

**IN THE HIGH COURT FOR ZAMBIA
AT THE FAMILY COURT DIVISION
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

2023/HPF/206

IN THE MATTER OF: SECTIONS 3(1) AND 28 OF THE CHILDREN'S CODE ACT NO. 12 OF 2022

AND

IN THE MATTER OF: SECTIONS 4, 6(1) (D) (E) (F), 24, 25(1), (2)(B)(P) OF THE HIGHER EDUCATION ACT NO. 4 OF 2013

AND

IN THE MATTER OF: SECTIONS 2, 4(A) (D) (P) OF THE LAW ASSOCIATION OF ZAMBIA CHAPTER 31 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: THE VIOLATION OF THE RIGHT TO EDUCATION OF LAW STUDENTS AT THE UNIVERSITY OF ZAMBIA ON ACCOUNT OF ACUTELY INADEQUATE LEARNING FACILITIES DUE TO OVERENROLMENT

AND

IN THE MATTER OF: AN ORDER FOR THE UNIVERSITY OF ZAMBIA COUNCIL TO PROVIDE THE SCHOOL OF LAW STUDENTS WITH THE REQUISITE LEARNING FACILITIES SUITABLE AND CONDUCIVE FOR LEARNING

AND

IN THE MATTER OF: AN ORDER THAT THE SCHOOL OF LAW REVERTS TO A NON-ADMITTING SCHOOL STATUS SO AS TO ENABLE THE SCHOOL TO DETERMINE AND QUALITATIVELY ADMIT STUDENTS TAKING INTO ACCOUNT ITS LIMITATIONS OF RESOURCES

BETWEEN

SIDNEY MUTALE NKOLE

PETITIONER

AND

COUNCIL OF THE UNIVERSITY OF ZAMBIA

1ST RESPONDENT

HIGHER EDUCATION AUTHORITY

2ND RESPONDENT

TH LAW ASSOCIATION OF ZAMBIA

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

BEFORE HONOURABLE LADY JUSTICE M. CHANDA ON THE 8TH DAY OF MAY 2023

APPEARANCES

For the petitioner:

Mr. Bright Chilufya Kaluba of Lewis Nathan Advocates

For the 1st respondent:

Ms. Towela Nkhoma in-house Counsel of the University of Zambia (UNZA)

RULING

LEGISLATION REFERRED TO:

1. ORDER 29/L/1 OF THE EDITORIAL NOTES OF THE WHITE BOOK
2. SHEPHERD HOLMES LTD V SANDHAM (1970) 3 ALL ER 402
3. MKUSHI CHRISTIAN FELLOWSHIP TRUST LIMITED (HOLD OUT AS CHENGELO SCHOOL) V HENRY MUSONDA APPEAL NO. 178 OF 2005
4. NOTTINGHAM BUILDING SOCIETY V EURODYNAMICS SYSTEMS (1993) F.S.R. 468
5. DORABE CAWASYI WARDEN V COONI SARAB WARDEN AIR 1990 SC 867
6. MEGHU MIAN V KISHUN RAM, AIR 1954 PAT 477
7. HAMMAD AHMED V ABDUL MAJEED & ORS CIVIL APPEAL NOS. 3382-3383 OF 2019 9 JULY, 2019

This is a ruling on an application for an interim order compelling the 1st respondent to find suitable learning spaces for the University of Zambia Law Students. The applicant in his affidavit set out that he had commenced proceedings on behalf of the Law students at the University of Zambia by way of a petition seeking redress for the violation of their right to education. He stated that the violation arose from the failure or neglect to find enough learning spaces to accommodate the huge number of students that the 1st Respondent had enrolled. He averred that because of inadequate learning spaces at the 1st Respondent's institution, every lecture time presented risks of near stampede circumstances as students jostled for seats, a situation that threatened the students' safety, health and compromised the quality of legal training.

The deponent averred that some students who did not find seats, sat on the floor or stood throughout the duration of lectures while others helplessly stood and followed lectures from outside due to the lack of

space. He averred further that there was a huge number of students who failed to keep up with the harsh learning environment and the indignity associated with legal training at the University of Zambia and decided to stay away from attending classes because they could not bear with the inhumane and degrading environment that the 1st respondent had subjected them to.

It was deposed that the chronicled plight of the law students at the University of Zambia required urgent measures to arrest the state of continuing deprivation and violation of the right to education of the law students. He stated that if the interim order was not granted to halt and arrest the situation at the university, the concerned students would suffer irreparable damages that could not be atoned for by damages from the court as they will be ill-equipped to sit for their examinations. He also stated that the University was scheduled to commence mid-year examinations in the months of June and July while end of year examinations were in November, 2023. He explained that failing a course or courses in the School of Law led to grave consequences of being sent on part-time and losing government sponsorship for those on loan schemes. He said that the huge potential prejudice and damage could be forestalled by the Court granting the said Order to reverse and halt the injustices that the law students were subjected to.

He stated that the plummeting of the standards of legal training at the University, which was the highest institution of learning in the country, was a matter of public concern requiring urgent solutions which included the court granting the order sought. He said that the

respondent would not suffer any prejudice if the Court granted the Order.

The 1st respondent's affidavit was sworn by the 1st respondent's Registrar, Theresa Chipulu Chalwe. The deponent averred that in 2020/2021 academic year, the University of Zambia saw an unprecedented enrollment of about 8,034 registered first year students with 751 students being admitted in the School of Law. That the increase in the student numbers was a result of the introduction of the Remodelling Income Generation (RIG) Initiative whose drive to grow students' numbers in an effort for the University to be self-sustaining. She averred that the introduction of RIG saw a change in the admissions system to on-spot admissions which resulted in the increase of students' admissions.

She averred further that the unprecedented numbers were attributable to the growing demand for education in Zambia and the pronouncement by the government of the Republic of Zambia to not leave anyone behind which was evident in the increase of government bursaries given to the universities. That the school of law had 265 first year students, 413 second year students, 202 third year students and 103 fourth year students. She exhibited the registration statistics as exhibit "TCC1".

Miss Chalwe asserted that the increase in the number of registered students meant that the university needed to upscale its teaching facilities. However, there was a breakdown in communication between the time the student classes were supposed to have commenced and

the available teaching facilities. That this led to a situation where school of law students would have to have class in a fully packed lecture theater.

She stated that the 1st respondent however, quickly identified ways of correcting this anomaly and commissioned two state of the art learning lecture theaters to manage the new numbers which could accommodate approximately 380 students and student from the school of law were] using these facilities. She produced the school of law timetable indicating the venue for lectures and pictures of the newly commissioned lecture theaters as exhibit "**TCC2**".

She further stated that the 1st respondent on or about 31st March, 2023 commissioned another lecture theatre at the Graduate School of Business with a combined sitting capacity of 550 students whose use would be extended to the school of law. She produced a picture of the newly commissioned lecture theater as exhibit "**TCC3**".

That in addition to this, the 1st respondent with the support of Africa Development Bank and the Ministry of Education, is building an ultra-modern teaching and learning complex with a combined sitting capacity of 800 which was at 95% completion. She referred to the picture of the building marked as exhibit "**TCC4**".

That the 1st respondent through the support of the World Bank was also constructing another facility which would be able to accommodate about 180 students and the school of law had been given land where other learning facilities and infrastructure would be built.

She added that apart from the physical learning theatres, the respondent had a blended system of learning where lectures were via online platforms called module-meet which could accommodate 1000 students at a given time. She said that module permitted the recording of lectures which are later shared with the students and all learning materials are posted on this platform and could easily be accessed by the students.

That further measures by the 1st respondent to manage and control the learning environment in the school of law led to the drastic reduction in the on-spot admissions, from the admitted 751 students in 2020/2021 academic year to only 150 students in the 2022/2023 which numbers could be supported by the teaching facilities at the University.

It was the deponent's averment that the 1st respondent had changed its admissions system from on-spot admission which was first come, first serve basis so long as the minimum entry requirements were met to admissions on merit basis, and the total number of admissions being informed by the recommended numbers of students by the school. That the 1st respondent had demonstrated that it cared to give the best education for its students by all the measures that had been highlighted.

She asserted that the 1st respondent had also demonstrated that it was in control of managing and ensuring that student learning centers were suitable and adequate. That the application was therefore misplaced as

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She asserted that the 1st respondent had also demonstrated that it was in control of managing and ensuring that student learning centers were suitable and adequate. That the application was therefore misplaced as

the 1st respondent had already implemented that which it purportedly sought to achieve.

That she had been advised by her advocates that the applicant had not disclosed full and material facts in this matter to warrant the granting of the application and that he, as a concerned person, should have in fact engaged the 1st respondent before making this application to appreciate all measures that had been put in place.

In winding up, she averred that this was an injunction application, and that there were established principles that guided the court in exercising its discretion to grant or deny interim injunctions and that the applicant's reasons did not meet the established principles for the application to be granted.

The applicant filed an affidavit in reply to the affidavit in opposition on 27th April, 2022 in which he basically averred that there were currently a lot of children aged between 17 and 18 years old enrolled at the University to whom the Children's Code Act applied by virtue of the definition of the word "child" in the Constitution of Zambia. He listed the children who were among those referred to and their computer numbers as follows: Deborah Manda - 2021405133; Macho Golfa - 2022068777; Luyando Simenti - 2022034601; Esther Nalumino - 20222007441; and Palo Lungu - 20222434315.

He asserted that he had disclosed full facts and reasons both in the affidavit in support and the affidavit in reply to warrant the grant of the instant application. He added that the application was not vexatious as

it sought to enhance the protection and enforcement of the children's rights provided by the law.

When the matter came up for hearing, counsel for the applicant and for the 1st respondent was before court. They indicated that they would rely on the affidavits filed as well as the skeleton arguments and made some oral submissions before court. I will not reproduce the skeleton arguments or the oral submissions but I will make reference to them where necessary.

It is considered my opinion that with the applicant having identified at least five students on behalf of whom he is making this application, the issue of litigating for unidentified children as raised in the skeleton arguments and submissions by counsel for the 1st respondent has been put to rest. In so doing, the lingering doubt of whether this court has jurisdiction to entertain this application has been laid to rest and need no further determination.

Having said that, I must mention that I agree with counsel for the 1st respondent's submission that what the applicant is in fact seeking from this court amounts to a mandatory injunction as defined at page 759 of the titled the *Zambian Civil Procedure Commentary and Cases*. I however need to point out that despite it being an injunction, the principles that govern the grant of a mandatory injunction differ from those for determining an injunction of a prohibitory nature.

Under Order 29/L/1 of the Editorial Notes of the White Book¹ it is provided that:

The Court has jurisdiction upon an interlocutory application to grant a mandatory injunction directing that a positive act should be done to repair some omission or restore the prior position by undoing some wrongful act but it is a very exceptional form of relief. [Underlined for emphasis]

Further, the court in the case of **Shepherd Holmes Ltd v Sandham**² stated that:

...the applicant's case has to be 'unusually strong and clear' before a mandatory injunction will be granted... [Underlined for emphasis]

In the case of **Mkushi Christian Fellowship Trust Limited (Hold Out as Chengelo School) v Henry Musonda**³, the Supreme Court opined that an interlocutory mandatory injunction should not be granted if it has the effect of determining the substantive issue at interlocutory stage.

The principles to consider for the grant of a mandatory injunction were accurately explained by Chadwick J, in the case of **Nottingham Building Society v Eurodynamics Systems**⁴ as follows:

The overriding consideration was first which course is likely to involve the least risk of injustice if it turns out to be "wrong" in the sense of granting an interlocutory injunction to a party who fails to establish his right at trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial...

Secondly, the Court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage may well carry a greater risk of injustice if it turns out to have been wrongly

made than an order which merely prohibits action, thereby preserving the status quo...

Thirdly, it is legitimate where a mandatory injunction is sought to consider whether the Court does feel a high degree of assurance that the Plaintiff will establish his right, there may be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage...

Furthermore, in the case of **Dorabe Cawasyi Warden v Cooni Sarab Warden**⁵ the Supreme Court of India held that for a grant of interim mandatory injunction the following test must be complied with:

- (a) The plaintiff has to demonstrate a strong case for trial is, it should be of a standard higher than that of a *prima facie* case;
- (b) The plaintiff has to lay-bare that the grant of mandatory injunction is necessary to prevent irreparable loss or serious injury, which cannot be compensated in terms of money; and,
- (c) The balance of convenience is in favour of the plaintiff as against the defendant. Mandatory injunctions are sometimes availed of as reliefs in the nature of '*quia timet*' that is, in a proper case, mandatory injunction may be granted when there is a threat of infraction of the plaintiff's right before the infraction has actually occurred. (case Law: **Meghu Mian v Kishun Ram, Air**⁶).

The Honourable Apex Court while dealing with the issue whether an interim mandatory injunction can be granted in a suit, held: in **Hammad Ahmed v Abdul Majeed & Ors**⁷. that "the balance of the case totally in favour of the applicant may persuade the Court to grant an interim relief though it amounts to granting the final relief itself. Of Course, such would be rare and exceptional cases. The Court would

grant such an interim relief only if satisfied that withholding of it would prick the conscience of the Court and do violence to the sense of justice, resulting in injustice being perpetuated throughout the hearing, and at the end the Court would not be able to vindicate the cause of justice. Obviously, such would be rare cases accompanied by compelling circumstances, where the injury complained of is immediate and pressing and would cause extreme hardship. The conduct of the parties shall also have to be seen and the Court may put the parties on such terms as may be prudent”.

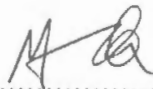
In the present case the question which arises is would the withholding of the grant of such an interim relief result in injustice being sustained throughout the hearing.

Upon hearing both parties and examining the evidence presented it is common ground that in the 2020/2021 academic year the University of Zambia in a bid to mobilise resources for operations over enrolled and admitted 751 students in the school of law. It is plain from the exhibits adduced by the 1st respondent that as at 16th March, 2023 there are only two lecture theaters that can accommodate about 380 students available for use by the law school. In as much as the measures put in place by the 1st respondent to manage and control the learning environment in the school of law are commendable, they are still inadequate. This is so because the available lecture theaters with the sitting capacity of 380 students cannot sufficiently accommodate the total number of 413 registered second year students as shown in exhibit “TCC1”

In light of these findings I am of the considered view that if the interim order is not granted to remedy the situation, the concerned students are likely to suffer irreparable damage that could not be atoned for by damages as they will be ill equipped to sit for their examination. I am also satisfied that refusing of the interim relief would prick the conscience of the Court in that the best interest of the children with regard to access to education will not be adequately safeguarded. In my opinion the injury complained of is pressing as well as immediate and could result in an injustice being perpetuated throughout the hearing. Thus, it is ordered that the application for an interlocutory relief to compel the 1st respondent to secure suitable learning spaces for the affected law students at the University of Zambia, which learning spaces shall be inspected, approved and declared fit for learning by the 2nd, 3rd and 4th respondents is hereby granted.

I order accordingly.

Dated at Lusaka this 8th day of May, 2023.



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Mwamba Chanda
Judge

