HH 152-21
HC 850/21

CHARLES CHINYAMA
versus
LORRAINE BHEBHE
and
THE HERITAGE SCHOOL
and
THE MINISTER OF PRIMARY AND SECONDARY EDUCATION

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 29 March 2021

Date of written judgment: 6 April 2021

Urgent chamber application

Mr *S. Kuchena*, with him Mr *M. Mpofu*, for the applicant
Mr *B. Magogo*, for the first and second respondents
Mr *R. Nyatoti*, for the third respondent

MAFUSIRE J

[1] The applicant is the father and natural guardian of two boys, Tendayi [or Tendai] Chinyama, turning 19 years in June this year, and Jayden Chinyama, turning 10 in November. In January 2017 the applicant had the boys enrolled at the second respondent school. It is a private school. The first respondent is employed by the school as Legal Officer. The third respondent is the Minister of Primary and Secondary Education. It has not been explained why he has been cited in these proceedings.

[2] This is an urgent chamber application. The applicant seeks two interim orders against the first respondent, Ms Bhebhe, and the second respondent, The Heritage School. He prays that his two boys be allowed back into the school forthwith, and that the school be stopped from charging fees at the black market or parallel rates of exchange.

[3] The first and second respondents are vigorously opposed to the application. Among other things, they challenge the citation of Ms Bhebhe, the first respondent. They say her joinder to the proceedings is unnecessary. They say it is spiteful. It is malicious. They argue

that at the school, she has no remit other than the *bona fide* discharge of her functions as an employee. They point out that the applicant's contract of learnership for the boys is solely with the school. She is not privy to it. Above all, no remedy is being sought against her.

[4] In both the founding affidavit and answering affidavit the applicant justifies and persists with the inclusion of the first respondent in the proceedings on the ground that she has been the purveyor of wrongful advice to the school and the one implementing the alleged harmful conduct complained of. At the hearing, sense prevailed. The applicant conceded the misjoinder. Ms Bhebhe was removed from the proceedings as a party. On his part, the third responded does not oppose the application. He agrees to abide by any order of the court.

[5] The background facts are common cause. They are these. Upon enrolling his boys at the second respondent school, the applicant signed the school's standard term contract. In terms of it he gave certain undertakings. Among other things, he agreed and declared that all school fees and levies would be paid on or before the first day of term. The clause with this particular stipulation goes on to state:

> "The Parents/Guardians recognise that failure to do so, or to make prior acceptable arrangements with the School, will entitle the School to send the child home until such fees are paid, or until suitable arrangements are negotiated. Interest on unpaid fees may be charged. Should the fees, levies and other charges still not be paid, or acceptable arrangements not be made, the School may terminate [or discontinue] that child's place [or enrollment] in the School with immediate effect."

[6] The applicant was in default. He is still in default. The boys' fees for term 2 of 2020, term 3 of 2020 and term 1 of 2021 are in arrears. USD8 408-00 was due. For much of that period the whole country was on some severe lockdown as part of the global measures introduced by governments worldwide in efforts to thwart the spread of the covid-19 global pandemic. Among other things, schools have been on shut down. Lessons have been conducted online. The applicant complains, but rather equivocally, that his children have not been receiving the school's on line service. But he accepts that this has been on account of his non-payment of the fees. He admits it is overdue.

[7] The school has been pressing hard for payment. On 28 January 2021, the applicant sent the first respondent a mobile telephone message. He undertook to pay at the rate of USD1 000 with effect from that day. He said he could only withdraw $1 000 per day. He did not pay. On

the same day, he sent the first respondent an e-mail. Among other things, he acknowledged his indebtedness to the school in "*... the sum of 8408 usd ...*" He undertook to pay it all off by 15 March 2021 at the latest, but otherwise by the end of February 2021. He did not pay.

[8] On the next day, 29 January 2021, the first respondent responded by e-mail asking the applicant to sign an acknowledgement of debt. He signed it on the same day. The material portion reads:

> "I Charles Chinyama I.D number 67-06r767x12 do hereby acknowledge my indebtedness to The Heritage School (Pvt) Ltd in the sum of US$8408.00 being outstanding school fees for Jayden Chinyama (Year 5) and Tendai Chinyama (Year 13) for Term 2 2020, Term 3 2020 and Term 1 2021. I promise to pay the entire debt on or before the 28th of February 2021."

[9] On or before 28 February 2021 the applicant did not pay. Neither did he do so by 15 March 2021. Nor at any time immediately thereafter. Only in his answering affidavit does he attach what he alleges to be a receipt from the school acknowledging an alleged cash payment for Tendai on 18 March 2021 of $920. I note that this alleged payment was just a day before the applicant commissioned his founding affidavit. It was signed on 19 March 2021.

[10] Matters came to a head. On 15 March 2021 the school made formal demand for payment of the outstanding US$8 408-00. It cited the applicant's undertaking to pay off the full amount by 15 March 2021 and his failure or neglect to pay. He did not pay. On 16 March 2021 the school notified the applicant, by letter, that because of the fees account for Tendai not being fully paid up, the child would not be allowed to attend classes and should not come to the school from the following day, 17 March 2021, until such time that the outstanding balance had been cleared. By this time schools throughout the country, and in line with further Government measures concerning the continued control of the corona virus, only examination classes had been allowed back at schools. Tendayi is in an examination class.

[11] On 17 March 2021, and through his legal practitioners, the applicant challenged very strongly the school's intended move to exclude Tendayi from school. They cited s 68C of the Education Act, [*Chapter 25:04*]. That provision says no pupil shall be excluded from school for non-payment of school fees or on the basis of pregnancy. The lawyers' letter demanded that the school should "*... undo ...*" its letter of 16 March 2021 by close of business that day, or else face urgent legal action in which Ms Bhebhe would be cited as the first respondent on the basis that her actions had been malicious or negligent.

[12] On 18 March 2021 the school recanted. It retracted its letter of 16 March 2021 insofar as it purported to exclude Tendayi from attending classes. But this was not before attention had been drawn to the stipulation in the contract binding parents or guardians to the obligation to pay all fees and levies termly in advance; the right of the school to send home any child whose school fees may be outstanding; and the school's further right to discontinue the child's enrollment should the school fees still not be paid.

[13] However, it is what the school did next that immediately sparked the current litigation. In its letter of retraction aforesaid, it went on to state that by his conduct in continuously failing or neglecting to pay the outstanding fees, the applicant had manifestly repudiated his contract with the school and that the school was now accepting his repudiation and taking the position that the contract had come to an end. On that basis there was no longer any reason or justification for the applicant's boys to remain at the school and their enrollment was being discontinued with immediate effect. The relevant portion of the letter reads:

> "Furthermore, we advise that the school considers that Mr. Chinyama has repudiated the Agreement he had with it by breaching the material terms of this Agreement particularly 'Clause 5' of the same. His conduct of not paying School Fees for his children Tendai and Jayden Chinyama from Term 2 2020 (May 2020), Term 3 2020 up to Term 1 2021 is inconsistent with the Contractual relationship which existed between him and the school. Despite attempts to have payment arrangements with him, he still found himself in flagrant breach of the same. Needless to state that the requirement to pay fees is a material term of the contract, the breach of which is clear repudiation of the same.
>
> The School has therefore accepted the repudiation and hereby discontinues Tendai Chinyama and Jayden Chinyama's enrollment with immediate effect."

[14] The applicant reacted by filing the application on 23 March 2021. Verbatim, his draft order reads:

> "**INTERIM RELIEF GRANTED**
>
> Pending determination of this matter, the Applicant is granted the following relief:
>
> 1. That forthwith the 1st and 2nd Respondents are ordered to allow the pupils, Tendayi Chinyama and Jayden Chinyama into The Heritage School.
>
> 2. That the 1st and 2nd Respondents be and are hereby stopped from charging school fees using an unsanctioned black market rate."

[15] On the return day, apart from the usual prayer for costs, the applicant seeks two substantive orders as final:

> "1. The 1st and 2nd Respondents' conduct of excluding from school over non-payment of school fees be and is hereby declared unlawful (*sic*).
>
> 2. The 1st and 2nd Respondents' conduct of trading, exchanging, and charging for school fees in foreign currency at black market exchange rates be and is hereby declared unlawful."

[16] The applicant's basic argument, as I understand it, is that by reason of s 68C of the Education Act, as amended, the second respondent school is precluded from excluding his children from attending classes. The school has other debt collection channels open to it. Its argument that the contract between himself and the school has been repudiated or cancelled is nothing but a façade. It amounts to the same thing as expelling pupils from school for non-payment of fees. Otherwise, s 68C is rendered nugatory. Furthermore, the conduct of the second respondent school amounts to a breach of the children's constitutional right to education.

[17] Regarding the school's alleged demand for payment in foreign currency convertible at the parallel or black-market rates, the applicant's submissions are these. In one of their telephone discussions, Ms Bhebhe shouted and chided him for wanting to pay the fees at interbank rates. She said the school is in business. A bank rate of foreign exchange would bankrupt it. The applicant says but this is a violation of the laws of the land. The correct rate of exchange for any foreign currency is the intermarket bank rate, not the black-market rate.

[18] In counter, the second respondent's argument is this. The applicant's claim is misplaced. The order sought is incompetent. He has misconstrued the reach and purport of s 68C of the Education Act. That provision prohibits the exclusion of pupils from a school only for the two specific reasons clearly outlined therein. These are (1) the non-payment of school fees and (2) pregnancy. None of them applies to the applicant's situation. The provision does not proscribe other conduct or situations that may entitle a school to exclude pupils. The exclusion where the contract of learnership has been terminated is not proscribed. That is the situation of the current matter. The applicant has not challenged the termination of his contract

with the school. It is not an issue before the court. Therefore, it is incompetent for him to rely on s 68C of the Education Act to force the school to accept his children back into the school.

[19] On the issue of the so-called black market rate versus the interbank rate of foreign exchange, Ms Bhebhe completely denies the alleged demand by herself. She insists that payment of school fees and levies is acceptable at the interbank rate. She argues that the applicant has not placed before the court any material or information or evidence to suggest that he was asked to pay at the black market rate of exchange. She points out that to the contrary, the letter of demand from his own lawyers acknowledges that the outstanding amount of USD8 408 was convertible at the prevailing bank rate.

[20] I find for the second respondent on both aspects of the case. The application is ill-conceived. The relief sought is incompetent. Section 68C of the Education Act does not proscribe exclusion of pupils from schools for reasons other than the two expressly stated therein. These are the non-payment of school fees and pregnancy. They do not apply to the applicant's situation. The exclusion of the applicant's children from the second respondent school is based on the fact that the pre-existing contract between himself and the school has been terminated. There is no longer any relationship between them. Section 68C of the Education Act is premised on there being in existence a contract of learnership between a school and a parent or guardian. It is when that relationship exists or is *extant* that a parent or guardian can invoke s 68C and insist on his or her children not being excluded for non-payment of school fees and levies even where there is an admission that these are outstanding.

[21] The applicant's arguments relating to the right to education as enshrined in s 75 of the Constitution of Zimbabwe, and the paramountcy of the best interests of the children in every situation concerning children are lame. They are manifestly misplaced. The right to education in s 75 of the Constitution is in relation to state funded education: see *Makani & Ors v Arundel School & Ors* 2016 (2) ZLR 157 (CC). This is quite plain. Section 75(1) reads:

> "[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."

[22] The second respondent is not a state funded institution. It is an independent private school. The same section 75 of the Constitution grants to every person the right to establish and maintain, at their expense, non-discriminatory independent institutions of reasonable standards. In sub-section (2) it reads as follows:

> "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."

[23] The applicant's argument is that the second respondent's exclusion of his children based on the non-payment of school fees is the same as its subsequent conduct in expelling them on the alleged basis that the contract of learnership had been terminated. This argument is misplaced. The two acts are not the same. But, at any rate, this particular argument is not squarely before me. It is one that was developed sporadically during oral submissions, and only following repeated requests for clarity by myself. The applicant's case before me, in both the founding affidavit and answering affidavit, is that the second respondent's conduct in excluding his children for non-payment of the outstanding fees is in flagrant violation of s 68C of the Education Act. To the second respondent's statement that it was its subsequent conduct in accepting the applicant's own repudiation of the contract that resulted in the exclusion of his children from the school, not his failure to pay, the applicant's reply in the answering affidavit is somewhat unintelligible. It lacks lucidity. He says:

> "10. Any averments of repudiation and the purported cancellation of learnership contracts are denied *in toto*. I am well advised that the repudiation can only be in respect of performance not yet due. To alleged (*sic*) that there is repudiation implies that the school fees is not yet due, but that I have conducted myself so as to give a clear impression that at that time when the fees will be due, I will not pay them. That is clearly not the case."

[24] What does the applicant mean? But whatever he means, I consider that the second respondent's actions were two separate, albeit related, quasi-juridical acts. In the one, it purported to exclude the applicant's children from the school for non-payment of the school fees. That is prohibited by the Education Act. When challenged, the second respondent recanted. It resorted to the second act. It declared the contract of learnership between the applicant and itself terminated. Excluding the children from the school was the natural consequence of that declaration. Yet when the applicant resorted to litigation, he based his cause of action on the second respondent's original conduct. But it had moved away from it. In these proceedings, the applicant does not ask the court to declare that where a contract of

learnership has been terminated, rightly or wrongly, s 68C of the Education Act is still applicable if a pupil is excluded from the school on the basis of such termination. He seeks an order that exclusion for non-payment of fees is illegal. That makes this application ill-conceived.

[25] That the second respondent's actions were two separate quasi-juridical acts seems borne out by both the actual wording of the contract, on the one hand, and the second respondent's actual implementation of it on the ground, on the other. The contract contemplates a two-pronged approach. The first is the exclusion of children from school for non-payment of fees or for want of negotiation of acceptable arrangements. It says: "*The Parents/Guardians recognise that failure to do so, or to make prior acceptable arrangements with the School, will entitle the School to send the child home until such fees are paid, or until suitable arrangements are negotiated*." Plainly this stipulation is inconsistent with s 68C. But of note, albeit in passing, is the fact that the stipulation predates s 68C of the Act. The parties' contract is dated January 2017. Section 68C was introduced by an amendment that came into force only on 6 March 2020. So, before that amendment there nothing wrong with that kind of stipulation. However, this is besides the point.

[26] The second aspect of the contract giving rise to the second quasi-juridical conduct of the second respondent is the expulsion or exclusion on the basis of termination on account of continued non-payment: "*Should the fees, levies and other charges still not be paid, or acceptable arrangements not be made, the School may terminate that child's place in the School with immediate act.*" On the ground, the second respondent initially followed the first route. That was unlawful. It was challenged. It recanted. It then resorted to the second route. That has not been challenged. There is nothing to suggest that such conduct is unlawful. On the other hand, there is no *prima facie* right that the applicant bases his prayer for an interdict on. He has neither paid the outstanding school fees nor complied with the arrangements that he negotiated. He has not challenged the termination of the contract of learnership.

[27] It is a fundamental requirement for an interim interdict that the applicant must demonstrate a *prima facie* right of his or hers the infringement of which is imminent, even if that right be open to some doubt. It is also another requirement for an interdict that there be no

alternative effective remedy available to him or her. The applicant has no right to insist that his children should remain at The Heritage School when, demonstrably, he cannot afford the fees. He has not shown that he cannot have his children enrolled at alternative schools whose fees he can afford. Thus, there exists an alternative remedy for him.

[28] Ordinarily, but for s 68C of the Education Act, it would not lie in the mouth of any parent or guardian to insist on inclusion of their children at a school when they have not paid the fees and levies required, or when they have not negotiated acceptable arrangements. The contract between the applicant and the school is an ordinary bilateral or synallagmatic agreement. Such contracts are *quid pro* arrangements. You pay in return for a service. Conversely, if you do not pay, you do not get the service.

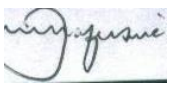
[29] Without the cover of s 68C of the Education Act, the applicant has no right to specific performance. One does not demand performance from the other party where they themselves have not performed, or tendered performance, of their side of the contact: see *Farmers' Co-operative Society (Reg) v Berry* 1912 AD 343; *Blumo Trading (Pvt) Ltd v Nelmah Milling Co (Pvt) Ltd & Anor* 2011 (1) ZLR 196 (H) and *Mwayera v Chivizhe & Ors* 2016 (1) ZLR 15 (S).

[30] The applicant's claim that the second respondent demanded payment of the outstanding fees at the parallel market rate of exchange is manifestly a red herring. There is no proof of that. The second respondent vigorously denies it. Facts on the ground support the second respondent. The applicant's own document is against him. His own lawyer's letter of demand on 17 March 2021 acknowledges that the fees was payable in United States dollars, or in local currency at the prevailing interbank rate of exchange. They wrote in part:

> "Our client acknowledges receipt of a letter on Heritage letterhead dated 15 March 2021 addressed to his former address, that is, 34 Armadel Road, Borrowdale, Harare wherein you are claiming for payment of USD $ 8 408.00 or its equivalence in RTGS <u>at the current bank rate</u> amounting to ZWL $ 706 103.84 before the 24th of March 2021." (*my underlining*)

[31] The applicant has no case. His application is hereby dismissed with costs.

6 April 2021



Masawi & Partners, legal practitioners for the applicant
Makuwaza & Magogo Attorneys, legal practitioners for the first & second respondents
Attorney-General's Office, legal practitioners for the third respondent