SENZENI NYATHI
(In her capacity as a parent and guardian of the
Minor child Amohelang Ulukile Dube)

Versus

ZIMBABWE TEACHERS ASSOCIATION
ZIMBABWE CONFEDERATION OF PUBLIC
SECTOR TRADE UNIONS
PROGRESSIVE TEACHERS UNION OF ZIMBABWE
AMULGATED RURAL TEACHERS UNION
OF ZIMBABWE
EDUCATORS UNION OF ZIMBABWE
THE CHARIPERSON OF THE PUBLIC SERVICE
COMMISSION N.O.
MINISTER OF PRIMARY & SECONDARY EDUCATION N.O.
MINISTER OF PUBLIC SERVICE, LABOUR &
SOCIAL WELFARE N.O.
MINISTER OF FINANCE & ECONOMIC DEVELOPMENT N.O.

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 17 & 30 SEPTEMBER 2021

Urgent Chamber Application

Advocate S. Siziba for the applicant
E. E. Matika for 1st respondent
No appearance for 2nd respondent
R. Matsikidze for 3rd respondent
N. Chinhanu for 4th respondent
No appearance for 5th respondent
F. Chingwere for 6th – 9th respondents

MOYO J: This is an urgent chamber application wherein the applicant seeks the following interim relief:

1. The respondent teachers' unions together with their members who are teachers be and are hereby interdicted from boycotting classes until the return date when this matter will be finalized.

2. All the 1st to 5th respondents' members who are teachers be and are hereby ordered to report for duty consistently within 48 hours of the granting of this order.
3. In the event that 1st to 5th respondents members refuse to or fail to comply with the order in paragraphs 1 and 2 above, 6th to 9th respondents be and are hereby directed and authorized to take all measures as may be expedient to ensure that there is no interruption of classes in all public schools in Zimbabwe, including but not limited to the suspension of salaries and allowances for all defaulters amongst the 1st to 5th respondents' membership and also the hiring of such persons as are qualified to teach classes in public schools.

The applicant avers that she is suing in her capacity as a parent and guardian of a minor child whose particulars are also given.

In paragraph 2 of the founding affidavit applicant states that she is the legal guardian of the minor child who is under her care, guardianship and custody. She also tells the court that she is the maternal grandmother to the child and that her biological daughter, the mother of the child is since deceased. She further avers that the minor child does have a father who never took responsibility for the minor child. She also avers that this an urgent constitutional chamber application in terms of Rule 107 of the High Court Rules 2021 and that she seeks an order to the effect that the consistent withdrawal of service by members of the 1st to 5th respondents as well as the failure by 6th to 9th respondents to provide teachers to all primary and secondary schools in Zimbabwe during episodes of labour disputes is a violation of children's' rights to education.

The factual basis of the applicant is given in paragraphs 17 to 52 wherein the applicant chronicles that in recent years and in particular 2020 – 2021 there has been a disturbing development in all primary and secondary schools where learning has been disturbed by strikes and that some children have lost a whole academic year due to a stalemate between teachers' unions and the employer over salary disputes. The applicant further gives as reasons for the this application the current threats by the 1st to 5th respondents where they made numerous demands against their employer and said they would not resume work when the new term opens and that it is apparent that the stalemate will not end in the foreseeable future. Some respondents have taken points *in limine* against the hearing of this matter. They are 1st respondent, 3rd respondent and 4th respondent. 6th respondent's counsel also submitted that 6th respondent was improperly cited and that he would not stand in for the Public Service Commission and that he had no

power to effect any order of the court as he is not the employer. This point *in limine* with regard to the citation of the 6th respondent is proper and is upheld.

The points *in limine* raised collectively by all the respondents are as follows:

1. ***Locus standi***

Respondents submitted that only a guardian can represent a minor and that applicant says in her founding affidavit she sues in her capacity as parent and guardian which she is obviously not. Further it has argued that her claims that she is even the custodian of the child are unfounded as she refers to the child as a female and yet the attached birth certificate shows that the child is male. The respondents further argued that in her heads of argument applicant then wants to shift the capacity to sue to section 85 (1) of the Constitution and that whilst that is also wrong as the section does not clothe the applicant with *locus standi*, the respondents argue that in fact that is not the capacity she gave in her founding affidavit as in her founding affidavit she is suing in her capacity as a parent and legal guardian of the minor child which she is not.

Applicant's counsel argued against this point *in limine* that the application deals with the interpretation of rights in the Constitution and that section 85 (1) of the Constitution does give the applicant capacity. However, on this point I am inclined to agree with the respondents on the basis that the founding affidavit clearly tells us on what basis applicant represented the minor and it is clearly on the basis of being a parent and legal guardian which she is clearly not. Further, the applicant does not seem to know the sex of the child that she purports to represent further complicating her claims.

I agree with the respondents that applicant has not established *locus standi* in this matter and should have used the legal guardian who is the father of this child to sue in this matter.

2. **Urgency**

The other point *in limine* is on urgency wherein the applicant avers that the cause of action arose in recent years and that particularly during the years 2020 – 2021, the respondent unions and their members have embarked on strikes thereby prejudicing applicant's grandchild.

The applicant's counsel conceded that the application should have been brought by way of an ordinary application but that there were practice directions that precluded the filing of cases and that the urgency then arose on 28-30 August

2021 with the threats by the 1st to 5th respondents. Surely, in this matter, this application could have been brought even in 2020 from the facts because the conduct complained of has been present in fact even dating back further than these 2 years. The need to act arose then. There is also no explanation as to why action was not taken when the need to act arose. The founding affidavit silent is such in that respect and that would mean that there is no explanation given for the seemingly inordinate delay. I accordingly uphold this point *in limine* as well and find that the matter is definitely not urgent. No case whatsoever has been made for urgency. Refer to the case of *Kuvarega* vs *Registrar General* 1998 (1) ZLR 188 wherein urgency was clearly defined as taking action when the need to act arises and not waiting for the day of reckoning to then try and act.

3. The application is fatally defective

The respondents submitted that the application is fatally defective as on the face of the application there are 8 respondents but on the founding affidavit there are 9 respondents and that in essence means the founding affidavit and the application itself are divorced from each other as they speak to different respondents. Clearly, this application was not well thought out and is in fact badly drawn. It was hurried through without much thought being applied to many things including the proper citation of the respondents.

4. Constitutional application

Respondents submitted that a constitutional application can only be brought as a court application in terms of Rule 107 of the High Court Rules 2021 that applicant should have brought a court application in terms of the rules and then filed an urgent application to deal with issues she considered urgent pending the determination of the court application. I cannot agree more, as I have already stated, this application was rushed through without much consideration of the rules, the parties, and the aspect of urgency.

5. Non-joinder

Respondents also submitted that the non-joinder of the teachers themselves is fatal as the interdict sought is against them. It was submitted on behalf of the respondents that section 65 (3) gives the individual teachers the right to collective job action and that taking away such rights can only be done with the affected individual teachers having been cited and not the unions. Further, respondents also submitted that the employer is not cited being the Public Service Commission. The respondents referred to section 319 of the Constitution of Zimbabwe which provides that the Public Service Commission is a legal entity.

Applicant's counsel submitted that they concede that the proper party to cite was the Public Service Commission and not the Chairperson but that the absence of the Public Service Commission did not matter as its Chairperson was cited and other government departments were cited.

Again, this point shows the inadequacies of the application, the lack of much thought and careful consideration of all the matters pertaining to it and the proper citation of the affected parties. Again I agree with the respondents on this point *in limine* and accordingly uphold it.

6. Relief sought

4th respondent's counsel also submitted that the interim relief sought is incompetent because it seeks the suspension of one right for the performance of another right in an interim basis. 4th respondent's counsel submitted that the applicant's grandchild has a right to education and the teachers also have a right to collective job action and that the suspension or performance of one right over another cannot be done on an interim basis. Of course the relief sought in the interim is clearly incompetent as the court cannot suspend one right in favour of another on an interim basis where clear rights have not been proven. In any event, how does one right get favoured against another right in the interim? This all goes back to the general picture pointed by this application that it was not well thought out and is in fact badly drawn. 3rd respondent's counsel submitted that the application should in fact be dismissed with costs at a higher scale as it is fatally flawed and the technical issues raised against it were not answered by the applicant who should have filed an answering affidavit but chose not to and that the application, should have been withdrawn before argument seeing it is alien and badly drawn. He submitted that persistence with a clearly problematic matter, when respondents had raised the points early enough meant that applicant must bear the costs at a higher scale. I agree with this contention, this application was not well thought out, it was badly drawn and rushed through. Applicant should have withdrawn it, tendered wasted costs and the set on a properly founded and well-drawn application. It is in such matters that respondents are unfairly and unnecessarily put out of pocket. It is for these reasons that I will award costs on a higher scale. Refer to the case of *Crief Investments & Anor* v *S. Grand Home Centre (Pvt) Ltd & Others* HH-12-18. The degree of irregularities in this application do justify costs at a higher scale in my view.

I accordingly dismiss the application with costs at a higher scale.

Ndove & Associates, applicant's legal practitioners
Matsikidze Attorneys At Law, 3rd respondents' legal practitioners
Zimbabwe Human Rights NGO Forum, 4th respondent's legal practitioners
Civil Division of the Attorney General's Office, 6th, 7th – 9th respondents' legal practitioners