FUNGAI HLAHLA
versus
UNITED BAPTIST CHURCH IN ZIMBABWE
and
CHAIRPERSON OF THE SCHOOL DEVELOPMENT COMMITTEE
and
DISTRICT EDUCATION OFFICER CHIMANIMANI DISTRICT
and
ARTHUR MUNJOMA

HIGH COURT OF ZIMBABWE
CHITAKUNYE & TSANGA JJ
HARARE, 19 May & 11 June 2014

Civil Appeal

D. Tandiri, for appellant
T. Magwaliba, for 1st, 2nd and 4th respondents
No appearance, for 3rd Respondent

TSANGA J: The principal issue surfaced by this appeal is whether a School Head, whom the relevant school authorities who own and run the school no longer deem suitable, can seek to interdict such authorities considered to be preventing her from running the school. The interdict rests on a claim of a clear right by the School Head arising from a reinstatement by the Public Service Commission following a period of suspension. The Magistrate in the court below decided that the school being non- governmental, such 'Head' does not have clear rights that can be brought against the school owners and authorities. The School Head has appealed.

The facts placed before the Magistrate were as follows. The appellant, Fungai Nhlahla, who was the applicant in the court below, was the headmistress of Biriiri High School (hereinafter referred to as the school) in Chimanimani District. The school is owned by the first respondent, the United Baptist Church in Zimbabwe. Sometime in June 2012, she was suspended from duty by the Ministry of Education, Sports and Culture's disciplinary authority on allegations of misappropriation of school funds and maladministration. Following the lapse of her suspension and a disciplinary hearing, permission was granted by the third respondent, the District Education officer, Chimanimani for her to resume duties.

The first respondent, the owner of the school, with the support of the second respondent, the School Development Committee refused to allow the appellant to execute any of her duties and locked her out of the office. The fourth respondent, Arthur Munjoma had in the meantime assumed duties as the new Head.

The appellant's submissions in the court below were that the respondents had no right to bar her from discharging her duties. The Magistrate found on behalf of the first and second respondents on the basis that they are the responsible authority running the school and that they have the right to do so in line with their principles, albeit subject to the law. She reasoned that the right to work at the school is subject to the approval of the first respondent and that where there is no approval there can be no right to talk about. Dissatisfied with this finding, the appellant has brought this appeal on the following grounds.

1. The learned Magistrate misdirected herself by finding that the appellant had failed to prove that she has a clear right yet she managed to prove on a balance of probabilities that she was reinstated by her employer without loss of salary and other benefits.
2. The court *a quo* further erred by finding that no injury of a right has been suffered by the appellant yet ample evidence was adduced to prove that the respondents are taking the law into other own hands. The court *a quo* has therefore condoned the respondent's illegal conduct.
3. The court *a quo* further erred by finding that the appellant had an alternative remedy that is adequate, ordinary, reasonable and legal that can grant her similar protection.
4. The court *a quo* erred by denying the appellant the relief she was seeking for that left her without a remedy. Appellant' right to protection of the law was thus violated.

Appellant seeks to have set aside the Magistrate's judgement. The prayer sought is worded as follows:

> "Wherefore, the Appellant prays that:
> 1.The judgment of the Court be and is hereby set aside and substituted with the following:
> The application is granted as prayed for in the Applicant's draft order
> 2. Costs of suit."

The difficulty raised with the wording of the above is that the record contains two draft orders relating to Case No.185/13. It appears that initially an application was made for a provisional order which cited applicant and first, second, and third respondents as the parties

thereto. This was dated 31 January 2013. It sought to interdict the respondents from interfering with her duties and to grant her access to her office. A second application was then made dated 19 March which cited fourth and third respondents in the present appeal, as the first and second respondents in that matter. The order sought was for the first respondent (now fourth respondent) to vacate the office of headmaster and the second respondent (now third respondent) was being asked to ensure compliance with the order. As gleaned from applicants affidavit in that matter, an application was made to join these two matters since the first matter was by then still pending.

However, there appears to have been no effort on the part of applicant's practitioners to file an amended draft order in the court below effectively capturing the order sought as a result of the consolidation of the two matters. Suffice it to say that courts hearing an appeal do not expect to have to put pieces together from the record to ascertain the exact nature of the prayer sought from the evidence of disparate applications that are subsequently joined. The formulation of the prayer sought in an appeal should be immediately apparent in the notice of appeal such that it leaves no doubt as to what is asked of the court. How such order relates to the parties concerned should also be clear. As the draft orders stand, the one that relates to the interdict which is the subject matter of this appeal does not involve the fourth respondent. As such the reality is that the fourth respondent is effectively not part of this appeal.

The gist of appellant's argument is that the respondents have no right to transfer her from the school as she is answerable to the Public Service Commission (PSC) and not to them. She contends that it is only the PSC that determines who heads the school. She regards the first respondent's ownership as limited to infrastructure. She further maintains that she has neither been dismissed nor transferred by the PSC. As such, she asserts that the respondents are taking the law into their own hands and that the Magistrate's decision effectively condones their illegal behaviour. Several authorities against taking the law into one's own hands are cited by the appellant. (*Gordon Charles Spencer & Another* v *Minister of Lands, Land Resettlement & 2 others* HB 11/10; *Nino Bonino* v *De Lange* 1906 TS 120; *Chisveto* v *Minister of Local Government & Town Planning* 1984(1) ZLR 248. She insists on an absolute right to be at the school due to her reinstatement. She also argues that great prejudice is being suffered by virtue of not being able to perform her work as 'Head'.

In her heads of argument the appellant states that she was summoned to attend a disciplinary hearing before the Ministry's disciplinary committee. She further states that the suspension was lifted and an order for reinstatement made. The first, second and fourth Respondents in their heads of argument do not dispute the reinstatement but they do state that the processes for misappropriation of funds and maladministration are still pending. What emerges from the record in the form of letters that exchanged hands between the school authorities and the relevant Ministry is that the suspension period lapsed and that the appellant was then reinstated. The nature of the findings of any disciplinary hearing if indeed there was a full scale hearing were not presented to the court below.

As this is a non-governmental school, the first and second respondents argue that legally they are the 'responsible authority' for the school in terms of the Education Act [*Cap 25:04*]. They aver that as the 'responsible authority' the Ministry of Education cannot deploy anyone as 'Head' without the consent of the first respondent. Additionally as a church institution, they further argued that the school upholds certain values which Appellant breached by her actions, resulting in loss of trust. It is the first respondent's further assertion that the School Development Committee, who are the second respondents together with the traditional leadership are all of the same mind in no longer wanting the appellant at the school. Given to the events that transpired they argue that her return would result in a loss of morale among staff and would significantly undo the work already put in in terms of re-instilling lost confidence in the school. The first respondent also maintains that far from taking the law into their own hands, the request for appellant's redeployment has been formally done through the Ministry of Education. Also, the removal of the appellant as signatory to the school accounts was done with the express permission of the Ministry. Furthermore, a new head has since been employed in the person of the fourth respondent. With regards to an alternative remedy, it is the first respondent's position that appellant has the duty to push her employer for redeployment as that is her alternative remedy in this matter.

Turning to the law, the basis for obtaining a final interdict are well established and embraced in our law. In essence an applicant must establish a clear right emanating from a substantive area of the law. Secondly, the applicant must show that as a result of the infringement of the right, they have suffered some injury although this need not necessarily be pecuniary in nature. Finally, the applicant must have no other remedy that is adequate in

the circumstances, that is ordinary and reasonable, and that grants a similar protection. (See *Setlogelo* v *Setlogelo* 1914 AD 221; *Flame Lily Investments Co (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd & Anor* 1980 ZLR 378; *Universal Merchant Bank Zimbabwe* v *The Zimbabwe Independent & Anor* 2000 (1) ZLR 234)

The right to establish and maintain, at their own expense, independent educational institutions as long as they do not violate any aspect of the Constitution is one that is sanctioned by s 75 (2) of our Constitution. The law that provides the detailed framework for the parameters of operation of such institutions is the Education Act [*Cap 25:04*]. Whether the appellant has a clear right founded in contract that justify interdicting the Respondents from interfering with that right, depends on the provisions of the Education Act with respect to the hiring of staff in nongovernmental schools.

Section 2 of the Education Act defines 'responsible authority' as follows:

> "In relation to or a school, means the person body or organisation responsible for the management and establishment of the school."

The ambit of what such 'responsible authority' is empowered to do *vis* a *vis* their school is in the initial instance set out in s15 of the Education Act in relation to the establishment of such schools. That non-governmental schools have a measure of autonomy in the engagement of teachers is evident from s15 (4) (c) of the same Act whereby a non-governmental school may be registered if the Secretary in the Ministry is satisfied that "the qualifications and experience of the proposed teachers are adequate to ensure satisfactory instruction of the pupils attending the school". Additionally, in terms of s15 (4) (d) the Secretary needs to be satisfied that "adequate financial provision has been made for the proper maintenance of the school".

The Act in s15 (5) provides for a consultative process with the Ministry in ensuring that all requisite standards are met.

Post registration, support for further autonomy regarding the engagement of staff is also to be found in s 59 (2) of this Act which reads thus:

> "Every responsible authority of a Government and a non-Government school shall, not later than thirty days after employing any teacher, notify the Secretary of the appointment and submit to the Secretary particulars of the teacher's qualifications."

This measure of autonomy that non-governmental schools have in the hiring of teachers is to be contrasted with the express lack of autonomy in deciding issues relating to

the curriculum and to exams which are clearly the preserve of the Ministry of Education. (See s63 of the Act.)

Section 59 (4) outlines the parameters for dealing with a teacher who is deemed to be unqualified for a job. It is worded as follows:

> "If the Secretary finds that any teacher referred to in subsection (2) is not qualified under this section to hold the post in question, he or she shall write to the responsible authority accordingly and the responsible authority shall, if it has employed the teacher concerned, terminate the employment of that teacher"

There is nothing in any of the above provisions to suggest that teachers are foisted on a non-governmental school by the Ministry in a top down approach. Appellant founds her clear right on the factual basis of her reinstatement by her employer whom she says is contractually answerable to and whom she says is the only one with the right to transfer her. Section 16A of the Public Service Act [*Cap 16:04*] states that members of Public Service to be appointed and removed only in accordance with the Act. It states as follows:

> "Except as maybe provided in any other Act-
>
> a) All appointments of members of the public Service shall be made in accordance with this Act and;
> b) No member of the Public Service shall be required to resign or retire, or be dismissed, discharged or otherwise removed from the public service, excerpt in accordance with this Act."

Her employer has not dismissed her. *In casu* the respondents are not seeking to dismiss the appellant from public service or interfere with her contractual obligations. On the contrary they recognise her contractual right with her employer, and merely seek that she be transferred to another school through the Ministry of Education. Asking that she be transferred from their school is within their right to do so. With the responsibility for maintaining such schools being constitutionally at their own expense, understandably reputation is everything for such non-governmental schools. They cannot be expected to raise funds for self- sustenance against the backdrop of a bad financial reputation from an imposed source. This would make no legal or financial logic. It is understandable that first and second respondents insist on taking all measures necessary not to reduce enrolments due to a compromised reputation.

As the responsible authority for the school, the first respondent has a right to insist that staff adhere to its mission and objectives. Among the responsibilities of the first respondent is to ensure that the finances of the school are in order. Therefore to refuse to re -

engage a teacher whom the first respondent deems to have failed to support its mission or to fulfil its goals, is not only logical but well within its rights to do so. They may make and are entitled to make decisions concerning the engagement and dismissal of staff based on the values that the school stands for as long as these are perfectly legal and are within the permissible constitutional boundaries.

Furthermore, the first and second respondents have at all times acted in consultation with the relevant Ministry, firstly with regard to changing the signatories on their account and secondly in making it clear that they no longer wished to have the appellant at their school. More significantly, legally the first respondent as the owner of the school and responsible authority has considerable autonomy in the engagement of its staff. There is thus no violation of any clear right.

The second ground of appeal put forward by the appellant that the court erred in finding that no injury has been suffered, cannot be divorced from the finding whether or not a clear right exists against the first and second respondents. In light of the finding that there is no clear right against the first and second respondents, there cannot be an injury suffered at their hands. The appellant remains a public service employee through the Ministry of Education. She enjoys her full benefits but not to the extent of insisting on a 'forced marriage' of sorts with first and second respondents. This would in fact go against the consultative grain that underlies the Education Act.

The third ground of appeal which is that the magistrate erred in finding that she had an alternative remedy must also fail given that there is no clear right against the school. Legally she can be transferred to another school by her employer through the Ministry of Education. As such the fourth ground that appellant has been left without a remedy equally cannot stand. Her inability to exercise her duties as headmistress stem from her own refusal to pursue a transfer with her employer.

In the result, it is ordered that the appeal is hereby dismissed with costs.

CHITAKUNYE J. Agrees _____

Tandiri Law Chambers, appellant's legal practitioners
Bere Brothers, respondent's legal practitioners