capable of providing effective redress to the applicant's complaint. For this reason, this court will withhold exercising its jurisdiction in the matter until internal or domestic remedies are exhausted by the applicant. I thus uphold the point *in limine* on internal remedies.

Conclusion

The issues of lack of urgency and the availability of internal remedies call for the removal of the matter from the roll of urgent matters. As such I shall not labour myself with the remainder of the points *in limine*.

Costs

I will grant costs against the applicant on a higher scale as prayed for by the respondents because after having been advised of the existence of internal remedies at the time the matter was initially heard before the withdrawal and after having been advised that the second respondent's council was going to meet on 28 September 2017, there was no need for the applicant to continue to pursue this application. He should have simply waited for the Council to convene on 28 September 2017 before approaching this court once again.

In the result, it be and is hereby ordered that:-

1) The matter is struck off the roll.
2) The applicant pays costs on the legal practitioner and client scale to the respondents.

Tendai Biti Law, applicant's legal practitioners
Chihambakwe, Mutizwa and partners, respondents' legal practitioners