

NDABEZINHLE MAZIBUKO
versus
THE BOARD OF GOVERNORS
CHRISTIAN BROTHERS' COLLEGE
and
THE NATIONAL INCOMES AND PRICING COMMISSION
and
THE SECRETARY, MINISTRY OF EDUCATION

HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 8 JUNE AND 30 JULY 2015

Opposed Application

Mr Chamunorwa for applicant
Advocate P Dube for respondents

MAKONESE J: The applicant avers that he has no quarrel with teachers being paid competitive salaries, but has a serious problem with teachers being paid huge salaries at the expense of his son's education. Applicant further contends that there is no reason why 80% of a school's budget should be allocated towards salaries when nothing at all is allocated towards the purchase of text books and stationery, which are the basic ingredients of a child's education. The applicant poses the question: What good is a good teacher without textbooks and stationery which the children are to utilize for their day to day education. It is argued by the applicant that the failure by first respondent to provide textbooks and stationery for his son and other learners amounts to a breach of the implied term of the contract between the parties, and that the school, as a registered secondary school, must provide textbooks and stationery for its learners in return for payment of school fees. Applicant's further contention is that the requirement for parents to buy textbooks and stationery amounts to an unauthorized levy or school fees by first respondent and should not only be declared as such, but first respondent must be compelled by an order of the court to provide textbooks and stationery to its learners.

The applicant has a son who attends secondary school at Christian Brothers' College, which is administered by first respondent. In 2011 applicant raised the issue of textbooks and stationery. In March 2012, first respondent indicated that the school had never provided textbooks and stationery since it opened in 1954. It was further noted that the issue of textbook purchases was not provided for in the school budget. The applicant who is unhappy with the position taken by the school filed a court application in this court, seeking the following relief:

“IT IS ORDERED THAT:

1. It be and is hereby declared that the failure by the 1st respondent to provide learners at Christian Brothers College with textbooks and stationery amounts to a violation of the Children's right to a proper education at the Institution as well as a fundamental breach of the implied term of the contract to provide said text books and stationery.
2. It be and is hereby declared that the requirement by the 1st respondent that the applicant and all parents/guardians of learners at Christian Brothers College to buy textbooks and stationery over and above payment of school fees amounts to an unauthorized and illegal fee or levy, contrary to the Provisions of Section 21 of the Education Act as amended and as read with Sections 2 and 4 of the Education (Control of Fees and Levies) (Government and Non-Government Schools) Regulations Statutory Instrument 194A of 2004.
3. The 1st respondent be and is hereby ordered to provide textbooks and stationery for all its learners at Christian Brothers College with effect from the first term of 2014.
4. The 1st respondent shall not increase school fees at Christian Brothers College expect after giving parents of learners enrolled thereat at least one terms' notice of such increase, after the increase has been approved by either the National Incomes and Pricing Commission or the Secretary of Education.
5. The practise by the 1st respondents and any other learning institution to bar its learners from attending classes on account of non-payment of or partial payment of school fees be and is hereby declared to be a violation of Section 7 (1) of the Childrens Act Chapter 5:06 and is declared to be unlawful.
6. In the event that a parent or guardian consistently fails to pay school fees for his or her child or ward, the 1st respondent shall not bar the child or ward from class or school but will only be entitled to terminate the contract between itself and the parent or guardian upon giving at least one terms' notice of such intended cancellation.
7. The 2nd and/or 3rd respondent be and are hereby ordered to ensure that the 1st respondent complies with this order.

8. The 1st respondent shall pay the costs of suit in a legal practitioner and client scale.”

The relief sought by the applicant is opposed by first respondent who argues that the applicant has no *locus standi* to bring this application. I propose to first deal with the preliminary issue raised by first respondent.

WHETHER APPLICANT HAS *LOCUS STANDI*

The first respondent (who shall be referred hereinafter as “the respondent), argues that applicant has not shown that he is an injured party in respect of the relief sought in the draft order. It is contended on behalf of the respondent that the relationship between the applicant and respondent is contractual, and as such, this court has no jurisdiction to review decisions made during the performance by one party or the other in respect of contractual obligations. The court, it is further argued does not have jurisdiction to direct either party to the contract in the performance or discharge of its private contractual relationship. It is submitted on behalf of the respondent that no violation of any right of learners has been established, and that, there is therefore no basis for the interference with the policies of respondent. Respondent submits that there is no live or existing controversy with regard to the alleged policy of exclusion of learners who have not paid school fees and that the court should not be called upon to pronounce upon abstract propositions of law that would amount to advisory opinions.

The applicant contends that he has *locus standi* to bring the application. He states that he has established *locus standi* on the following grounds:

- (a) He is a parent of a minor child enrolled with the respondent’s school.
- (b) As the parent and guardian of the minor child, and having signed the contract with respondent for the education of the minor child, the applicant is solely responsible for payment of all school fees and provision of all other educational needs for the minor child at Christian Brothers College.
- (c) In the event of failing to pay school fees for the minor child, with respondent’s policy of chasing away children for non-payment of school fees, the applicant is directly affected, as well as the minor child.

It is a well established principle of our law that a party who initiates legal proceedings, whether by application or summons, should indicate in the commencing papers that he has *locus standi* to bring such proceedings. What the applicant must show in order to satisfy that requirement is that he has an interest or special reason which entitles him to bring such proceedings.

See the case of *Stevenson v Minister of Local Government and others* 2002 (1) ZLR 498

(S). In this matter SANDURA (JA), stated at page 500 as follows:

“In many cases, the requisite interest or special reason entitling a party to bring legal proceedings has been described as “a real and substantial interest” or as “a direct and substantial interest.”

In his founding affidavit, the applicant dealt with the aspect of *locus standi* in paragraphs 5, 6 and 7 as follows:

- “5. I have a son, namely Ndabezinhle Ntandoyenkosi Mazibuko, born on the 4th of April 1998, who attends secondary school at Christian Brothers’ College which is administered by 1st respondent. He was in form 3.2 in the year 2013 and is proceeding to do his form 4 this year and will be in class 4.2.
6. I have received the school fees invoice for the first term of 2014 for the sum of US\$1650,00 which includes a proposed increase of the fees from US\$1575.00 which have not yet been approved by either the 2nd and 3rd respondents. More on that later.
7. What baffles me and really gets under my skin is that we are paying such a large amount of money in school fees and yet the 1st respondent does not provide text books and stationery for our children.”

It is my view that the grounds upon which the applicant contends that he has *locus standi* to bring this application are properly canvassed in his founding affidavit. The respondent averred that a case stands or falls on the founding affidavit, and placed reliance *inter alia* on the case of, *Director of Hospital Services v Mistry* 1979 (1) SA 626 (AD).

I am satisfied that the applicant disclosed the nature of his interest with sufficient clarity in his founding affidavit. He has a substantial and direct interest in the matter. It follows therefore, that the point *in limine* was not well taken and the matter must be heard on the merits. See also *Zimbabwe Teachers Association and others v Minister of Education and Culture* 1990 (2) ZLR 48.

On the merits

It is not disputed that respondent is a non-government secondary school registered in terms of the Education Act [Chapter 25:04]. The school raises school fees which it collects from the parents of the children enrolled with them. The funds are utilized by the school for various purposes, including the payment of wages for teachers and other day to day operations. The argument has been made by the applicant that term “school fees” denotes a payment made on behalf of the minor child on provision of the necessary schooling at the school. In simple terms, the school provides educational services to its learners. The parents pay fees to the school for the provision of educational services. Applicant argues, further, that because what is provided by respondent is basic secondary education, this includes the provision of teachers and facilities for teaching such as classrooms, laboratories and textbooks upon payment of school fees. The applicant submits that whether or not the provision of textbooks is expressly stated in the contract entered into with the school by the parent, it must be a standard and implied term of the contract that the school should provide such textbooks. This argument is carried forward by pointing out that that other elite secondary schools offering the same educational instruction as respondent do in fact provide their pupils with textbooks. Failure to provide the requisite textbooks amounts to failure by the school to provide the child with basic secondary education, so it is argued by applicant.

The applicant’s argument makes good and practical common sense to the extent that an elite school charging high fees should necessarily provide textbooks. The parents are undoubtedly incurring additional costs by buying textbooks for their children after paying high school fees. The difficulty is that there exists a contractual relationship between the applicant and the respondent. The applicant, who is not a layman signed a written contract, with specific terms and conditions. In terms of the written contract, the applicant acknowledges that he will be bound by such rules and regulations as may be put in place by respondent, or the headmaster from time to time. Clause 3 of the contract provides as follows:

“The parent further undertakes to supply the pupil with all uniforms, equipment and other requirements as may be stipulated by the school from time to time and to replace the same as and when necessary.”

The applicant avers that the term “other requirements” in the contract does not mean textbooks as these are inherently and intrinsically linked to the provision of basic secondary education but rather relate to extracurricular and optional activities such as sports and other social clubs which the pupil may decide to join at the school. It is common cause that the school has never provided textbooks since its inception in 1954. The applicant, who has had another child at the same school before, has always been aware of the policy of the school regarding the provision of textbooks. The applicant signed a contract with the school on the terms and conditions agreed between himself and the school. As I have stated, the applicant is not a layman, and has always been aware of the rules regulating the parties. The *maxims volenti non fit injuria* and *caveat subscripto* are applicable in the circumstances of this case.

It is a settled principle that the courts will not interfere in private contractual relationships. Such relationships include the relationship between a voluntary association and its members, which relationship is based on contract. The applicant and respondent entered into a contractual relationship, which the courts will be reluctant to interfere with, in the absence of any alleged breach of rules of natural justice or any perceived conduct which is *ultra vires*. In the present case, the applicant has not alleged any breach of any rules of natural justice and the case involves a private contractual relationship, and there is, therefore no basis for the court to interfere. See the case of *Jockey Club of South Africa and others v Feldman* 1942 AD 340. In any event the courts have always respected the freedom of contract, and have been loath to reformulate, or formulate, contractual terms for the parties, nor alter the express terms of a contract, nor act as registries for the registration of such contracts. In the case of, *Magodora and Others v Care International* S 24/14 the court laid down the principle as follows:

“It is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they were shown to be onerous or oppressive. This is so as a matter of public policy. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with the express terms.”

In the instant case, the essence of the application before me is to seek to rewrite the terms of the contract between the parties by imposing a new and specific obligation on the respondent to provide textbooks for the pupils. This condition was not expressly or impliedly contemplated by the parties when the contract was executed. The applicant invites the court to interfere on the

basis that there has been a violation of the learner's right to education, and further, a breach of a tacit term in the parties' contract that respondent will provide learning facilities as well as textbooks and stationery. The express terms of the parties' contract exclude such a term. The right to education as envisaged in the Education Act and under section 85 (1) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 does not relate to provision of textbooks and stationery. The right adverted to is the right to free basic education at elementary level which the government of Zimbabwe has an obligation to provide.

The applicant filed supplementary heads of argument where he attempted to smuggle a new argument based on the provisions of section 8 of the Consumer Contracts Act [Chapter 8:03] by alleging that the contract between the applicant and respondent is a consumer contract and that the court is empowered to interfere and vary the terms of the contract. I have no doubt that his additional ground came as an afterthought and as such I do not intend to detain myself on that argument in great deal. The founding affidavit does not raise this issue and accordingly, the application falls or stands on its papers. The aspect of the contract being a consumer contract was not even mentioned in the applicant's replying affidavit, but only surfaced in the Supplementary Heads of Argument. This is inappropriate.

It is my view that the applicant failed to show that there is any legal basis for the court to interfere in a private contractual relationship. There is no good ground for the court to review the respondent's long standing policies on school fees and their relationship with the parents. I have found that there can be no basis to imply a tacit term into the contract, especially where such a tacit term would be contradicted by express terms of the contract. I have not made any specific finding on the issues raised in paragraphs 4, 5, and 6 of the draft as there is no live controversy regarding the exclusion of pupils from school by reason of non-payment of school fees. The applicant confirmed at the hearing that this child was up to date with school fees. There was therefore no need to consider that issue.

In the result, the application is dismissed with costs.

Calderwood, Bryce Hendrie and Partners, applicant's legal practitioners
Webb, Low and Barry, 1st respondent's legal practitioners