TARISAYI ZVOMA
versus
WATERSHED COLLEGE (represented by Joseph Goromonzi,
Chairman of the Board of Governors)

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 4 and 11 February 2009

Urgent Chamber Application

J P Mutizwa
Ms *A Mapanzure*

HUNGWE J: The applicant filed an urgent chamber application seeking a provisional order couched in the following terms:

> "Pending the final determination of this matter the applicant is granted the following relief: -
>
> > The respondent shall forthwith and without conditions, but in any event within five hours of the service of this Provisional Order on Joseph Goromonzi release Chiedza Chirinda's full 'O' level results failing which the said Joseph Goromonzi shall be held in contempt of Court and be imprisoned until there is compliance with this order".

The application is based on the following facts which appear to be common cause. Watershed College ("the college") is a trust school or private school operated by a trust in terms of the laws of Zimbabwe.

All parents with children attending the college are invited to debate issues regarding the running of the institution as required by the Education Act [*Cap 25:04*] and the regulations made thereunder.

A meeting was held on 7 August 2008 to set fees for the third school term. The minutes of the meeting reflect that one parent asked for a clarification on the use of Watershed Units. Parents present were reminded that fees were payable in Zimbabwe dollars and that the unit was simply an administrative tool and that after 22 August 2008 the units will be revalued daily. What this meant was that parents paying after this date would have to contact the school bursar first and be given the ruling rate for that day before making payment in cash on that

date. The college adopted the Old Mutual Implied Rate to convert the units to Zimbabwe dollars. There was a meeting held at the school on 16 October 2008 where it was resolved to raise a supplementary fee for third term. The minutes of another meeting of parents on 28 November 2008 show that some parents did not pay the agreed fees on time others did not pay at all. As a result the parents' body resolved that those pupils whose fees for 2008 remained uncleared will not be admitted in the new term of 2009 and those that sat for exams will not have their results released till they made good their previous obligations.

The applicant, it is clear from the register of attendance attached to the respondent's papers, never attended any of these meetings. She however was aware of the need to first contact the bursar before making any payments in order to get the day's prevailing rate before making payment. She states in her founding affidavit that she did this on each occasion prior to making payment. She therefore disputes that she owes the school anything besides the 4.24 units for postage. She claims that the college has no lawful right to withhold her son's Cambridge Examinations results. She claims the apparent debt is a result of the college unlawfully recalculating the value of the Zimbabwe dollar at the actual time the cheque payments were presented and met against the value of the Watershed Unit.

From the minutes of the meetings held between the college and the parents, it is apparent that early payment was encouraged in order to avoid the position where the college would have to borrow in order to keep afloat. The college would also benefit from bulk purchases if all payments were made in time. In this way the college will get value for the Zimbabwe dollar and beat inflation. Parents were made aware of this. "Top-ups" were necessitated by late payments and erosion of value of the Zimbabwe dollar due to inflation. Even payments made through the Real Time Gross Payments System ("RTGS") were affected. Thus parents agreed to use units in order to cushion late payments against the vagaries of inflation. The minutes are clear on this.

The applicant claims that this is unlawful. If her contention is to be upheld I still find myself unable to come to her assistance. She agreed to be bound by such decisions as the college authorities may make on her behalf. In any event she contracted herself to abide by the rules and regulations of the college. This is reflected in the manner in which she up till this dispute had been conducting herself. She is a party to an illegality she now complains of. The principle of our law is generally that no cause of action can arise from an illegal contract as

expressed in the maxim *ex turpi causa non oritur actio.* (See *Brits* v *Van Heerden* 2001 (3) SA 257)

The applicant enrolled her son and in that regard entered into a contract with the college. That contract is titled "Watershed College Entry Form." It is dated 14 January 2006 by the applicant and is Annexure "C" to the respondent's opposing papers.

Paragraph (d) of that contract provides:

> "… that I understand and agree that I will pay the fees to the school for any term (including the pupil's first term) by the beginning of that term, unless written notice that the place is not required has been given to the headmaster by me or on my behalf by the first day of the previous term not withstanding that the pupil may not attend school for the whole or part of any term. I also acknowledge that the headmaster has the right to refuse to allow a student to return in any term at the beginning of which the previous term's fees have not been fully paid up without prejudice to the school's right to claim and enforce payment of the fees for any term in accordance with this declaration. I further agree that even if the headmaster has not exercised the right set out above he shall nevertheless still have (the) further right to refuse to allow any pupil to sit for a Public Examination at the school if his account for the current term is not completely cleared."

In view of this declaration, which I hold amounts to the terms of the contract between the parties, applicant bound herself to the decisions taken by the headmaster. In any event the decision to withhold applicant's son's examination results was arrived at by consensus of the other stake-holders, the parent body, which body includes the applicant. It is a sensible method of enforcing payment. To my mind it does not infringe on the International Convention on the Rights of the Child recognized under the United Nations Charter nor does it infringe on the domestic laws. Her son was allowed to sit for examinations when at that point the headmaster was entitled to exclude him provided, of course, that he gave the parent of the affected pupil due notice.

Even if I were wrong to hold that this maxim applied in the instant case, I would still arrive at the same conclusion on another basis.

The applicant was quite aware of the need to pay school fees punctually. A decision was made that payments would attract rates to be decided on the date of actual payment. A payment by cheque is not payment till it is cleared. This is why she acknowledges the debt of 4.24 units for which a cheque was dishonored. Therefore all her late payments were lawfully subjected to the valuation against the rate prevailing on the date on which such cheques were cleared. Consequently it cannot be seriously argued that she paid the values which she

unilaterally fixed. In short the applicant is indebted to the college for the sums reflected on the invoice produced during the hearing.

Schools are entitled to institute systems which enhance their service delivery and functionality. Their core business is to provide an education. But this comes at a cost to both the parents whose children benefit from the services offered by the institution and the Trustees who have been trusted with the running of the school. Although they have to operate like a business unit they in practice do not do so principally for profit. Private colleges are known to operate for profit. If colleges like the respondent do make such a profit it would be more of an exception than the rule. Therefore it seems to me that in delivering on their mandate schools (and non-profit colleges) where the parent body has democratically elected to adopt such a method for debt collection, as here, ought to be permitted to use such less formal methods of debt collection as withholding examination results. This practice is however by no means comparable to the commercial lien.

Further Ms *Mapanzure* pointed out that the applicant cannot succeed in view of the fact that the order sought is against the chairman of the respondent personally when it is the college that is being sued. I agree. I did not hear Mr *Mutizwa* to adequately address this deficiency on the form of the order. The respondent is the college; Mr Goromonzi is its chairman. He cannot be held in contempt in a representative capacity.

I am therefore satisfied for the above reasons that this application cannot succeed. It is dismissed with costs.

Chihambakwe, Mutizwa &Partners, applicant's legal practitioners
Kantor and Immerman, respondent's legal practitioners