TSHELANYEMBA HIGH SCHOOL DEVELOPMENT COMMITTEE
(Represented by Patrick Ndiweni)

Versus

THE SALVATION ARMY
(Represented by the Territorial Commander)

And

THE SECRETARY OF PRIMARY AND SECONDARY EDUCATION

And

THE MINISTRY OF PRIMARY AND SECONDARY EDUCATION

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 30 OCTOBER AND 9 NOVEMBER 2023

Application for a Declaratur

K. I. Phulu, for the applicant
T. Zhuwarara, for the 1st respondent
No appearance for the 2nd and 3rd respondents

KABASA J: This is an application for a declaratur seeking the following order:-

"1. The 1st respondent is not a Responsible Authority over Tshelanyemba High School in the contemplation of section 2 of the Education Act [Chapter 25:04] in that the 1st respondent did not establish the school aforementioned.

In the alternative

2. It be and is hereby declared on the basis of section 59 of the Constitution of Zimbabwe (Amendment Number 20) 2013, that the Tshelanyemba community, represented by the applicant as stakeholders of Tshelanyemba High School have a right and freedom to disassociate with the 1st respondent, and to substitute the 1st respondent as the Responsible Authority over Tshelanyemba High School, with a Responsible Authority of choice.

3. Respondent who unsuccessfully opposes this application be and is hereby ordered to pay the costs of this application on an attorney and client scale."

The genesis of the application as gleamed from the founding affidavit deposed by Patrick Ndiweni is that the 1st respondent built a primary school and a hospital at Tshelanyemba communal lands which is in Kezi in Matobo District. The primary school was later closed in 1968. In 1981 the Government of Zimbabwe allowed for the setting up of a Secondary School within the premises of the now closed primary school. The 1st respondent, being a church, could not be funded by Government to establish the Secondary School, which was to be a boarding school. The church had no resources to establish the school. As a result the Tshelanyemba community sought permission from Government to build a day secondary school. Land for that purpose was subsequently obtained from a fellow villager who was given alternative land to re-settle. Tshelanyemba Secondary School was then established by the community which invited the 1st respondent to be the Responsible Authority. The building of the school was made possible through a Government grant, donor funds, the School Board which paid the builders and Matobo Rural District Council which provided two tractors to help ferry building materials.

Due to long-standing discord between community members and the 1st respondent, the community decided to part ways with the 1st respondent and wrote to Matobo Rural District Council asking that the Council takes over as the Responsible Authority. The Council in turn expressed willingness to take over provided the 1st respondent handed over the school to the Council. The 1st respondent was not prepared to hand over the school.

The resultant impasse birthed the application I am now seized with. The application is opposed by the 1st respondent. The second and third respondents did not file any papers and did not appear on the date of hearing. This, to my mind, is indicative of their intention to abide by the decision of the court. I must point out that the application is saved by the fact that the second respondent is but one of three respondents. I say so because there is no legal entity called Ministry of Primary and Secondary Education which can be sued. The correct citation would be the Minister. There is therefore no second respondent before the court. The application is however still properly before the court in light of the other respondents who were properly cited.

That said I turn now to the opposition by the 1st respondent. In opposing the application the 1st respondent took points *in limine*. These are:-

1) Lack of *locus standi*

2) Material disputes of facts

I propose to set out the basis for taking these points *in limine* in an endeavor to make it easy to follow the issues presented in this application.

The 1st respondent's contention is that the application is brought in terms of section 14 of the High Court Act, Chapter 7:06. The applicant must therefore be an "interested person" having a direct and substantial interest in the subject matter of the suit.

The applicant is Tshelanyemba School Development Committee, 'SDC' a distinct legal *persona*, created per the dictates of section 36 of the Education Act. It is a creature of statute whose interests do not go beyond the dictates of the law. The relief sought is intended to benefit the community of Tshelanyemba and not itself. A school development committee represents the interests of parents and guardians with children at a particular school. Such interest does not therefore extend to the community at large. That being so because the community at large includes people who do not have children or are guardians of children attending the school.

The order being sought is at variance with the statutorily defined interests of the applicant, thereby stripping the applicant of *locus standi.*

The second point relates to irredeemable disputes of facts. The crux of the issue relates to the identity of the one who established Tshelanyemba High School. The school was established in 1981 on land officially given to the 1st respondent by the Council and local leadership. The 1st respondent therefore became the Responsible Authority not by virtue of an invitation but through establishing the school. The Government grant and all other donations including labour were not peculiar to this school's establishment and do not change the fact that the 1st respondent established the school. The 1st respondent has no intention of handing over the school to Council and should any parents be aggrieved with the 1st respondent's management of the school, they are free to get land and establish their own school.

The issue of who established the school is therefore contentious and cannot be resolved without resort to a trial. The applicant ought to have appreciated this and decided to proceed by way of motion, a gamble they must be prepared to face the consequences for, so contended the 1st respondent.

The two points are dispositive of the matter and I therefore invited the parties to address me on the points *in limine* only. This judgment is concerned with these points *in limine*.

Does the applicant have *locus standi*? Whilst counsel for the 1st respondent addressed the points *in limine* as raised in heads of argument I cannot ignore the issues raised in the opposing affidavit, which issues also speak to the lack of *locus standi* of the applicant. These are that the resolution of the School Development Committee "SDC" nominating Patrick Ndiweni as their representative in proceedings that emanated from an interdict granted against the then Headmaster of the school from constructing a girls dormitory is a nullity as it was not signed by all the stated committee members. Patrick Ndiweni's term also expired in 2019 and he has no child at the school. One Sibonokuhle Sibanda and Siphathisiwe Sibanda were never elected as SDC members but were co-opted by Patrick Ndiweni. The court order upon which the resolution is anchored does not relate to the SDC but to an individual who was the school's former Headmaster.

The SDC committee refused to subject itself to the electorate and an attempt to hold elections after the expiry of the SDC's term was frustrated and disrupted by individuals who included Patrick Ndiweni.

I take the view that all these points relate to the issue of *locus standi* and as none of them were abandoned, the court is enjoined to pronounce itself on each and every one of them.

In responding to the issue of *locus standi*, the applicant contended that the 1st respondent was working with the SDC as presently constituted at the time of the filing of the application and so cannot now seek to divest the SDC of authority.

The 1st respondent as the Responsible Authority had the mandate to cause the holding of elections upon the expiry of the incumbent's term but failed to do so. The 1st respondent is therefore estopped from challenging the applicant's *locus standi*.

As regards the court order which appears to have informed the decision to mount this litigation, it was the reason for reaching a decision to mount the litigation not that it is the cause of action upon which the litigation is founded. The girls' dormitory was the applicant's project and the order obtained to stop its construction informed the applicant's decision to bring the present application.

The co-options of the two members to the SDC without the holding of elections was in terms of section 11 of SI 87 of 1992 and therefore lawful. The SDC member said to have not signed the resolution signed certifying the SDC minutes as true and correct. In any event the resolution is not invalidated by the absence of signatures of some of the SDC members.

Section 85 (3) of the Constitution seeks to make courts accessible and the dictates of natural justice frown on restricting such access on procedural technicalities. The current members of the SDC have a direct and substantial interest in the matter as representatives of parents and as members of the community which established the school.

The applicant therefore has *locus standi* on the basis of the foregoing, so applicant argued.

I propose to consider each of the grounds upon which the lack of *locus standi* point is anchored.

The first one is based on the fact that one Sheilla Sibanda did not sign the SDC resolution. The said resolution appears on page 22 of the record and is marked "Annexure A". The said Sheilla Sibanda's signature appears just above the certification of what was described as extract of the minutes. That signature, although not appearing against Sheilla's name suffices. This ground therefore has no substance.

The second ground relates to Patrick Ndiweni who is said not to be a parent or guardian of a child who attends the school. In his answering affidavit Patrick Ndiweni identified a child who is said to be in Form 2 for whom he is responsible for. He therefore is a guardian of a pupil attending school at Tshelanyemba. There is equally no substance to this ground.

The third ground relates to the fact that the SDC term ended by effluxion of time and efforts by the 1st respondent to have elections conducted for a new SDC were scuttled by the divisive elements who are behind the present application.

In its heads of argument applicant referred to section 36 (2) of the Education Act which provides that:-

> "(2) The responsible authority of any registered school shall cause the School Parents Assembly to establish a School Development Committee."

The 1st respondent did not cause that to happen and has continued to work with the SDC whose term has expired. They are therefore estopped from impugning the SDC's authority. Did the 1st respondent act in a manner inconsistent with the non-recognition of the SDC whose term had expired? Minutes of an Annual General Meeting held on 27 February 2020 and 8 April 2021 are said to be evidence of the fact that the 1st respondent did not do the needful for the holding of elections. Unfortunately the attached minutes "Annexures AA1 and AA2" are in Ndebele and were not translated into English. If this assertion was not correct the 1st respondent could have sought leave to file a supplementary affidavit to correct this narrative. That was not done and I would take it that such elections were not held for the reasons stated by the applicant. It follows therefore that the SDC continued in office post its term. There being no provision that states that an SDC whose term has expired automatically ceases to function as such or that a failure to hold elections renders the SDC whose term has expired devoid of legality, I am inclined to accept that the 1st respondent is estopped from impugning the authority of the SDC.

The fourth ground relates to the co-option of two members by Patrick Ndiweni. Section 11 of the Education (School Development Committees) (Non-Government Schools) Regulations, 1992 provides that:-

> "11. On the death of, or vacation of office by –
>
> (a) an elected member of a school development committee, the committee may co-opt a qualified person to fill the vacancy until the next annual general meeting held in terms of section 15."

A qualified person would be one who is a parent or guardian of a pupil attending the school. Both Siphathisiwe and Sibonokuhle deposed to Supporting Affidavits attesting to the fact that they are parents of children who attend the school.

To that end therefore and in light of section 11 their co-option would not render the SDC resolution a nullity.

The last ground is articulated as follows:-

> "The resolution is a nullity as its cause of action is premised on a non-existent court order against the School Development Committee. The said court order is against an individual, Ezekiel Hleza, the former Headmaster of Tshelanyemba High School, not the School Development Committee."

The court order referred herein was against the former Headmaster of the school who was interdicted from building dormitories and visiting the school premises.

A reading of the resolution does not state the cause of action as anchored on the court order granted against Ezekiel Hleza but shows the mounting discontent and discord between the parties which informed the decision to litigate.

This ground therefore has no substance. All the grounds as appear in the Opposing Affidavit deposed to by Patrick Sithole have no substance. I venture to surmise that this must be why counsel for the 1st respondent made no reference to them at the hearing of the matter. I however decided to deal with them as they were not specifically abandoned.

Whenever points *in limine* are raised the court is enjoined to deal with them before moving to the merits (*Heywood Investments (Pvt) Ltd t/a GDC Hauliers* v *Zakeo* SC 3-2011).

I turn now to the grounds articulated in the heads of argument on the same point of *locus standi.*

Reference was made to *Johnson* v *Agricultural Finance Corp* 1995 (1) ZLR 65 (S) where GUBBAY CJ made the following observation on the issue of a declaratur:-

> "The condition precedent to the grant of a declaratory order under section 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an "interested person", in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court."

Advocate Zhuwarara, for the 1st respondent, contended that the applicant has no direct and substantial interest in the relief sought as it is a distinct legal *persona* whose interests cannot go beyond what is stated in its Constitution or the relevant Statutory Instrument.

Section 36 of the Education Act provides for the establishment of an SDC whose functions and duties shall be as contained in the Constitution of the School Parents Assembly. Broadly speaking such a committee's duties relate to the administration of funds, collection

and utilization thereof for the benefit of the school for which it was created. Members of such a committee must be parents or guardians of children who attend such school.

The relief sought *in casu* is to declare that the 1st respondent is not the Responsible Authority of the school or in the alternative that the Tshelanyemba community have a right to disassociate itself from the 1st respondent.

Is the relief sought meant to benefit the applicant or the community of Tshelanyemba? The applicant is not the Tshelanyemba community. The Tshelanyemba community does not necessarily have parents or guardians of children who attend the school.

The court was referred to *Mpukuta* v *Motor Insurance Pool & Ors* 2012 (1) ZLR 192 where NDOU J articulated the pre-requisite to the grant of a declaratory order.

I can do no more than reproduce counsel's thrust on this point:-

> "In adjudicating the applicant's *locus standi* it must be kept in mind that section 36 of the Education Act [Chapter 25:04] limits the legal interest of the applicant. The applicant is statutorily established to represent the interests of parents and guardians with children at the school. This genus of legal interest does not extend to representing the community at large."

In seeking to vindicate the interests of the community the applicant is in my view going on a frolic of its own.

In referring *to Adbro Investment Co. Ltd* v *Minister of the Interior & Ors* 1961 (3) SA 283 (T) counsel made the point that where one seeks a declaratory order there must be:-

> "some tangible and justifiable advantage in relation to the applicant's position with reference to an existing, future or contingent legal right or obligation flowing from the grant of the declaratory order."

As a School Development Committee the applicant's application and the relief sought is devoid of a *nexus* that is derived from the applicant's statutorily defined interests. The community of Tshelanyemba is not SDC and the converse equally holds true.

I am therefore persuaded by counsel for the 1st respondent's argument that the applicant has no direct and substantial interest in the order it seeks. It therefore lacks *locus standi.*

In any event, even if I were to hold that it has such *locus standi,* the issue here relates to the ownership of this school. The volumes of documents and the contents therein speak to parties who are far apart as regards the facts. It is to be expected that whenever a dispute relates to ownership of something each party has their version which is diametrically opposite to the other party's.

The 1st respondent's Secretary for Administration who deposed to the Opposing Affidavit's assertion speaks volumes to the nature of the factual disputes in this matter. He had this to say:-

> "… Matobo Rural District Council is prepared to take over the school on condition first respondent hands over the school. First respondent has no such intention. If the parents are aggrieved by the first respondent they are free to approach council, get land, apply to the relevant offices and build a school of their own."

One who is invited to manage another's property can never claim such property as theirs. The applicant asserts that this is what brought the two parties together and yet the 1st respondent holds a very different view. It is the owner of the school and derives its Responsible Authority tag from that, not because of an invitation by those who claim to own the school.

This is one matter that ought not to have been brought by way of motion. *Advocate Phulu,* for the applicant appeared to appreciate this point. Counsel however sought to argue that it is really about interpretation of the facts but the facts are not disputed. I do not agree. Facts hardly ever need interpretation, they state what the position is. What other interpretation can be given when the applicant states that the 1st respondent failed to establish a Secondary School and the community took over, obtained land and proceeded to build the school to the exclusion of the 1st respondent.

The applicant must have appreciated that this matter would require the leading of evidence. Counsel for the applicant submitted that this was not anticipated. How could it not have been anticipated given the fight the parties have had as demonstrated by the documents filed of record and the rift caused by the dispute regarding the ownership of this school.

If there are no real disputes of facts would counsel have asked that the matter be referred to trial? I think not.

In *Supa Plant Investments (Pvt) Ltd* v *Chidavaenzi* HH 92-09 MAKARAU J (as she then was) had this to say on what amounts to material disputes of facts:-

> "A material dispute of fact arises when such material facts put by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

Am I persuaded to refer the matter to trial? In *Mashingaidze* v *Mashingaidze* 1995 (1) ZLR 219 (H) ROBINSON J had this to say:-

> "It is necessary to discourage the too-oft recurring practice whereby applicants who know or should know, … that real and substantial disputes of fact will or are likely to arise on the papers, nevertheless resort to application proceedings on the basis that, at the worst, they can count on the court to stand over the matter for trial" (See also *Jangara* v *Nyakuyamba & Ors* 1998 (2) ZLR 475 (H), *Tamarillo (Pty) Ltd* v *B N Aitken (Pty) Ltd* 1982 (1) SA 398 (A), *Masukusa* v *National Foods Ltd & Anor* 1983 (1) ZLR 232 (H).

Granted the court can refer a matter to trial but is this an option I would take in the circumstances of this case? I am afraid not.

This is one case which must be dismissed so as to discourage parties from proceeding by way of application when the right course would be to proceed by way of action.

I decided to deal with both points *in limine* notwithstanding my ruling regarding the first point *in limine* on *locus standi*. Given my ruling on the second point *in limine* the disposition is different from what it would have been had I only dealt with the first point *in limine.* The finality which comes with the upholding of the second point *in limine* informed my decision to proceed as I did.

As regards costs, costs are within the court's discretion. I am not persuaded to hold that the applicant's conduct is deserving of censure.

In the result I make the following order:-

1. The point *in limine* on *locus standi* be and is hereby upheld.

2. The point *in limine* on material dispute of facts be and is hereby upheld.

3. The application be and is hereby dismissed.

4. The applicant shall pay costs at the ordinary scale.

Ncube Attorneys, applicant's legal practitioners
Coghlan, Welsh & Guest c/o Joel Pincus, Konson & Wolhuter, 1st respondent's legal practitioners