REPORTABLE ZLR (25)

Judgment No. SC 26/07
Civil Application No. 291/06

FARAI DZVOVA v (1) MINISTER OF EDUCATION SPORTS AND CULTURE (2) RUVHENEKO PRIMARY SCHOOL (3) F NYAHUYE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA, CHEDA JA, ZIYAMBI JA &
MALABA JA
HARARE, JANUARY 25 & OCTOBER 10,2007

*Z Chadambuka*, for the appellant

*R Sweto,* for the respondents

**CONSTITUTIONAL APPLICATION IN TERMS OF SECTION 24(2) OF THE CONSTITUTION OF ZIMBABWE**

CHEDA JA: The applicant is the father of a 6 year old child Farai Benjamin Dzova, (hereinafter referred to as "the child").

The first respondent is the Government Minister responsible for Education, Sports and Culture, under whose Ministry the second respondent falls (hereinafter referred to as "the Minister").

The second respondent is the Primary School in which the child was enrolled (hereinafter referred to as "the school").

The third respondent is the Headmaster of the school (hereinafter referred to as "the Headmaster").

At the beginning of March 2005 the child was enrolled in grade (0) at the school in line with the new education policy of the Ministry of Education which required that children's pre-schools be attached to primary schools so that the children would automatically attend the primary schools from pre-schools. The child graduated from the pre-school system and was then enrolled in the primary school system. The fees were paid and all necessary books and stationery were purchased.

The child's father said while in pre-school the child's hair was never cut and was kept what is commonly known as dread locks until the child graduated from pre-school.

The child's father was called to the school a few weeks into January 2006 to discuss the issue of the child's hair with the teacher-in-charge and asked to write a letter to explain. By then the child was being detained and was no longer going to the classroom with other children. The father sent a letter from his church.

On 27 January 2006, one Brighton Zengeni brought a letter from the school addressed as follows:

> "Ruvheneko Government Primary School
> P.O Box GN8
> Glen Norah
> Harare
>
> 25 January 2006
>
> Dear Parent
>
> REF: FARAI BENJANI DZVOVA'S HAIR
>
> You are cordially advised that one of our regulations as a school, is that hair has to be kept very short and well combed by all pupils attending Ruvheneko Government Primary School, regardless of sex, age, race or religion:- You are therefore being asked to abide by this regulation, failure to which, you will be asked to withdraw or transfer your child Farai Benjamin Dzvova to any other school. This is to be done with immediate effect.
>
> Yours Faithfully
>
> F. Nyahuye
> SCHOOL-HEAD"

The applicant went and discussed the matter with the deputy headmaster and the teacher-in-charge who maintained that they could not accept the child's continued learning in the school so long as his hair was not cut to a length acceptable by the school.

A further discussion with the headmaster of the school and the Regional Education Officer did not resolve the matter.

The applicant then made an application to the High Court and obtained the following provisional order:

**"TERMS OF ORDER MADE**
That you show cause to this Honourable Court why a final order should not be made in the following terms:

TERMS OF THE INTERIM RELIEF

BY CONSENT OF THE PARTIES:

1. Pending the resolution of this matter by the Supreme Court it is ordered that:

   i) The respondents be and are hereby compelled to allow the minor Farai Benjamin Dzvova to enter upon the second respondent school for purposes of education until the Supreme Court determines the matter.

   ii) The respondents are hereby interdicted from in any way negatively interfering with the minor Farai Benjamin Dzvova's education, more particularly in that the respondents be and are hereby barred from:

      a) separating Farai Benjamin Dzvova from his classmates;

      b) otherwise detaining Farai Benjamin Dzvova in solitary or in the sole company of adults;

      c) in any other way discriminating against Farai Benjamin Dzvova on the basis of his hairstyle or his religious beliefs pending the determination of the matter by the Supreme Court.

2. The case is referred to the Supreme Court for the determination of:

   i) whether the exclusion of the minor child Farai Benjami Dzvova was done under the authority of a law as envisaged in s 19(5) of the Constitution and in the event the court finds it was done under the authority of a law;

ii) whether such a law is reasonably justifiable in a democratic society."

In accordance with para 2 of the above order the application has now been brought to this Court in terms s 24 of the Constitution alleging that the child's right guaranteed by s 19(1) of the constitution has been violated.

In his founding affidavit the applicant says he is a Rastafarian as well as his wife and they were customarily married in 1991. His wife Tambudzayi Chimedza is the mother of the child. They have been practising Rastafarianism for almost a decade. They initially attended Chaminuka Rastafarian House in St Mary's, Chitungwiza which is the Headquarters of the National Rastafarian Council. He said about four years ago in 2002 they opened a branch of the church in Glen Norah for which he is "Ilect of Priesthood".

Church services are held every Sabbath day and in good weather they begin the preceding Friday evening. He said it is an integral part of the Rastafarian faith that they take certain vows as part of their religion. The vows include that they do not eat refined food, but only eat food in its natural state. Further to this, they do not drink alcohol. Also central to this is the vow that they do not cut their hair (My underlining). He said the vow not to take alcohol or eat refined food and to shave their hair is the Nazarene vow which is biblically present in Numbers 6 verses 1-6.

He said their children are born Nazarites. Thus Farai Benjamin Dzvova, in line with the family religion, cannot cut his hair. (my underlining).

He said they let their hair grow long and the twisting which eventually occurs is a natural result of African hair which is let to grow long. This is one of the visible distinguishing factors between geniune Rastafarian adherents and those who appear to have as a their hairstyle for fashion purposes actually twist it, which is forbidden by their religion.

He said in accordance with their religion, before, and during his days at pre-school, their son's hair was never cut and it was in the inevitable locks.

He then narrated the events from March 2005 which led to the order that was later obtained at the High Court.

Section 19(1) of the Constitution provides as follows:

> "(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of conscience, that is to say freedom to change his religion or belief, and freedom, whether alone or in community with others, and whether in public or private, to manifest and propagate his religion or belief through worship, teaching, practice and observance."

In order to determine whether this application falls within the ambit of the above section, it is necessary to consider the following question:

Is Rastafarianism a religion?

The appellant submitted that Rastafarianism is a religion. He stated in his founding affidavit the following:

> "About four years ago in 2002 we opened a branch of the church in Glen Norah of which I am "Ilect of priesthood', that is, the priest. This is at Jah Ruins in Glen Norah B, behind, In-fill primary school. Church services are held every Sabbath day, that is, every Saturday. In good weather, they begin the preceding Friday evening".

The above shows that the Rastafarian Organization conducts services for worshipping purposes on week-ends. He further stated that the Rastafarian religion is based on the Bible which is a basis for many other religions.

The *New English Dictionary on Historical Principles,* VIII, gives the following definition of religion:

"1. A state of life bound monastic vows ….

2. A particular monastic or religious order or rule ….

3. Action or conduct indicating a belief in, reverence for, and desire to please a divine ruling power, the exercise or practice of rites or observances implying this;

4. A particular system of faith and worship;

5. Recognition on the part of man of some higher or unseen power as having control of his destiny, and as being entitled to obedience, reverence and worship. The general mental and moral, attitude resulting from this belief, with reference to its effect upon the individual or the community; personal or general acceptance of the feeling as a standard of spiritual and practical life.

6. Devotion to some principle, strict fidelity or faithfulness, conscientiousness; pious affection or attachment."

What the applicant said about Rastafarianism falls within these descriptions, thus leaving no doubt that it is a religion.

The applicant also referred to cases in other jurisdictions in which it was decided that Rastafarianism is a religion.

These are: *Reed v Faulkner* 842 f 2d 960 (7th Cir 1988); *People v Lewis* 510 NYS 2 73 (Court of Appeals of New York, 1986); *Crown Suppliers (Property Svcs Agency) v Dawkins* (1993) 1 CR 517 (CA).

These cases were also referred to in a recent case that was before the Supreme Court, that is *In re Chikweche* 1995 (1) (ZLR) 235 (S) in which it was held that Rastafarianism is a religion.

The applicant's complaint is that the rules made by the respondent -

> "… are unlawful and in contravention of my son's rights under s 19 of the Constitution which provision gives the right to protection of freedom of conscience and religion."

The rules referred to, are under the following heading:

"**RUVHENEKO GOVERNMENT PRIMARY SCHOOL JANUARY 2005**
**SCHOOL RULES FOR ALL PUPILS**

1. All pupils to be in school uniform all the time at the school.
2. All pupils to have short brush hair regardless of sex, age, religion or race.

3. …

4. …".

The protection of the rights of an individual rules bear the signature of the School Head. The applicant referred the Court to a number of cases from other jurisdictions which dealt with an issue similar to the one complained of in this case.

The protection of the rights of the individual against discrimination on religious grounds are in s 19 of the Constitution of Zimbabwe.

There have been several decisions on the nature and content of the rights. They include the following -

1. In re *Munhumeso & Ors* 1994(1) ZLR 49 where it was confirmed that every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual which are stipulated in the Constitution subject to certain limitations.

2. In *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) it was held that:

> "… religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights".

3. In the English case of *The Queen on application of SB, the Claimant/Appellant and Head teacher and Governors of Denbigh High School, Defendants/Respondents*, the Supreme Court of Judicature, Court of Appeal

(Civil Division) 2004 EWHC 1389 LORD JUSTICE SCOTT BAKER stated that:

> "Every shade of religious belief, if genuinely held, is entitled to due consideration under Article 9. What went wrong in this case was that the school failed to appreciate that by its action it was infringing the claimant's Article 9 right to manifest her religion".

This case shows that it is important to respect one's genuine religious beliefs.

The applicant referred to several useful international authorities based on similar provisions of the Human Rights Charter.

The distinction between the authorities and referred to in this case is that they inquired into the validity of regulations. This case deals with rules made by a school headmaster. The question is, on what authority did he make them. I now proceed to deal with this question.

As indicated earlier, the rules were issued and signed by the head master of the school.

Section 19(5) of the Constitution of Zimbabwe provides as follows:

> "Nothing contained in or done under the authority of a law shall be held to be in contravention of subsection (1) or (3) to the extent that the law in question makes provision:
>
> (a) …

(b) …

(c) …."

The question is - Was the rule on the basis of which the applicant was barred from attending at the school made under the authority of a law? If it was, it would have been necessary to consider any derogations or justification provided in the Act. In this case it seems this was not done under a law since no law authorized such action.

Section 4 of the Education Act [*Cap. 25:04*] provides as follows:

"4. **Children's fundamental right to education in Zimbabwe.**

1. Notwithstanding anything to the contrary contained in any other enactment, but subject to this Act, every child in Zimbabwe shall have the right to school education.

(2) Subject to ss (5), no child in Zimbabwe shall -

(a) be refused admission to any school; or

(b) be discriminated against by the imposition of onerous terms and conditions in regard to his admission to any school;

on the grounds of his race, tribe, place of origin, national or ethnic origin, political opinions, colour, creed or gender.

It follows that the attempt by the school to bar the child from the school contravenes not only the Constitution, but the above provision of the Education Act as well.

Section 69 of the Education Act provides as follows:

> "1. The Minister may make regulations providing for all matters which by this Act are required or permitted to be prescribed or which, in his opinion, are necessary or convenient to be prescribed for carrying out or giving effect to the Act.
>
> 2. Regulations made in terms of ss (1) may provide for –
>
> (a) …
>
> (b) …
>
> (c) discipline in schools and the exercise of disciplinary powers over pupils attending schools, including the administration of corporal punishment and the suspension and expulsion of such pupils in respect of their attendance and conduct in schools, and in public places when not accompanied by their parents or by adult persons into whose custody they have been entrusted by their parents."

There is nothing in the Act which confers similar powers on the headmaster of a school to make similar rules or regulations.

The respondents submitted that the Minister made regulations (Education (Disciplinary Powers) Regulations, 1998 S.I 362 if 1998). These regulations provide as follows:

> "2. Every pupil who enrols in a Government or non-Government school shall conform to the standard of discipline enforced at that school, and shall render prompt obedience to the school staff".

The respondents concede that the school rules are not laws, but argue that they were made under the authority of a law.

The provisions of SI 362 of 1998 deal with discipline in the school and obedience to the school staff. It has not been suggested, nor can it be argued, that having long hair at the school is indiscipline or disobedience to the school staff.

It is only a manifestation of a religious belief and is not related to the child's conduct at school.

I therefore do not agree that these regulations are relevant to the matter complained of by the applicant.

In s 3 of the Interpretation Act [*Cap.1:0*], "law" means any enactment and the common law of Zimbabwe. 'Regulation", 'rule', 'by-law', 'order', or 'notice', means respectively a regulation, rule, by-law, order or notice in force under the enactment under which it was made. There is nothing to link the school rules with any enactment. The rules were not made under any enactment.

Section 26 of the Interpretation Act states as follows:

> **"Holders of Offices**
>
> Where any enactment confers a power, jurisdiction or right, or imposes a duty, on the holder of an office as such, then the power, jurisdiction or right may be exercised and the duty shall be performed, from time to time, by the holder for the time being of the office or the person lawfully acting in the capacity of such holder."

The question that follows then is: Was the head master authorized by the enactment to make rules?

Section 69 of the Education Act confers powers to make regulations on the Minister regarding discipline in schools and other related matters. It does not confer any powers to make regulations on the head master. It does not authorize the Minister to delegate to the headmaster the power to make regulations regarding the conditions of the admission of a child to a school.

The regulations clearly specify the powers the headmaster can exercise over a pupil in cases of serious acts of misconduct only.

The Minister made the Education (Disciplinary Powers) Regulations, 1998, SI 362/98 ("the Regulations").

Section 2 of the Regulations provide as follows:

> "Standard of discipline
>
> 2. Every pupil who enrols in a Government or non Government school shall conform to the standard of discipline enforced at that school, and shall render prompt obedience to the school staff."

I understand this to refer to the conduct or behaviour of pupils and obedience to the school staff generally. I do not consider that asking pupils to conform to a standard of discipline would include an aspect that infringes on a pupil's manifestation of his religion. There is no suggestion by the respondents that keeping dreadlocks is an act of indiscipline or misconduct.

If the head master believed that he had authority to make such rules then he was wrong.

The Minister did not make regulations concerning the type of hair to be kept by the pupils. Neither did he delegate the making of regulations on that subject matter to the head master.

Further to that, s 26 of the Interpretation Act provides as follows:

> "26 Where any enactment confers a power, jurisdiction or right, or imposes a duty, on the holder of an office as such, then the power, jurisdiction or right may be exercised and the duty shall be performed, from time to time, by the holder for the time being of the office or the person lawfully acting in the capacity of such holder."

Section 27 provides as follows:

> "27 An appointment made under an enactment may be made either by name or by reference to the holder of an office or post."

It is clear that the enactment appointed only the Minister, and not the headmaster, to make regulations.

It is also clear that the headmaster of the school was never appointed to the office held by the Minister, and he did not act in that post at all.

The Minister allowed the school to maintain certain standards at the school, but never authorized the school to make any regulations.

It follows that the submission by the respondent that the rules were made under the authority of a law cannot be correct.

The head teacher cannot make rules which constitute a derogation from the constitutional rights of the pupils.He exceeded his powers which are stipulated in the SI 362 of 1998 and used powers which he did not have.

In so doing he was wrong as such powers were never, and could never have been, lawfully delegated to him.

Having concluded that the rules by the school were not made under a law, it is not necessary to consider the issue of justification raised by the respondents.

In conclusion, the following order is made -

(a) The respondents be and are hereby compelled to allow the minor Farai Benjamin Dzvova to enter upon the second respondent school for purposes of education.

(b) The respondents are hereby interdicted from in any way negatively interfering with the minor Farai Benjamin Dzvova's education, more particularly in that the respondents be and are hereby barred from:

i) separating Farai Benjamin Dzvova from his classmates;

ii) otherwise detaining Farai Benjamin Dzvova in solitary or in the sole company of adults;

iii) in any other way discriminating against Farai Benjamin Dzvova on the basis of his hairstyle or his religious beliefs.

(c) It is hereby declared that expulsion of a Rastafarian from school on the basis of his expression of his religious belief through his hairstyle is a contravention of ss 19 and 23 of the Constitution of Zimbabwe.

(d) The respondents shall pay the costs of this application.

CHIDYAUSIKU CJ: I agree.

SANDURA JA: I agree.

ZIYAMBI JA: I agree.

MALABA JA: I agree.

*Zimbabwe Lawyers for Human Rights*, applicant's legal practitioners

*Civil Division of the Attorney General's Office*, respondent's legal practitioners