THE ASSOCIATION OF TRUST SCHOOLS
and
ARUNDEL SCHOOL TRUST
and
JAMESON TIMBE
versus
THE CHAIR, NATIONAL & PRICING COMMISSION
and
GODWILLS MASIMIREMBWA

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 4 & 11 September 2008

Urgent Chamber Application

Mr. Mhike, for the applicant
Mr. Mhlanga, for the first, second and third respondents

CHATUKUTA J: The facts in this mater are that on 30 August 2008, the National Incomes and Pricing Commission (the Commission) issued, in The Herald, a schedule of school fees that it had fixed for the schools identified in that schedule. The schedule was accompanied by a statement by the 1st respondent that the flouting of the fixed fees would result in the prosecution of school heads and cashiers. Fearing the arrest of school heads and cashiers at the instance of the respondents, and the disruption of operations of schools as a result of the arrests, the applicant filed this urgent chamber application.

During the proceedings the applicants amended their interim order to read:

> "1. The Respondents shall not request, instigate or effect the arrest of a head teacher or cashier or other employee at a non-government school maintained by Second Applicant or any other member of First Applicant on the basis of the NIPC Fees fixed by the Respondents on 30 August 2008 in Annexure A;

2. The fees set out in Annexure A be and are hereby set aside;
3. Full and due consideration will be given by the First Respondent to all applications that have been made or are made by the Second Applicant or any other member of First Applicant under Section 21 of the Education Act [Chapter 25:05], as amended; and
4. That this order shall remain binding pending any appeal, and will not be suspended merely by the noting of an appeal."

The respondents raised a point *in limine* that the matter was not urgent. *Mr. Mhlanga*, for the respondents submitted that the certificate of urgency did not disclose the basis upon which the application should be considered urgently. He contended that the applicants were aware, as far back as early August, that schools were to reopen on 2 September, 2008. They were and have always been aware that the public examinations are written in the third term. These two considerations do not create any urgency.

He further contended that by 30 August 2008, the Commission had received only six applications for the approval of fees for the third term. The applications had already been considered and approved by the Commission. The Commission sent out reminders to all the members of the 1st Applicant to submit their applications on 25 August 2008 and only six schools had done so. It contended that the fixing of fees on 30 August 2008 did not therefore create any urgency.

Mr. Mhlanga also submitted that the alleged threats of arrest and prosecution, attributed to the 2nd respondent, were a restatement of the law which criminalizes the charging or receipting of fees that have not been approved by the Commission. It was contended that this restatement of the law should not be considered as a threat and does not create any urgency.

Mr. Mhike, for the applicants, submitted that the urgency did not arise merely from the date of the opening of schools. It arose from the potential disruption of schools as a result of the respondent fixing fees without following the procedures prescribed by law. He contended that the threats of arrest and prosecution were issued following the publication of the schedule of fees on 30 August 2008. The applicants therefore were seeking protection from threats made in connection with fees that had not been properly prescribed.

This court has held that an application is urgent when, if at the time the cause of action arises, determination of the matter cannot wait. (See *Kuvarega v Registrar-General* & *Another* 1998 (1) ZLR 188 (HC)). In such a case, the filing of an application with the court immediately after the cause of action arises emphasises the urgency of the matter and the vigilance of the applicant. In my opinion the urgency arises from the fact that the Commission announced a schedule of fees that schools are expected to comply with failing which school heads and cashiers would be arrested or prosecuted. The respondents did not dispute that the alleged threats were issued following the publication of the schedule. It however stated that it was a restatement of the existing law. It is not in issue that the National Incomes and Pricing Commission Act [*Chapter 14:32*] provides for the prosecution of school officials who levy and collect fees not approved by the Commission. However, it is the restatement of that legal position following the publication of the schedule of fees that has raised the apprehension that has been stated by the applicants. The possible harm to be suffered by the applicants is the disruption of school activities and in particular preparation of examination by the school authorities and the students hat would arise from the threatened arrest based on the failure of the school authorities to comply with the dictates of the published schedule. I therefore hold that the application is urgent.

I turn now to determine the matter on the merits.

It is trite that to obtain an interlocutory interdict, the applicant must establish:

(a) a clear or *prima facie* right and show:

(b) an infringement to his right by the respondent or at least a well grounded apprehension of such infringement; and

(c) the absence of any other satisfactory remedy; and

that the balance of convenience favours the granting of an interlocutory interdict – *Setlogelo* v *Setlogelo* 1914 AD 221and *Econet (Pty) Ltd* v *Min of Information, Posts and Telecommunications* 1997(1) ZLR 342(H).

The applicants contended that their officials have a right not to be arrested on the basis of a non violation of the law as the document upon which the 2nd respondent issued threats of prosecution was not lawful. As a result they should not be arrested for charging the fees set in that document. The respondents should therefore be interdicted from instigating the arrest of the school officials. They further contended that they also seek to enforce the right to education which is guaranteed under the Constitution. They have a mandate to ensure the enjoyment of this right without disruption. Any arrests would result in the disruption of school administration and compromise the enjoyment of the right to education.

The respondents submitted that the applicants and school authorities did not have a right not to be arrested for flouting the law. It was contended that the applicants want to charge and receive fees not approved by the law.

It appears to me that the applicants and those they represent do have a *prima facie* right to be protected against arrest on the basis of the schedule that may not be legal. In my view that right is in fact linked to the relief sought. Further, the disruption of school activities on the basis alluded to constitute a *prima facie* right in relation to the temporary interdict sought. The respondents' contention in this respect would have been sustained had the applicants been seeking a blanket protection against arrest without tying that right to the schedule. The applicants conceded that any authority found flouting the provisions of the law would be open to arrest and would not be protected by the relief that they seek. This would include authorities receiving fees in foreign currency and fees not yet approved by the Commission.

As already observed earlier in this judgment, the applicants have a founded apprehension of the infringement of their right. This follows from the pronouncement by the 2nd respondent that any authority found charging and receiving fees in excess of those provided for in the schedule would suffer the full wrath of the law.

The applicants contended that there is no other remedy to the threat of arrest except the relief that they seek. The respondents contended that the applicants could avoid arrest by not breaching the law. The applicants firstly need to submit their applications for approval and not charge and receive fees that have not been approved by the Commission. The respondents again seem to forget that applicants' relief is tied to

the schedule. The applicants cannot have any other protection for the threats of arrest based on the schedule other than the relief they seek in this application.

I am of the view that the balance of convenience weighs in favour of the applicants. As contended by the applicants, it is the applicants and not the respondents who will suffer inconvenience if the school officials are arrested and the smooth administration of the schools is disrupted.

In the result, the applicants must succeed in the interim relief they seek in so far as it relates to the prevention of any request or instigation of the arrests of officials of or interference with school operations on the basis of the schedule. It is my view that it is necessary at this stage to stress that the interdict applies only in so far as it relates to the schedule. The respondents filed documents relating to the charging and collection of fees by members of the 1st applicant which it contends it has not approved. An example was Hartman House, Harare which is charging fees in foreign currency. One parent had to enter into arrangements with the school for the payment of fees in foreign currency by instalment. Goldridge College, Kwekwe, has set its fees in units and the units can be offset by fuel coupons. The applicants conceded that some of its members had not yet submitted their applications to the Commission for approval. The applicants did concede that they are aware that in order for any of them to charge and receive fees they must have been approved in terms of the Education Act and the National Income and Pricing Act. They conceded that the relevant legislation does not provide for provisional fees. What they term provisional fees are interim arrangements to assist the schools in their administration. They contended that there is a long-established practice where parents pay their share of all anticipated costs for each term in advance at the start of term. Such a payment is provisional pending the approval of applications to the Commission. It was underscored that such payments were voluntary and no student would be expelled from school for failure to make the interim payments. I believe that this is so on the basis that the authorities cannot accept payment of fees that have not been approved by the Commission. However, as rightly contended by the respondents, the relevant legislation does not provide for such interim payments. Further, a practice cannot override the law.

The second interim relief that the applicant sought is the setting aside of the schedule. The applicants contended that the court could do so on an interim basis as it is

clear that the respondents did not follow the laid down procedures. It is my view that it is not competent for this court to set aside an act of an administrative body in an urgent application. This would amount to a review of that act. It appears to me that in terms of Order 33, a review can only be in terms of a court application and on notice on the other party. It is only in such an application that a party can allege the proper grounds of review.

The third relief sought is that the respondents must give full and due consideration to applications that have been made and are to be made by the 2nd applicant and the members of the 1st applicant. The 2nd applicant has not pleaded that it has made an application which the Commission has not given due consideration. The 1st applicant has not identified any of its members who have made applications that have also not been given full and due consideration by the Commission. The respondents have, on the other hand, identified six schools that submitted their applications before the opening of the third term. The respondents submitted that all the applications were approved before the term opened. In any event, it is the mandate of the Commission to give full and due consideration to any application submitted to it. The applicants have not contended that the respondents have been derelict in or reluctant to consider the application. In the absence of such a contention, the applicants have not established a basis upon which the relief they seek should be granted.

The last relief that the applicants seek is that the noting of an appeal by the respondents should not suspend the relief granted. In other words, the applicants seek an order for execution pending appeal. It is my view that such a relief is not competent in an interlocutory matter. Further I am of the opinion that that such a relief can be granted following a proper application for leave to execute. As rightly noted by *Mr. Mhlanga*, the applicants have not even established a basis for the relief in the founding affidavit. In *Net One Cellular (Private) Limited v 56 Net One Employees and Anor* SC 40/05, CHIDYAUSIKU CJ quoted with approval CORBETT JA, in *South Cape Corporation, supra,* at pp 544H -545H that:-

> "Whatever the true position may have been in the Dutch Courts, and more particularly the Court of Holland (as to which see *Ruby's Cash Store (Pty) Ltd v Estate Marks and Another* 1961 (2) SA 118 (T) at pp 120-3), it is today the

> accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application. (See generally *Olifants Tin "B" Syndicate v De Jager* 1912 AD 377 at p 481; *Reid and Another v Godart and Another* 1938 AD 511 at 513; *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (AD) At 667; *Standard Bank of SA Ltd v Stama (Pty) Ltd* 1975 (1) SA 730 (AD) at p 746.)"

The applicant must establish the requirements for the granting of leave to execute. This the applicant has not done and I believe cannot do, firstly in an interlocutory matter, secondly on an urgent basis and lastly without mounting a proper application.

In the result, the applicant is entitled to the first paragraph of the interim relief only. However, the relief can only be granted where the applicant is seeking the setting aside of the decision of the Commission in the final order. I have therefore amended the terms of the final order sought and also taken into account the amendments made by the applicants during the hearing.

I, accordingly, make the following order:

A. FINAL ORDER SOUGHT

The respondents shall show cause why a final order should not be granted in the following terms:-

1. That the interim relief granted is confirmed.
2. That the schedule of fees published by the first respondent be and is hereby set aside.
3. That the 1st respondent shall consider every application received under section 21 of the Education Ac [*Chapter 25:04*] promptly and in accordance with the law and notify the responsible authority without delay of its approval or other decision in accordance with the law.

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4. That should the 1st respondent decide not to approve any application in full, it shall provide its written reasons for its decision to the responsible authority.
5. (If this application is opposed) That the respondents shall, jointly and severally, the one paying the other to be absolved, pay the costs of this application.

A. INTERIM RELIEF GRANTED

Pending the determination of this matter, the respondents be and are hereby restrained from requesting, instigating or effecting the arrest of a head teacher or cashier or other employee at the school run by the 2nd applicant or any member of the 1st applicant by reason of any alleged or perceived violation of the fees fixed by the 1st respondent on 30 August 2008.

C. SERVICE

A copy of this provisional Order shall be served on the respondents and may be served by the applicants' legal practitioners or by a person in the employ of the applicants' legal practitioners.

Atherstone & Cook, applicant's legal practitioners
Chihambakwe, Mutizwa & Partners, respondents' legal practitioners