

MOHAMMED ISMAIL (in his capacity as the guardian of X- a minor)
versus
SAINT JOHNS COLLEGE
and
CAVALIERE COORRADO TRINCI N.O
and
STEVE MARTIN N.O
and
MINISTRY OF PRIMARY AND
SECONDARY EDUCATION

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE January 11 and 15, 2019

Urgent chamber application

L. Madhuku, for applicant
G. Ndhlovu with B Ziwa and M Chuma for the 1st, 2nd and 3rd respondents.

CHITAKUNYE J: This is a chamber application brought on a certificate of urgency. The provisional order the applicant seeks was couched as follows:

FINAL ORDER

1. That the conduct of the 1st, 2nd and 3rd respondents consisting of ordering X, a minor enrolled as an upper six student at the 1st Respondent, to shave his beard as a pre-condition to the continuation of his studies at the 1st Respondent, be and is hereby declared null and void and of no force or effect as an infringement of his right to freedom of religion protected by section 60 of the constitution of Zimbabwe.
2. That the conduct of the 1st, 2nd and 3rd respondents consisting of ordering X, a minor enrolled as an upper six student at the 1st respondent, to shave his beard as a pre-condition to the continuation of his studies at the 1st respondent, be and is hereby declared null and void and of no force or effect as an infringement of his right not to be discriminated against on account of religion, such right being protected by section 56 of the constitution of Zimbabwe.
3. That the minor, X, be and is hereby allowed to remain a student of the 1st respondent while at the same time keeping his beard in accordance with the Islamic religion.

4. The respondents who oppose this order shall pay the costs of this application on a legal practitioner and client scale.

INTERIM RELIEF

Pending determination of this matter, the Applicant is granted the following relief:-

It is ordered that:-

1. That the 1st, 2nd, and 3rd respondents be and are hereby interdicted from barring X from entering the premises of the 1st respondent for purposes of continuing with his upper sixth Form studies notwithstanding the fact that the aforesaid Yusuf Ismail is not shaving his beard.
2. That the 1st, 2nd and 3rd respondents be and are hereby interdicted from insisting, directly or indirectly, that X shaves his beard as a pre-condition to him continuing with his upper sixth Form studies at the 1st respondent.
3. That the respondents who oppose this order shall pay the costs of this application on a legal practitioner and client scale.

The basic facts leading to this application were that:

The applicant enrolled his son X, hereinafter referred to as the minor, at St Johns College in 2013. At the time of enrolment applicant signed a contractual document- Acceptance of Entry- in which were stated the conditions for the acceptance of the minor at St. Johns College. Amongst the terms and conditions that the applicant unequivocally accepted were clauses 2 and 3 which stated that:-

- “2. That the student will be bound by all rules and requirements as laid down by the college from time to time in both academic and extra-curricular activities.
3. That in particular the student will be bound by the St. Johns College Code of Conduct as amended from time to time.”

The code of conduct stipulated the conduct that was expected from all the students without discrimination. The particular aspect that led to this case pertains to the requirement that all students be cleanly shaven. At the time of enrolling at the college the minor had not yet developed a beard. However towards the end of 2018, he developed a beard. It is common cause as between the parties that in terms of the Code of Conduct the minor was expected to shave the beard.

In recognition of this regulation and as the minor had already been advised to be cleanly shaven in terms of the regulation if he was to continue at the school, on the 1st October 2018

the applicant wrote a letter to 1st respondent requesting that the minor be allowed to grow his beard. That letter stated, *inter alia*, that:-

“This letter serves as a humble request to allow my son, X (L6S) to keep his beard. It is imperative that he does not shave his beard for religious purposes. X leads congregational prayers at the mosque, and it is not permissible for those who lead the prayer to remove their beards.”

After acknowledging the valuable role played by the regulations in moulding boys into responsible men, the applicant proceeded to say:-

“Allowing Yusuf to keep his beard will permit him to practice his faith without it interrupting his education.”

On the 3rd October the 1st respondent to the request with a clear NO in, *inter alia*, these words:-

“Please note that we no longer grant exemptions to these requests under any circumstances and hence your appeal for X to keep facial hair on religious grounds is denied. He has to shave and follow our regulations to the letter as outlined in the code of conduct.”

Despite what should have been a clear response, on the 28th December 2018, the applicant, through his legal practitioner wrote to 1st respondent inquiring if 1st respondent would carry out what he termed its threat to bar the minor from attending school if he did not shave his beard. That letter did not yield a positive response as the 1st respondent indicated it was yet to refer the applicant’s letter to its legal practitioners for a response as the college had been closed as from 14 December and had just opened and so was yet to consult its legal practitioners.

As the 2019 first school term drew closer applicant paid school fees for the minor but the school would not allow the minor to attend school without complying with the requirement to be cleanly shaven.

As a consequence applicant launched this application. It is pertinent to note that the fact that the applicant and the minor are Muslims is common cause. In this application the applicant emphasised the fact that there is a family tradition in their family to be an Imam. In this regard the minor is studying to be an imam hence he is now leading a congregation in prayers. It is in that respect that he said the minor has to strictly adhere to the Islamic requirement for male persons not to shave the beard. The applicant alleged that by refusing to allow the minor to attend school without shaving the school is effectively asking the minor to abandon his religion.

He also alluded to the infringement of the minor's freedom to religion, protected by s 60 of the Constitution by ordering him to shave his beard before he can be allowed into the school premises. Other sections he said were infringed include ss 56 and 75 of the constitution.

The 1st to 3rd respondents opposed the application. A point *in limine* on the issue of urgency was raised and I decided it in applicant's favour as I was of the view that though applicant could easily have approached court in October 2018 when the school made it clear that the minor had to adhere to the school's Code of Conduct and that no exemption would be granted, as this involved the rights of a child it ought to be dealt with expeditiously so that an appropriate decision is made on the future of the child's education.

As regards the merits of the application, respondents contended that they were not infringing on the minor's rights. Whilst it was common case that applicant and the minor are Muslims, it was the applicant who accepted that the minor will comply with the school regulations as stipulated in the code of conduct. As far as the respondents are concerned they were simply enforcing what the parties had agreed to. Respondents denied that the minor has been discriminated against on religious ground or at all. All the respondents wanted is for the minor to adhere to school regulations which applicant had agreed to. For easy of reference the sections relied upon in this application state as follows:

“56 Equality and non-discrimination

- (1) All persons are equal before the law and have the right to equal protection and benefit of the law.
- (2)
- (3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.
- (4) A person is treated in a discriminatory manner for the purpose of subsection (3) if—
 - (a) they are subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected; or
 - (b) other people are accorded directly or indirectly a privilege or advantage which they are not accorded.
- (5) Discrimination on any of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.
- (6)

“60 Freedom of conscience

- (1) Every person has the right to freedom of conscience, which includes—
 - (a) freedom of thought, opinion, religion or belief; and

- (b) freedom to practise and propagate and give expression to their thought, opinion, religion or belief, whether in public or in private and whether alone or together with others.
- (2) No person may be compelled to take an oath that is contrary to their religion or belief or to take an oath in a manner that is contrary to their religion or belief.
- (3) Parents and guardians of minor children have the right to determine, in accordance with their beliefs, the moral and religious upbringing of their children, provided they do not prejudice the rights to which their children are entitled under this Constitution, including their rights to education, health, safety and welfare.
- (4) Any religious community may establish institutions where religious instruction may be given, even if the institution receives a subsidy or other financial assistance from the State.”

“75 Right to education

- (1) Every citizen and permanent resident of Zimbabwe has a right to—
 - (a) a basic State-funded education, including adult basic education; and
 - (b) further education, which the State, through reasonable legislative and other measures, must make progressively available and accessible.
- (2) Every person has the right to establish and maintain, at their own expense, independent educational institutions of reasonable standards, provided they do not discriminate on any ground prohibited by this Constitution.
- (3) A law may provide for the registration of educational institutions referred to in subsection (2) and for the closing of any such institutions that do not meet reasonable standards prescribed for registration.
- (4) The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of the right set out in subsection (1).”

Another section of importance in this regard is section 86 which permits the limitation of fundamental rights in these terms:-

- “(1) The fundamental rights and freedoms set out in this Chapter **must be exercised reasonably and with due regard for the rights and freedoms of other persons.**
- (2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to **the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity**, equality and freedom, taking into account all relevant factors, including—
 - (a) the nature of the right or freedom concerned;
 - (b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;
 - (c) the nature and extent of the limitation;
 - (d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
 - (e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and

(f) whether there are any less restrictive means of achieving the purpose of the limitation.

(3) No law may limit the following rights enshrined in this Chapter, and no person may violate them—

(a) the right to life, except to the extent specified in section 48;

(b) the right to human dignity;

(c) the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment;

(d) the right not to be placed in slavery or servitude;

(e) the right to a fair trial;

(f) the right to obtain an order of *habeas corpus* as provided in section 50(7)(a).”

(emphasis is mine)

It is apparent that none of the rights that applicant alleged would be infringed by the conduct of the respondents falls into the category of inviolable rights enumerated in subsection (3) of s 86. Accordingly, in the event that the applicant establishes that the conduct would violate any of the rights, it will be necessary to measure such *prima facie* violation as against the rights and freedoms of others, in terms of subs (1), and within the context of the permissible derogations contemplated in subs (2).

Counsel for both parties referred to the case of *Makani & Others v Arundel School & Others* 2016(2) ZLR 157 (S) wherein the above rights were extensively discussed.

In that case, the applicants sought several declarations and consequential relief in respect of alleged violations of their children’s constitutional rights. The applicants had enrolled their children at Arundel School. In enrolling them they agreed that the children will abide by the school’s regulations. The school being an Anglican school had its requirements for inculcating value systems in the children. The regulations were amended making it compulsory for all students to attend chapel prayers in order to reinforce collegiality. The applicants and their children were practicing Jehovah’s Witnesses. Their beliefs are not similar with other Christian denominations. Upon application to the school for the admission of their children, each of the applicants completed a standard application form in which they indicated that they were Jehovah’s Witnesses.

When compulsory chapel attendance was introduced and the children were being compelled to attend against their beliefs, the applicants wrote several letters to the school expressing their complaints. When the school insisted on the children attending Chapel, the applicants approached this court seeking an order for the children to continue attending school without being compelled to attend chapel pending the determination of their application at the constitutional court.

The court considered issues that are also relevant in this matter. In dealing with the right to education as enunciated in section 75 court alluded to the fact that subsections (1) and (4) thereof pertain to right to education funded and availed by the State. As regards private schools, at page 165H-166B, court aptly stated that:-

“Subsections (2) and (3) of s 75 deal separately with private or independent educational institutions. They permit the establishment of such institutions, subject to such State supervision and control as may be necessary to ensure that they meet prescribed reasonable standards. The right to establish and maintain an independent institution guaranteed by subs (2) must be construed not only in the physical and structural sense but to include as well the establishment and maintenance of educational and ethical standards. Conversely, the provision does not envisage any right to flout the rules and regulations designed by the institution to safeguard its educational and ethical standards. The only qualification to the rights of an independent institution is that it must not discriminate on any ground prohibited by the Constitution. ...”

What this entails is that a private school is entitled to lay down rules and regulations for the admission of pupils espousing its objectives and ethos as long as those regulations do not discriminate on any of the grounds prohibited in the constitution.

In casu, 1st respondent is a private/independent educational institution. In opening its doors to learners it set its objectives and ethos as stated in its regulations, including the code of conduct. Thus any learner seeking admission was made aware of the institution’s regulations and had to agree to abide by those regulations as a pre-condition for admission. The Code of Conduct was designed to espouse the institutions objectives and ethos thus giving it a unique identity. The Code of Conduct applied to all the learners alike and did not discriminate on any ground. The school in effect expected every pupil to maintain the ‘St. Johns College’ educational and ethical standards as espoused in the Code of Conduct.

Ex- facie, the Code of Conduct does not contravene s 56 as it requires all pupils to abide by the same regulations in equal measure.

In dealing with a similar provision that required all pupils to attend chapel that PATEL JCC in *Makani* case (*supra*), at 166E-F stated that:-

“Given that this contractually agreed stipulation is intended to apply to all pupils without distinction, I do not think that it is necessarily discriminatory on the grounds of religion. Every parent who agrees to this condition does so willingly and actively chooses to abide by it implications. Thus, as I have stated earlier in relation to the right to education, it cannot be said that this mutually agreed condition per se amounts to discriminatory treatment at the point of admission to the school.”

As noted in s 56(4) what constitutes discrimination would be differentiation in treatment of the pupils. *In casu*, the requirement to be cleanly shaven applied to all the pupils and the respondents' enforcement of this regulation was the same in respect of all the pupils. In their opposition to this application respondents have insisted that applicant's child be treated the same as other pupils. Any differentiation in treatment would bring disharmony within the body of students and would in fact amount to discrimination. There was thus no discrimination in the way respondents applied the code of conduct or as proscribed by the constitution.

The other ground argued by applicant's counsel was that the requirement for the minor to shave infringes on the minor's religious beliefs which is contrary to s 60 on freedom of conscience. Whilst indeed the insistence on shaving is not in keeping with the minor's religious belief, such a condition was known to applicant as he signed the contract for the minor's admission to the school. It is the applicant who in signing that contract without any reservations compromised that minor's religious beliefs in order to gain from the educational and ethical standard enjoyed at 1st respondent. The minor can still exercise his freedom of conscience without hindrance as long as he abides by the contractual obligations applicant accepted in enrolling him at 1st respondent. It is for the applicant and the minor to conform to their contractual obligations and not for 1st respondent to be forced to conform to applicants beliefs now that the minor is studying to be an Imam. The applicant must respect 1st respondent's rights and interests as an independent institution.

Further, as was held in *Makani case* (supra):

“The freedom of religion is not inviolable and maybe limited in order to respect the rights and freedoms of other persons within the contemplation of section 86(1) of the constitution of Zimbabwe 2013...”

The limitation maybe where a person has voluntarily renounced their religious beliefs or if it is reasonable and justifiable in a democratic society. Freedom of religion must also be exercised reasonably and with regard to the rights of others. As aptly noted by PATEL JCC in *Makani case* (supra) at 173A-C:

“The provision that I deem most apposite to the resolution of this matter, and which I now turn to consider, is s 86(1) of the Constitution. It declares that ‘fundamental rights and freedoms must be exercised reasonably and with due regard for the rights and freedoms of other persons’. The analysis of conflicting rights postulated by s 86(1) calls for an essentially unitary approach. The question whether a given right is being exercised reasonably is inextricably intertwined with the question whether it is being exercised with due regard for the rights and freedoms of others. What is required is the balancing of actually or potentially antagonistic rights, having regard

to the nature of those rights, the manner in and the extent to which they impinge upon one another, and the circumstances in which they have been or are to be exercised.”

In casu, on admission of the minor applicant agreed to abide by the regulations of the school including the code of conduct. The 1st respondent as party to that contract expected applicant to comply. The school as a private educational institution has a right to the observance of its institutional objectives and ethos. As long as those objectives and ethos do not discriminate on any ground stated in the constitution, 1st respondent is justified in insisting on the observance of its regulations.

The principle of mutual respect and tolerance requires that the applicant accommodate the institutional rights and interests of the school in pursuing its perceived objectives, so long as those objectives are not pursued unreasonably and, equally importantly, so long as they do not radically undermine the religious beliefs and convictions of any of its pupils. To expect the school to forego its objectives and ethos to accommodate those of its pupils would lead to some form of loss of identity as espoused from the institutions objectives and ethos. One can imagine a situation where pupils with varying antagonistic or conflicting religious beliefs each wanting to practice their beliefs at the expense of the institutional objectives and ethos. This would make a mockery of the contract the parents of the pupils would have entered to abide by the school regulations in order to maintain the private school’s objectives and ethos. I am of the view that as long as those regulations do not contravene constitutional provisions, parties must respect the sanctity of their contract.

Whilst being cognisant of the importance of education and the fact that the minor in question is supposed to enrol for his sixth form, it is my view that the predicament he finds himself in could have been avoided by seeking a school whose regulations permitted or had no issue with the growing of facial hair.

In light of the above the issue of the nature of relief sought would not make any difference. Even if the application had been for a declaration against the provisions in the code of conduct that would not have succeeded as I am of the view that it is for the pupil to conform to school regulations and not school regulations to conform to individual pupils’ beliefs and standards no matter how dearly one holds to such beliefs.

The respondent asked for costs on the higher scale. The issue for determination involved the rights of a minor. It is the minor who has been excluded from school because he has grown a beard which he wishes to grow as he is studying towards being an Imam. I do not

perceive any mala fide to warrant costs on a higher scale. The school had on past occasions granted some pupils exemption so applicant may have thought it reasonable to insist on such as well. In any case as the case involved a minor child's rights even an award of costs may not be justified. The need to pronounce on the minor's rights in this regard was necessary and this should act as a guide to parents and guardians alike to enrol children at institutions that accord with their religious beliefs. Where this is not feasible then obtain written exemption from certain rules or regulations at the time of enrolment as part of the contract.

Accordingly the application be and is hereby dismissed with no order as to costs.

Lovemore Madhuku Lawyers, applicant's legal practitioners.

Gill, Godlonton & Gerrans, 1st, 2nd and 3rd respondents' legal practitioners.