

NDABEZINHLE MAZIBUKO

v

**(1) THE BOARD OF GOVERNORS, CHRISTIAN BROTHERS
COLLEGE (2) THE NATIONAL INCOMES AND PRICING
COMMISSION (3) THE SECRETARY, MINISTRY OF EDUCATION**

**SUPREME COURT OF ZIMBABWE
GARWE JA, GOWORA JA & HLATSHWAYO JA
BULAWAYO: 25 JULY 2016 AND 1 AUGUST 2017**

S. Chamunorwa, for the appellant

P. Dube, for the first respondent

GARWE JA

Judgment No. SC 54/17
Civil Appeal No. SC 482/15

1

[1] The appellant, as applicant, filed an application before the High Court in which he sought certain declarators and other ancillary relief against the first respondent. After considering the papers filed of record and submissions by counsel, the High Court dismissed the application with costs. Against that order the appellant now appeals to this court.

BACKGROUND

[2] The appellant is a senior practitioner with a law firm in Bulawayo, whilst the first respondent is the authority charged with the responsibility of running the affairs of Christian Brothers College, a private educational institution. The second and third respondents were cited owing to the fact that it is their responsibility to approve school fee and levy increases by private educational institutions.

[3] Christian Brothers College (“the school”) is, as already noted, a private school, situated in Bulawayo. It was established in 1954 as a private college. In the court *a quo* it was common cause that, right from the time of its establishment, the school, whilst charging school and other fees, has never supplied textbooks and/or stationery to pupils undertaking studies on its premises. The practice over the years has been for the school to provide, annually, a list of textbooks and stationery that parents would be required to provide for their children.

[4] The appellant has had two sons enrolled at the school. The elder son completed his ‘A’ level studies at the institution in 2011. At the time of institution of the court application in January 2014, he had a minor son who had just completed his Form 3 and was due to commence Form 4 studies during that year. In both cases, the appellant, like all other parents, had been required to sign a contract with the school to enable admission of his children into the institution. Paragraph 3 of the contract provided 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 same as and when necessary.”

[5] The appellant was, during the period of nine (9) years when his two sons attended school at the institution, required, over and above the school fees, to purchase textbooks and other items of stationery. He considered the school fees charged by the school to be not only substantial but exorbitant and formed the view that the school should, from these fees, be able to purchase and provide textbooks and stationery items required as part of a child’s education. In January 2012 he raised the issue with the school. Despite an exchange of correspondence, nothing came out of this engagement. Consequently, he filed a court application with the High Court at Bulawayo seeking the declarators and other relief already referred to.

PROCEEDINGS BEFORE THE HIGH COURT

[6] The appellant's main complaint before the High Court was this. He has had to spend an average of US\$400 annually in order to purchase books and stationery required by the school. He believes that the substantial school fees that parents with children at this institution pay should cater for items such as stationery, textbooks and other extracurricular activities. Instead of purchasing these items, the school spends over eighty per cent of its budget on teachers' salaries. He considers this conduct a violation of a child's right to education and a breach of the implied term in the contract entered into by the school and parents that the school would provide these essential items. The implied term is so obvious as not to require express provision. Further, the requirement that parents purchase these items amounts to an unauthorised levy or school fee. He is aware that other private schools like The Dominican Convent, Girls' College and Petra High School charge lower school fees but are able to provide textbooks and stationery.

Judgment No. SC 54/17
Civil Appeal No. SC 482/15

3

[7] He has two other complaints against the school. The first is that when the school increases fees, it does not give a full term's notice and yet parents are required to give a full term's notice when they intend to withdraw their children from the school. Secondly, the school is in the habit of barring children who would have failed to pay school fees, a practice he believes is unlawful for violating s 7 of the Children's Act [*Chapter 5:06*] ("the Children's Act").

[8] In the result, he sought the following before the court *a quo*:-

- a declaratur that the failure by the school to provide textbooks and stationery amounts to a violation of a child's right to a proper education and a breach of the implied term of the contract signed by the school and the parents.
- a declaratur that the requirement by the school that parents buy textbooks and stationery, in addition to payment of school fees, amounts to an unauthorised and illegal fee or levy, contrary to the Education Act [*Chapter 25:04*] ("the Education Act") and Regulations made thereunder.
- an order that the school is to provide textbooks and stationery for all children attending lessons at the institution.
- an order that the school shall not increase school fees unless parents are given at least one term's notice of such increase, which increase should in any event be approved by the government in terms of relevant legislation.
- an order that the practice of barring students from attending classes owing to non-payment of fees be declared a violation of the Children's Act.
- an order that where a parent consistently fails to pay school fees, the school shall not bar the child from attending lessons but should terminate the contract only upon giving at least one term's notice.

Judgment No. SC 54/17
Civil Appeal No. SC 482/15

[9] The school opposed the application. It stated as follows. Since its inception in the 1950's, it has never provided textbooks and stationery. The school fees paid by the parents do not include a provision for text books and stationery and, if the school were to provide these, it would have to increase school fees by \$50 per term per pupil. The school provides a wide range of *syllabi* and it is therefore impossible for the school to buy a textbook that covers an entire subject. An exercise carried out by the school has determined that the cost of purchasing new textbooks is less than \$170 per year per child. The school further denied that

school fees payable by parents necessarily include a fee for textbooks and stationery or that eighty per cent of the school budget goes towards teachers' salaries. It further argued that in terms of the Constitution, whilst every person has a right to a basic State funded education, no person has a right to education at a private institution.

[10] The school further denied that there is a tacit term in the contract that requires the school to provide textbooks and stationery. The school provides more hours of tuition than the other schools cited by the appellant. One should not therefore compare the *quantum* of school fees charged by different schools without taking into account the facilities offered by the individual schools.

[11] On whether a full term's notice should be given before increasing fees and levies, the school submitted that this suggestion is unreasonable and impractical. On the subject of barring non-paying students, the school submitted that the appellant had no *locus standi* to raise this issue, as his child had not been barred by the school for non-payment of fees.

[12] In supplementary heads filed with the court *a quo*, the appellant submitted that, in view of the fact that the contract that is the subject of this dispute is a consumer contract, the court had the power, under the Consumer Contracts Act, [Chapter 8:03] ("the Consumer Contracts Act") to do a number of things including cancellation, variation, and so forth.

FINDINGS BY THE COURT A QUO

[13] In its judgment, the court *a quo* found that the applicant, being the parent of a minor child enrolled at the school, had the *locus standi* to bring the application. However, it also found that the appellant, having signed the contract with the school, was bound by the terms and conditions contained therein and that a court of law, in the absence of an alleged breach

of the rules of natural justice or conduct that is *ultra vires* the contract, cannot interfere, as it is essential that freedom of contract be respected. Consequently the court concluded that the relief sought by the appellant constituted an invitation to the court to re-write the terms of the contract by imposing a new and specific obligation on the part of the school to provide text books for the pupils.

[14] On the appellant's submission that the court should have proceeded in terms of the Consumer Contracts Act, the court found that this aspect had not been raised in either the founding or answering affidavits and had surfaced for the first time in supplementary heads of argument filed by the appellant, a mere four days before the hearing of the matter.

[15] Lastly the court found that the allegation that the provision of textbooks and stationery was an implied term of the contract had not been proved.

Judgment No. SC 54/17
Civil Appeal No. SC 482/15

6

Consequently the court dismissed the application with costs. Hence the present appeal.

THE GROUNDS OF APPEAL

[16] The appellant has filed a number of grounds of appeal. These are:-

- That the court *a quo* misdirected itself in dismissing the application on the basis that a court does not ordinarily interfere with the terms of a contract when legislation, such as s 4 of the Consumer Contracts Act, empowers a court to do so.

- That the court *a quo* erred in not making a determination whether or not the supply of text books and stationery by the school was an implied term of the contract.
- That the court erred in not determining the question whether forcing parents to buy textbooks for their children amounted to an unauthorised fee or levy contrary to s 2 of the Education Act.
- That the court erred in holding that the failure by the respondent to provide textbooks and stationery was not a violation of a child's right to a proper education.
- That the court *a quo* misdirected itself in not determining the following issues:-
 - (a) that barring children from attending classes on account of non-payment of school fees violated s 7 of the Children's Act, Judgment No. SC 54/17 Civil Appeal No. SC 482/15
 - (b) that where a parent consistently fails to pay school fees, the school shall not bar the child from class but may terminate the contract on giving at least one term's notice of such termination.
 - (c) that the school should not increase school fees without giving parents a term's notice of such increase.
- That the court *a quo* erred in rejecting the argument based on the Consumer Contracts Act.

APPELLANT'S SUBMISSIONS ON APPEAL

[17] In his heads of argument, the appellant submitted that parents pay, not just tuition, but other fees to the school. School fees include not only instruction but also the provision of teaching material.

17.1 Other schools in the same league as the respondent provide textbooks for its learners. Government schools do the same.

17.2 The contract does not exclude the school from supplying the textbooks but neither does it say it should provide them.

17.3 Therefore the contract, impliedly, includes the provision of textbooks.

17.4 The book list that parents are forced to purchase is an unauthorised levy on parents.

[18] The appellant further submitted that the court erred in declining to make a ruling on the other issues raised when it was apparent that the school had sent out school fee invoices containing an increase and in light of the fact that the agreement between the school and the parents expressly authorises the school to bar defaulting pupils from attending classes.

Judgment No. SC 54/17
Civil Appeal No. SC 482/15

8

[19] Lastly, he submitted that since the Consumer Contracts Act allows a court, whether on application or *mero motu*, to grant relief, the court should have exercised such powers and therefore misdirected itself in declining to invoke the provisions of the Act. The contract was unreasonably oppressive, firstly, in requiring parents to give a term's notice of the removal of a pupil from the school and yet the same contract does not require the school to give a term's notice in the event of an increase in school fees; secondly, the contract was oppressive in requiring parents to buy textbooks; thirdly, in giving the respondent the right to exclude non-paying pupils from school.

FIRST RESPONDENT'S SUBMISSIONS ON APPEAL

[20] In its heads of argument, the school has taken two points *in limine*. Firstly, that the appellant failed to timeously serve the notice of appeal on the Registrar of the High Court and, secondly, that the grounds of appeal are not clear and concise.

In oral submissions, however, the school advised that it was no longer pursuing these points *in limine*. These two issues therefore merit no further consideration.

[21] On the merits, the school has made the following submissions:-

- (a) That in terms of the contract, parents were required to supply “other requirements” as stipulated by the school from time to time. Since its establishment, the school had never provided textbooks. The courts should not lightly interfere with a contract nor re-write its terms.
- (b) The appellant failed to substantiate his submission that provision of textbooks was an implied term. Was it a term necessary to give commercial efficacy to the contract or was it implied by custom or trade usage? The existence of such trade usage was not proved.
- (c) Further, in ordinary parlance, a levy would be payable to the institution itself. What is complained of in the present matter is the cost of textbooks and stationery purchased by a parent for his own children and which items do not, at the end of the day, accrue to the school.
- (d) No factual basis has been provided for the Consumer Contracts Act to be invoked and, in particular, the suggestion that the contract was onerous and oppressive.

ISSUES FOR DETERMINATION

[22] The issues that emerge from a consideration of the heads of argument and the oral submissions are the following.

Firstly, what is an implied term and, flowing therefrom, whether the payment of school fees necessarily obliges an educational institution to provide, in addition to tuition, textbooks and stationery. Incidental to this issue is whether asking parents to purchase textbooks and stationery for their children is an unauthorised levy which would require government approval.

Secondly, whether the court *a quo* failed to make a determination on the relief sought by the appellant barring the respondent from:-

- (a) Increasing school fees except on giving a term's notice
- (b) Turning away pupils on account of the non-payment of fees, and
- (c) Terminating a contract, in the case of non-paying pupils, except on giving at least a term's notice of such cancellation.

Judgment No. SC 54/17
Civil Appeal No. SC 482/15

10

Thirdly, whether the provisions of the Consumer Contracts Act apply and, if so, whether the court improperly found that the appellant could not rely on the same.

I deal with the above issues in turn.

WHAT IS AN IMPLIED TERM

[23] In general, the courts are reluctant to imply terms into a contract at common law. It is the contracting parties' role to agree the terms of their particular agreement. It is generally not considered to be the role of the courts to re-write a contract for the parties. Freedom of contract prevails. The limited circumstances where a court will imply a term into a contract at common law relate to (a) terms implied through custom or trade usage (where a particular

term is prevalent in a trade) (b) tacit terms or terms implied from the facts which include the business efficacy test (i.e. would the contract make business sense without it?) and the officious bystander test (i.e. would the parties have been agreed on the matter had they thought about it?) and (c) terms implied by law in contracts of a defined type. The third category clearly has no application to this case.

TACIT TERM OR TERMS IMPLIED FROM THE FACTS

[24] The Law on what constitutes a tacit term is now well settled.

24.1 In *Douglas v Baynes* [1908] TS 1207, the court cited with approval remarks in

Hamlyn & Co. v Wood & Co. [1891] 2 QB, 494 that:-

“The court ought not to imply a term in a contract unless there arises from the language of the contract itself, and in the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the court is necessarily driven to the conclusion that it must be implied.”

Judgment No. SC 54/17
Civil Appeal No. SC 482/19

11

24.2 In *Reigate v Union Manufacturing Co. (Ramsbottom Ltd & Another)*, [1918] 1

KB 592, 605 the court remarked:-

“A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, “What will happen in such a case,” they would both have replied, “Of course, so and so will happen; we did not say that; it is too clear.”

24.3 In *Discovery Life Limited v Barthram* (71989/2013) [2015] ZAGPPHC 110 (6

March 2015) the court remarked:-

“The test for inferring a tacit term is whether the parties, if asked whether their agreement contains the term, would immediately say: “yes of course that is what we agreed.” Similarly, an implied term is used to denote an unexpressed provision of the contract which derives from the common intention of the parties as inferred by the court from the express terms of the contract and the surrounding circumstances ...

A tacit term can be imported into a written contract where there are expressed terms. When that happens, the tacit term supplements the expressed terms in the contract and it thus forms much part of the contract as its express terms. Such a tacit term for it to be imported should not amend, contradict or vary the contract, instead it must form part of the contract with its expressed terms.”

24.4 In *Standard Bank of South Africa Ltd & Another vs Ocean Commodities Inc & Others* 1983 (1) SA 276A, 292B-C, the court remarked:-

“In order to establish a tacit contract, it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact *consensus ad idem*

It appears to be generally accepted that a term may not be tacitly imported into a contract unless the implication is a necessary one in the business sense to give efficacy to the contract.”

TRADE USAGE

[25] In respect of terms implied by trade usage, the case of *Golden Cape Fruits (Pty) Ltd v Fotoplate (Pty) Ltd* 1973 (2) SA (c) 642, is authority for the proposition that the parties to a contract would be bound by – and the contract in question would be subject to – an alleged trade usage:

“provided that it is shown to be universally and uniformly observed within the particular trade concerned, long-established, notorious, reasonable and certain, and does not conflict with positive law (in the sense of endeavouring to alter a rule of law which the parties could not alter by their agreement) or with the clear provisions of the contract.” (at page 645 H).

[26] The above case further emphasized the need for the person alleging a usage to prove it. At p 646, the court cited with approval remarks in *Crook v Pedersen Ltd* 1927 WLD 62, 70 that:

“The evidence must amount to something more than mere opinion; it must establish the fact of the existence of the usage, and provide instances of the usage having been acted upon, otherwise the testimony will be of little weight.”

[27] English law adopts a similar approach. The *Golden Cape Fruits* case (*supra*) at p 646 E-G cites *Halsbury*, vol. II, secs. 367 and 369. Halsbury states:-

“A usage is proved by the oral evidence of persons who become cognizant of its existence by reason of their occupation, trade, or position. The evidence must be clear and convincing; it must also be consistent ... The evidence of witnesses, in order to prove the existence of a usage, must amount to something more than mere opinion; it must establish the fact of the existence of the usage, and provide instances of the usage having been acted upon”

BASIS FOR IMPLIED TERM MUST BE ESTABLISHED

[28] It is a requirement that a person relying on an implied term must prove the circumstances from which he maintains it should be implied – *Christie, Business Law in Zimbabwe*, p 61; *Christie, The Law of Contract in South Africa* 3rd Ed p 185. See also the *Golden Cape Fruits* case (*supra*) at page 646. Further the party relying on an implied term must set out in his pleadings the circumstances from which he maintains it should be implied – *Christie, Business Law in Zimbabwe*, (*supra*) at p 61.

[29] The point that needs to be made therefore is that, for one to rely on trade usage clear, convincing and consistent evidence which amounts to something more than opinion must be led to establish the existence of such trade usage. In the case of a tacit term, it is necessary to prove, on a balance of probabilities, conduct and circumstances which are so unequivocal that the parties must have been satisfied they were in agreement on the tacit term – *Christie, The Law of Contract in South Africa* – (*supra*), at p 191.

WHAT ARE SCHOOL FEES

[30] It is important, for a proper determination of the issues raised before this court, that the term “school fees” be defined. I say this because, as the present case reveals, the term might mean different things to people in different places.

[31] The School Fee Abolition Initiative (SFAI) was launched by Unicef and the World Bank in 2005. In its *Operational Guide: Six Steps to Abolishing Primary School Fees*, at page 28, it is stated:-

“It is often hard to define school fees precisely, because what constitutes them varies from place to place and time to time. In addition, there is frequently a difference between the official definition of school fees (what the governments indicate should or can be collected) and what is actually collected.”

[32] The Collins English Dictionary defines school fees as the money paid for a person to go to school. School fees can be broken down into direct fees and other private expenses.

[33] The SFAI Operational Guide (*supra*) further states:-

Judgment No. SC 54/17
Civil Appeal No. SC 482/15

14

“Direct fees include fees paid directly to the school or school system (tuition, examination fees, activity or sports fees, building or building maintenance fees, school development fees, boarding fees). Other fees include those that involve payments to commercial entities for books, supplies, uniforms, transportation and meals/snacks and “voluntary” contributions made to PTAs. The types of fees charged vary across countries and regions In some cases children pay schools directly for books and uniforms; in others PTAs’ collect funds that cover basic school expenses, such as teacher salaries or parts thereof Some schools or teachers may collect fees that are unauthorised or even illegal, such as fees for end-of-year parties, teachers’ gardens, or extra – tutoring or private lessons.”

[34] The authors Kattan RB & Burnett N in their article *User Fees in Primary Education*, ‘Education Sector, Human Development Network’ - *World Bank July 2004*, state as follows:-

“General discussion of user fees is often explicitly or implicitly about tuition fees. In practice however, there are a large number of different “fees” that private households sometimes have to pay for publicly provided primary education, including tuition fees, textbook fees or costs and/or rental payments, compulsory uniforms, Parent Teacher Association (PTA) dues, and various special fees such as exam fees, community contributions to district education boards, and the like.”

[35] The Education Act, in s 13, provides that the Minister shall prescribe the fees which shall be payable in government schools, for instruction, accommodation and additional fees for instruction in special subjects or special educational courses. In addition, in terms of s 14, Government School Heads are required to establish a general purpose fund in aid of extra curricular activities and facilities and into which moneys received by the school not constituting tuition or boarding shall be paid into. Tuition and boarding fees are required to be paid into the School Services Fund in terms of s 30 of the Audit and Exchequer Act [Chapter 22:03].

[36] In terms of the same Act, non-governmental schools are allowed to charge fees and levies and to increase them subject to approval by the National Incomes & Pricing Commission. Like government schools, they are also required to establish a School Services Fund into which all monies paid as fees or levies shall be deposited. In determining whether to approve a fee or levy of a private school, the Commission will consider, *inter alia*, the costs of operating and maintaining the school as well as any programme for improving the facilities at the school.

[37] The Education Act does not provide a definition of what constitutes school fees or levies. What is clear is that tuition and boarding fees are remitted to the government whilst the remaining fees or levies are deposited into a school fund. It would appear that what is sometimes termed a levy is in fact a fee that is not remitted to the government but is retained to sustain other day to day operations of the school. The distinction between levy and fee therefore appears to be blurred, particularly in the case of a private school.

[38] From the above, it is clear that there is no set definition of what constitutes school fees or even school levy. A sports fee in one school may be termed a sports levy, particularly in government institutions.

WHETHER SCHOOL FEES IMPLICITLY INCLUDE TEXTBOOKS AND STATIONERY

[39] It is therefore clear, from the foregoing, that school fees charged by different schools do not necessarily include a textbook and stationery fee. The *onus* was on the appellant to prove, *a quo*, that the provision of textbooks and stationery is an implied term of the contract. The fact that some schools include textbooks and stationery in the school fees that they charge does not necessarily mean that the same applies to all schools. Nor does it constitute an implied term that a school is obliged to supply textbooks and stationery once a pupil has paid the school fees charged by the school.

Judgment No. SC 54/17
Civil Appeal No. SC 482/15

16

[40] The Education Act acknowledges that one of the factors to be taken into account in determining the *quantum* of school fees to be charged by a private school is the cost of operating and maintaining the school or the cost of improving the facilities provided at a school. Such costs would obviously vary from school to school. A new school might find it necessary to charge higher fees than an old, established school, in order to put up necessary infrastructure. In the case of established schools, the fees have to be related to the quality of the facilities at the school. It follows from this that a comparison of the school on the one hand, and other private schools on the other, does not assist in resolving the issue whether the provision of textbooks and stationery is an implied term in a contract between a parent and the school.

[41] The appellant did not, either *a quo* or before this court, clarify whether his cause of action was based on a trade usage or a tacit term. On the facts of this case, the argument on trade usage (if such was the argument) could not have been successfully relied upon by the appellant for two reasons. Firstly, no evidence of such usage was led *a quo*. There was an attempt only during oral submissions before this court to show that there was such usage. In the court *a quo* the attitude of the appellant was that the usage was so obvious that it need not have been proven. Secondly, as earlier highlighted, what constitutes school fees differs from place to place. In short, therefore, appellant did not prove that the decision by some schools to provide textbooks and stationery is universally and uniformly observed by all private schools in Zimbabwe. On that basis therefore, the appellant's argument on trade usage is without merit.

[42] As regards the question whether there was a tacit term, it is clear from the facts that the school has never provided textbooks and stationery since its inception and each parent is required to purchase such items for his child. The standard contract signed by the parent makes it clear that parents will be required to meet, over and above the school fees they pay, other expenses. The contract makes it clear that the parent is required to supply uniforms, equipment and other requirements as may be stipulated by the school from time to time. The school has always made it clear that parents should provide textbooks and stationery. In these circumstances, a tacit term cannot be imported into the contract in contradiction to the express term in the contract requiring parents to meet other expenses as may be determined by the school from time to time. We are not told how, on the facts, either the business efficacy test or officious bystander test, would be applicable.

FREEDOM OF CONTRACT MUST BE RESPECTED

[43] The principle is now well established that the courts should not interfere in private contractual relationship except in a few circumscribed situations. In this case, the contract made it clear that parents would be required to provide *other requirements as may be stipulated* by the school from time to time.

[44] In finding that the court was not entitled to interfere with the contract, the learned judge *a quo* remarked at page 6-7 of the cyclostyled judgment:-

“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 or 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...”

Judgment No. SC 54/17
Civil Appeal No. SC 462/15

18

[45] I agree entirely with the above remarks which accord with principle.

THE CONSUMER CONTRACTS ACT

[46] The appellant correctly submits that in terms of the Consumer Contracts Act, a court, on being satisfied that a contract is unfair or that any exercise or non-exercise of power is unfair or that such a contract contains a scheduled provision, may make an order cancelling the whole or part of the contract, varying the contract, enforcing part only of the contract, declaring the contract to be enforceable for a particular purpose only, ordering restitution or awarding compensation to a purchaser or user or annulling the exercise of any power, right or discretion under the Act. Relief under s 4 of the Act may follow an application made to it or given by the court *mero motu*.

[47] In s 5, the Consumer Contracts Act attempts to define when a consumer contract is unfair for its purposes. A contract may be regarded to be unfair if, as a whole, it results in an unreasonably unequal exchange of values and benefits, if it is unreasonably oppressive in the circumstances, if it imposes obligations on a party that are not reasonably necessary to protect the interests of any other party, if the contract excludes or limits the liability of a party to an extent not reasonably necessary, if the contract is contrary to commonly accepted standards of fair dealing and, lastly, if the contract is cast in language not readily understood by the party.

[48] Subsection 2 of s 5 of the Act however makes it clear that a contract shall not be found to be unfair solely because it imposes onerous obligations on a party, that it does not result in substantial or real benefit to a party or that a party may have been able to conclude a similar contract with a different party on more favourable terms or conditions. Subsection 3 thereof also makes it clear that in determining whether or not a contract is unfair, a court shall have regard to the interests of both parties and shall take into account, where appropriate, any prices, charges, costs or other expenses that might reasonably be expected to have been incurred if the contract had been concluded on terms and conditions other than those on which it was concluded.

[49] It is clear from the foregoing provisions that the facts in any given case need to be properly articulated and proved before a court can be called upon to make a finding whether or not a contract is unfair. Whether a contract results in an unreasonably unequal exchange of values or benefits or whether such contract is unreasonably oppressive in all the circumstances are issues that involve the making of a value judgment, which judgment can

only be made on full facts. A court would also need to engage in a balancing act by taking into account the interests of both parties before coming to a conclusion one way or the other.

[50] The difficulty that the appellant faced in the court *a quo* was that he did not timeously lay a factual basis upon which the court could exercise its discretion in terms of the Act. Whether the contract was unfair was not an issue that the appellant canvassed both in his founding and answering papers. It was not an issue that the school was called upon to respond to. It was only in supplementary heads of argument filed a mere four days before the hearing of the application that the appellant sought to rely on the provisions of the Act. Clearly, this was belated and obviously prejudicial to the respondent who, if the matter had been raised timeously, would have been given the opportunity to prove facts to show that the contract was not unfair, as defined. Indeed the respondent vehemently opposed the attempt to introduce new argument based on the Consumer Contracts Act.

Judgment No. SC 54/17
Civil Appeal No. SC 482/15

20

[51] In dismissing the attempt to rely on the Act, the court *a quo* remarked:-

“... 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 (*sic*). 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 ... only surfaced in the supplementary heads of argument. This is inappropriate.”

I agree entirely with the above remarks.

WHETHER THE COURT A QUO FAILED TO DEAL WITH ISSUES RAISED

[52] The appellant argues that the court *a quo* failed to deal with three issues he had raised. These issues were (a) that the school should not increase school fees except upon giving parents a term's notice of such increase (b) that the practice of barring learners from attending classes on account of non-payment of school fee is a violation of s 7 of the

Children's Act and (c) that where a parent *consistently* fails to pay school fees, the school shall not bar the pupils from attending class but may only terminate the contract upon giving the parent at least one term's notice of termination.

[53] It is not correct, as the appellant argues, that the court *a quo* did not deal with the above issues. It did. Aware that those aspects were part of the contract, the court remarked at pages 6-7 of the cyclostyled judgment:-

“... The applicant signed a contract with the school on the terms and conditions agreed between himself and the school ...

... 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

... There is no good ground for the court to review the respondents' long standing policies on school fees and their relationship with the parents. I have not made any specific finding on the issues raised in paragraphs 4, 5 and 6 of the draft order 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 his child was up to date with school fees. There was therefore no need to consider that issue.”

Judgment No. SC 54/17
Civil Appeal No. SC 482/15

21

[54] The appellant may not agree with the above conclusion that there was no live controversy necessitating a resolution of the three issues he had raised. The fact is that the court dealt with them. The contract signed by the appellant allowed the school to bar non-paying pupils and further did not require the school to give a term's notice of school fee increases. In para 2 of the contract every parent undertakes to pay all fees and charges which the school, *in its sole discretion*, shall impose from time to time, termly in advance, for each term that a child remains at the school. Para 7.4 gives the Headmaster the discretion to refuse entry to a pupil who fails to pay. Having found that these terms bound the appellant, the court *a quo* further found that the issues were in any event academic. The court *a quo* cannot be blamed for reaching that conclusion.

[55] The barring of students and increase in school fees were terms of the contract signed by both parties. The appellant accepted those terms and conditions. To order a school not to increase school fees except upon giving a terms notice or to prohibit a private school from barring a pupil on account of non-payment of fees would be to interfere, in the absence of lawful cause or a statutory provision justifying such interference, in the private contractual relationship of parties.

[56] Moreover, as the court *a quo* noted, the appellant's child was up to date in the payment of school fees. The order that the appellant sought was not predicated on an event that had happened to him personally. It was speculative. Appellant was acting as torchbearer for parents who *might* fail to pay school fees.

[57] The role of the courts is to deal with real issues and not to pronounce on hypothetical situations. As stated by INNES CJ in *Geldenhuys and Neethling v Beuthin* 1918 AD 426, 441

Judgment No. SC 54/17
Civil Appeal No. SC 482/15

22

“... Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.”

[58] In any event, the Education Act makes it clear that a child can be refused admission to a government school for non-payment of fees. In this regard see s 13(4).

[59] Lastly the basis upon which it is suggested that the respondent's conduct violates s 7 of the Children's Act remains unclear. Section 7 criminalises the ill-treatment, neglect, abandonment, assault of a young person by a parent or guardian of a child. Allowing, causing or procuring the child to be ill-treated or exposing him to such ill-treatment is also a criminal offence. Subsection 2 deems a parent or guardian to have ill-treated a child if he

engages in behaviour stipulated in that subsection. Subsection 3 provides that it is not necessary that the child actually suffers any injury. Subsection 4 deals with possible defences by an accused person. Subsection 5 makes provision for the penalty consequent upon a conviction.

[60] In the present case, the Board of Governors of the school is not the “parent” of a student engaged in studies on its premises. But is it a guardian? The Act defines a guardian to include any person who has the custody, charge or care of a child, whether permanently or temporarily. *Prima facie* the word “any person” may be wide enough to include an institution or other artificial person. In terms of s 7 of the Act, if a parent neglects or fails to pay schools fees for his child, he exposes the child to possible exclusion from class and is liable to criminal prosecution. In such a situation, can the board of governors of a private institution be said to have *also* violated s 7? In my view, probably not. However in the absence of full argument on the matter, the basis of the suggestion that the board is guilty of contravening s 7 remains unclear and unsubstantiated. Whether an institution would be guilty in these circumstances is a matter I prefer to leave for consideration on another day.

Judgment No. SC 54/17
Civil Appeal No. SC 482/15

23

DISPOSITION

[61] No proper basis has been shown upon which the decision of the court *a quo* can be impugned.

[62] Consequently it is ordered as follows:-

The appeal be and is hereby dismissed with costs.

GOWORA JA: I agree

HLATSHWAYO JA: I agree

Calderwood, Bryce Hendrie & Partners, appellant's legal practitioners

Messrs Webb, Low & Barry, respondents' legal practitioners