

AMALGAMATED RURAL TEACHERS UNION OF ZIMBABWE[2]  
and  
OBERT MASARAURE  
versus  
ZIMBABWE AFRICAN NATIONAL UNION [PATRIOTIC FRONT]  
and  
MINISTER OF PRIMARY AND SECONDARY EDUCATION

HIGH COURT OF ZIMBABWE  
MAFUSIRE J  
HARARE, 16 & 17 July 2018

**Urgent chamber application – leave to execute**

Mrs *B. Mtetwa*, for the applicants  
Mr *N. Mushangwe*, for the first respondent  
Mr *T. Undenge*, for the second respondent

MAFUSIRE J

[1] This is an application for leave to execute pending appeal. On 28 July 2018 I granted an interim interdict in the following terms:

“Pending the final determination of this present case and/or the conclusion of the 2018 election cycle, including any run-off election, whichever comes first, it is hereby ordered:

- The first respondent is interdicted and restrained from asking, encouraging or forcing children at schools to attend or to participate in political rallies or activities or causing the closure of schools for any of its political rallies or activities.
- The first respondent is interdicted and restrained from compelling teachers to attend political rallies, wear party regalia, prepare performances for children to deliver at rallies or make contributions towards rallies whether in cash or kind.
- The first respondent is interdicted and restrained from using school property including school premises, buses, furniture, classrooms or any other property that belongs to the school, the Government or School Development Associations for any political rally or any other political purpose.
- The second respondent and/or any employees of his Ministry are interdicted and restrained from assisting the first respondent to do any of the restrained activities above or allowing the first respondent to use schools for political purposes.”

[2] The first respondent is the ruling party in Zimbabwe. The second respondent is a minister of government in charge of primary and secondary education. He is a

member of the first respondent. The first applicant is a trade union of primary and secondary school teachers in rural Zimbabwe. The second applicant is a teacher. He is the current president of the first applicant.

[3] The first respondent appealed against the interdict in its entirety. It is pending that appeal that the applicants have sought leave to execute. Just as in the original application, the second respondent does not oppose the application and he seeks to abide by the decision of the court. On the other hand, the first respondent does oppose it vigorously.

[4] An application for leave to execute is available because by operation of the law, an appeal automatically suspends the decision appealed against and so it cannot be carried into execution. But if despite the appeal the successful party wants to execute the judgment in the interim, he has to seek the leave of the court that granted the judgment.

[5] The application is premised on the principle that the court has an inherent power to control its own process. The overriding principle is the need to achieve real and substantial justice: see *Santam Insurance Company Ltd v Paget [2]*<sup>1</sup>. In such an application, the court is guided by the following factors, which it considers cumulatively:

- The preponderance of equities: that is to say, the potentiality of irreparable harm and prejudice to the applicant if leave to execute is granted, or the potentiality of irreparable harm and prejudice to the respondent on appeal if leave to execute is refused.
- The prospects of success of the appeal: that is to say, whether the appeal is frivolous or vexatious or has been noted, not with the genuine intention of correcting a perceived wrong, but merely in order to buy time;
- If the competing interests are equal, then the balance of hardship to either party;

see *Zaduck v Zaduck [2]* 1965 RLR 635 [GD]; 1966 [1] SA 550 [SR]; *Graham v Graham* 1950 [1] SA 655 [T]; *South Cape Corporation v Engineering Management*

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<sup>1</sup> 1981 ZLR 132, at p 134 – 135

*Services* 1977 [3] SA 534 [A]; *Fox & Carney (Pvt) Ltd v Carthew – Gabriel* [2] 1977 [4] SA 970 [R]; *Arches [Pvt] Ltd v Guthrie Holdings [Pvt] Ltd* 1989 [1] ZLR 152 [H]; *ZDECO [Pvt] Ltd v Commercial Carriers College [1980] [Pvt] Ltd* 1991 [2] ZLR 61 [H]; *Econet [Pvt] Ltd v Telecel Zimbabwe [Pvt] Ltd* 1998 [1] ZLR 149 [H];

- [6] Invariably, the decision whether or not to grant an application for leave to execute turns on the relative strength or weakness of the appeal. This necessarily entails ploughing substantially the same field as done at the original hearing. It also entails the court peeking into an appeal that is pending before the superior court and, in some way, pronouncing a verdict on it. That is one of the shortcomings of this type of application. Mr *Mushangwe*, for the first respondent, argues that this in fact, amounts to a usurpation of the functions of the superior court. That seems true, but to a very limited extent.
- [7] In an application for leave to execute it is necessary to weigh the relative strength or weakness of an appeal to guard against frivolous and vexatious appeals that are noted purely to buy time and not for any genuine intention to correct a wrong by the lower court. Each case depends on its own facts. Some factors relevant to the determination of this type of application may assume greater or lesser importance in some cases than do others in other cases.
- [8] In the present case, I have considered that I can decide the matter without making a pronouncement on the prospects of success of the appeal. Some other factors have assumed greater importance. I have been informed that once the appeal was filed, the Supreme Court has already set down the appeal for hearing on 27 July 2018. That is eleven [11] days away, and just three [3] days before the general election on 30 July 2013.
- [9] In *Engen Petroleum [Pvt] Ltd v Infrastructure Development Bank of Zimbabwe*<sup>2</sup> I declined an application for leave to execute pending appeal when it was brought to my attention that the appeal had been set down for hearing in the Supreme Court in

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<sup>2</sup> HH 270-17

just a month's time. I regarded it would be more prudent, more expedient, more practical and less disruptive to allow the appeal to be heard without upsetting the status *quo*. That would avoid a potentially embarrassing situation where I would grant the application only for the Supreme Court to overturn my judgment in a month's time, probably after the Sheriff had attached and possibly removed assets.

- [10] However, in the present case, the term “**execution**” is hardly being used in the literal sense. It is hardly meant to refer to the situation of the Sheriff going after the respondents with some form of writ. What the applicants seek to achieve is basically to ensure that my order of 28 June 2018 remains operative despite the appeal.
- [11] The applicants justify the granting of such an order on an urgent basis and with costs on a punitive scale on the grounds that even after the order was granted, the first respondent has with impunity persisted with the prohibited conduct. The applicants have detailed instances of the first respondent, through several functionaries, including some of its aspiring members of parliament in several parts of the country, ordering teachers and school children to attend its campaign rallies. They have attached pictures of school children and school buses draped in the first respondent's colours at the first respondent's rallies. Some parents of school children have submitted sworn statements confirming the forced attendance of their children at the rallies.
- [12] Mrs *Mtewa*, for the applicants, has argued that the first respondent's conduct is extremely disruptive of school life, particularly at this time of the year when most schools are conducting mid-year examinations. She says there is a real fear of physical injury being caused to the children given that the first respondent's rallies not infrequently turn violent. The damage is also psychological. Vulgar conduct, inflammatory language and other anti-social activities are all part and parcel of the first respondent's rallies. Despite the first respondent's appeal having been set down for hearing on an urgent basis, the need to protect children remains ever urgent. The damage being meted out to them is irreversible. This is against the background that the second respondent, the custodian of government policies on children, has not only

refrained from appealing against the interdict, but also has, as he did in the original application, undertaken to abide by the decision of the court.

- [13] The first respondent does not dispute the urgency of the matter. However, it stresses that the appeal having been set down for hearing in the next 11 days, there is no compelling reason for granting the order sought. It is more expedient to leave everything to the Supreme Court to give a final determination on the whole matter.
- [14] The first respondent argues that the application is predicated on bald allegations that have remained unsubstantiated. It denies being involved in any of the wrongful activities chronicled by the applicants. It has argued that the order sought severely prejudices it. Among other things, the election campaign by all parties has entered a decisive phase. The first respondent cannot be seen to be switching the venues for its rallies some of which comprise school grounds. It denies using these premises, or the school buses and other assets by force and says it pays for them or utilises them with the consent of the relevant school authorities or parents' bodies.
- [15] Mr *Mushangwe*, for the first respondent has drawn particular attention to paragraph 3 of the interim interdict. Unlike paragraphs 1 and 2 that make it clear that what is prohibited is the conduct of the first respondent in compelling or coercing school children and their teachers to attend rallies or to contribute towards the cost of holding them, paragraph 3 is cast in very wide terms. It is a blanket prohibition against the use of school property regardless of whether the first respondent pays for it or not, or regardless of whether it secures the consent of the relevant school authorities. Such a prohibition is so harmful to the first respondent's interests that it must remain suspended by the pendance of the appeal.
- [16] Mr *Mushangwe* has a point. Paragraph 3 of the interdict is couched in very wide terms. It clearly was unintended that the first respondent should be prohibited from using the school premises and other assets where it has the agreement of the relevant authorities. Mrs *Mutetwa* agrees that this is not what the applicants intended. Both parties have agreed that this particular concern can easily be addresses by a simple amendment to paragraph 2[c] of the draft order sought in the current application, by

the addition of the words, “... **without the consent of the school development committees or associations** ...” so as to make it clear that what is being prohibited is the first respondent’s use of force. Of course, the first respondent does not concede that the order sought is warranted.

[17] But beyond its concern on the wording of paragraph 3 of the interdict as aforesaid, the first respondent really has no good reason to resist the order being sought in the present application. No reasonable person can genuinely have any serious objections to such a progressive order that merely seeks to protect a vulnerable section of society such as school children. Even the first respondent itself is not saying that such an order is a bad thing. It is simply saying it is not doing the acts complained of.

[18] To my question what prejudice the first respondent will suffer if the order is granted, Mr *Mushangwe* retorts by a counter question: what prejudice do the applicants themselves suffer if the status *quo* remains until the appeal is determined in a mere 11 days’ time?

[19] In my judgment in the original application, I made a positive finding that the respondents were guilty of flagrant abuse of the rights and freedoms of the school children; their schools and their teachers as was set out in that application. I found that the respondents’ conduct infringed on a number of the children’s rights as set out in the Constitution, such as the following:

- the right to education [s 75 and s 81(1)(f)];
- the right not to be compelled to take part in any political activity [s 81(1)(h)];
- the right not to perform work or provide services that are inappropriate for the children’s ages [s 19(3)(b)(i)];
- the right not to perform work or provide services that place at risk the children’s well-being, education, physical or mental health or spiritual, moral or social development [s 19(3)(b)(ii)];

[20] I also found that the respondents’ conduct infringed on the rights of the applicants’ members as set out in the Constitution, such as the following:

- the right to freedom of assembly and association, and the right not to assemble or associate with others [s 58(1)];
- the right not to be compelled to belong to an association or to attend a meeting or gathering [s 58(1)];
- [in relation to school premises and assets under their occupation, custody or control] the right to hold, occupy and use property, and the right not to be compulsorily deprived of same [s 71(2) and (3)].

[21] On such findings I held that any breach of the rights accorded by the Constitution should not be allowed to subsist for any day longer. It is when such allegations are made that the court, as the upper guardian of all minor children, should be moved to set aside all its other non-urgent business to attend to the urgent matter.

[22] *In casu*, I have considered that the preponderance of equities favours the granting of the application. If it were an application for leave to execute an ordinary judgment sounding in money, as was the case in the *Engen Petroleum* case referred to above, then it would probably have been more expedient to leave everything for the Supreme Court which is set to determine the appeal in the next eleven days. But this is not an application for leave to execute an ordinary judgment sounding in money. *Engen Petroleum* is distinguishable.

[23] Both parties agree that campaigning for votes in the forthcoming election on 30 July 2018 has entered the home stretch. Political parties are leaving no stone unturned. There is heightened political activity. More rallies have been lined up. It is probably now, more than ever, that school children and their teachers in particular, require greater protection from some excesses by political parties. Examinations should not be disrupted. Every day counts. Eleven days is such a long time, especially given that one of the applicants' fears is that of physical violence.

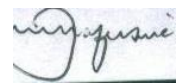
[24] The first respondent's concerns are more to do with what it considers to be negative publicity generated by the interdict. But it is up to it to desist from the conduct complained of. At any rate, that kind of prejudice is incomparable to that being suffered by the school children. The evidence placed before me shows that the first

respondent has continued with the prohibited conduct even after the granting of the interdict.

[25] In the premises the application for leave to execute is hereby granted in the following terms:

- i/ The application for leave to execute the judgment of this court granted on 28 June 2018 in Case No. HC 263/18 pending the appeal against that judgment noted by the first respondent under SC 513/18 is hereby granted.
- ii/ Thus, the respondents, their employees, members and/or agents are, notwithstanding the appeal, interdicted and restrained from:
  - asking, encouraging or forcing children at schools to attend or participate in political rallies or activities or causing the closure of schools for any of its political rallies or activities;
  - compelling teachers to attend political rallies, wear party regalia, prepare performances for children to deliver at rallies, or to make contributions towards rallies whether in cash or kind;
  - using school property including school premises, buses, furniture, classrooms or any other property that belongs to the schools for any political rally or any other political purpose without the consent of the relevant school authorities.
- iii/ The first respondent shall pay the applicants costs for this application.

17 July 2018



*Mtewa & Nyambirai*, legal practitioners for the applicants  
*Mushangwe & Company*, legal practitioners for the first respondent  
*Civil Division of the Attorney-General's Office*, legal practitioners for the second respondents