HARARE RESIDENTS TRUST
versus
CITY OF HARARE
and
MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS
AND NATIONAL HOUSING
and
MINISTER OF PRIMARY AND SECONDARY EDUCATION

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 20 May 2021 & 29 July 2022

Opposed Court Application

F Mahere with *Ms Liff,* for the applicant
A Moyo, for the 1st respondent

CHITAPI J: The applicant applies for a declaratur and *mandamus* orders. Its draft order reads as follows:

IT IS ORDERED THAT:

1. The first, second and third respondents' failure to establish a public primary school in Tynwald South Township, Harare is hereby declared to violate the rights of children from low-income households in Tynwald South, specifically their rights to education, the best interests of the child, to dignity, to administrative justice, and to equality and non-discrimination, as protected in sections 75, 81, 68 and 56 of the Constitution.
2. The first respondent shall, with immediate effect, redirect the Beer Levy funds of US$200 000 allocated for the construction of a public primary school in Tynwald South from 'Stand 16106' in Fountain Blue, Kuwadzana to an appropriate site within Tynwald South Township.
3. The first, second and third respondents shall, with immediate effect, designate an appropriate, at minimum 3.5 hectare, site in Tynwald South for the construction of public primary school, in consultation with Harare Residents Trust and Tynwald South residents.
4. The first, second and third respondents shall take all necessary measures, in consultation with Harare Residents Trust and Tynwald South residents, to ensure the establishments and opening of the public primary school in Tynwald South, by January 2022 at the latest.
5. The second respondent shall direct that a public inquiry be conducted into unlawful allocations, sales, leasing, subdivisions, disposals and changes of use of public land in Tynwald South in terms of section 311(2), and section 311(5) of the Urban Councils Act [*Chapter 29:15*], within six months of the date of this order.

6. The first respondent shall conduct a study in terms of section 13(b)-(c) of the Regional, Town and Country Planning Act with recommendations for the review of the Local Plan for Tynwald South to address the public amenity needs of Tynwald South residents, within six months of the date of this order.
7. The first and second respondents shall with immediate effect, halt the development, sale, subdivision, leasing, disposal, change of use and development of all land in Tynwald South owned by the state or first respondent and/or reserved for public use or services, pending the completion of the public inquiry of the second respondent and, and the study of the first respondent, into public land use in Tynwald South.
8. The respondents shall pay the costs of this application on an ordinary scale.

The applicant is an association that represents Harare residents. It is a *universitas* which is constituted in terms of its constitution. It has power to sue and be sued in its name. The first respondent is the local authority for Harare Metropolitan area. It is constituted by the Urban Councils Act [*Chapter 29:15*]. For purposes of this application, the first respondent is responsible for matters of planning and such planning is done in accordance with the provisions of the Regional, Town and Country Planning Act [*Chapter 29:12*]. The second respondent is the Minister responsible for the administration of the Urban Councils Act. The third respondent is the Minister responsible for Primary and Secondary education in Zimbabwe. The applicant alleged that this particular Minister has the responsibility in terms of ss 2 and 7 of the Education Act [*Chapter 25:04*] to administer the Act and inter-alia to establish educational institutions which include primary and secondary schools.

The applicant alleged that it represented the interests of Tynwald South Township established in 1996 as a low income residential and composed of two roomed houses. It was alleged that the area had become overcrowded with more than 1 200 households in the area. The applicant alleged that the first and second respondents had failed to establish, build or provide public amenities to service the area. The applicant averred that it had since 2018 been assisting the residents by petitioning the State and the Municipal Authorities to provide adequate facilities for the residents of the area. It was the applicant's further allegation that because of expansion of the area, there was limited vacant land remaining which had been reserved for construction of amenities such as schools and clinics. The applicant averred that the reserved land area had been leased or sold to private developers who in turn subdivided the land and sold it to individuals.

At the centre of this application is the alleged failure by the first and third respondents to ensure that a primary school was built in the area and at a place reserved for that purpose. The applicant averred that it was the policy of the government that a school is established per every

600 households. The applicant attached a copy of a Circular by the Ministry of Local Government Works and National Housing Number 11 of 2000 which set out the 600 households one public school policy. The applicant averred that the area still did not have a public school. There had been established a number of private schools within the area. The private schools charge exorbitant fees which the generality of the residents cannot afford. This situation had forced parents to seek school places for their children from neighbouring residential areas which are distant. The failure to provide a public school has resulted in a situation and consequences which the applicant set out in para 9 of the founding affidavit as follows:

> "9. This has left low income families with limited options to enable their young children to access education. Parents and care givers are forced to travel long distances to accompany their children to and from schools in neighbouring areas, depriving them of critical working hours in which to earn income for the family and forcing them to pay transport fares for both student and caregiver to and from the schools, alternatively, young children have to travel the long distances unaccompanied, putting their lives and safety at risk or families are forced into by having to pay the fees for private schools in Tynawald South. As a result of these restricted options, many children in the area are not able to access school at all."

The issue of the absence of a public school has been a burning issue between the applicant and the first respondent. The applicant averred that it had noted that the provision of a public school had been topical since 2006. The applicant in its push for the establishment of a public school wrote a letter to the first respondent. I consider it convenient to restate the letter. It reads as follows:

> "**HARARE RESIDENTS TRUST**
>
> 15 January 2018
>
> Mr B Manyenyeni
> Mayor
> Town House
> Harare
>
> Dear Sir
>
> **RE: FOLLOW UP ON TYNWALD SOUTH SCHOOL AND SHOPPING CENTER LANDS**
>
> The Harare City Council has promised the residents of Tynwald that they will be starting to construct a school in 2006 as it was responded by Sekesai Makuwarara. Now its 2018 and there is no public school which was built in our area and the land was invaded by the Land Barons (stand number 2164). We as the resident we are demanding an explanation from the City Council. The Zimbabwe Education Policy state that on every 500 households there must be a primary school and for every 1 000 households there must be a secondary school but in Tynwald South there are more than 1 000 households but not a single school is servicing our area which brings inconveniences to us as residents'.

> Furthermore, the City Council also notified the residents' that it is going to invite business people to come and build their shops at shopping centre lands (stands number 2165). They further added that they shall put an advert on local newspaper to invite business people. Now is 12 years after your response and not a single shop has been constructed and the places has been invaded already. We would like to know your position on these services we are entitled to get but we are not receiving them.
>
> Lastly the whole of Tynwald South does not have a health centre and previously it has been stated that the City Council does not have the budget to build a clinic in the area. The building which was supposed to be a clinic now it has been invaded by Mother Touch Primary School.
>
> As residents we are asking if you could do something so that we can have a health centre in our area since there are sites reserved for schools, shopping area and a health centre but they are being misused. We would also like that our area should have tower light and humps as the District office has done nothing to help us therefore we asking if you can help us to have them installed.
>
> Your feedback will be greatly appreciated.
>
> Yours faithfully
>
> Tynwald South Residents
> Cc Mayor"

The letter which the first respondent did not dispute receiving is in the form of a complaint by the applicant that Tynwald South residential area did not have a public primary and secondary school as per the Zimbabwe Education Policy which required that a public primary school should be provided for every area comprising 500 households and a secondary school for every area comprising 1000 households. The applicant averred that since 2006 the calls for the establishment of the primary school had been made. Complaints were also made on the non-provision of a shopping centre at Stand Number 2165 following a promised invitation to business people to take up the stand. A complaint was similarly made that the area had no health centre and the stand was taken up and a private primary school Mother Touch Primary School was instead built on the stand reserved for a health centre. Further complaints were made that there was no tower light nor speed bumps in the area. A call was made for the first respondent to attend on the issues raised. This letter shows that there has been ongoing complaints made by the applicant albeit the current application focuses on the provision of a school.

The first respondent raised a point *in limine* to the effect that the applicant had approached the wrong forum and instituted the wrong process. The first respondent submitted that the applicant ought to have instituted an application to compel the first respondent to provide reasons for its

failure to provide the public primary school. Alternatively the first respondent submitted that the applicant ought to have made an application to challenge why the first respondent approved a layout plan for Tynwald South. It was also submitted that it was not for this court to "declare" the provision of a primary school to cater for Tynwald South since this is an administrative function of the first respondent that the court cannot perform. It was submitted that the court must not usurp the administrative functions of the first respondent which is an expert in plaining and carries this mandate according to law. It was also submitted that there were material disputes of fact which could not be resolved on the papers. In the same vein the first respondent then submitted that the first respondent had already reserved a stand adjacent to Tynwald South being Stand Number 16106 for the establishment of a primary school and that the stand was within walking distance from Tynwald South.

The applicant opposed the point *in limine*. It submitted that its application was a plea to the court to declare the first respondent's failure to establish a school as unlawful and for the issue of a *mandamus* to order and compel the first respondent to establish the school. The applicant also submitted that it did not have an alternative remedy and that the applicant had been writing to the first respondent on several occasions as per letters which the applicant attached to the founding affidavit. The applicant submitted that the first respondent never bothered to give its reasons for failure to provide the school which it could have done in answer to the letters of demand.

There was no substance in the point *in limine*. The first respondent cannot take advantage of its short comings. It was the duty of the first respondent to explain to the applicant and indeed the occupiers of Tynwald South the reasons for not establishing the school. It is illogical and senseless for the first respondent to admit implicitly that it has a duty to give reasons for non-performance of a duty or obligation and to them plead that the applicant should instead take the respondent to court for an order to compel it to provide the reasons. The first respondent did not explain why it did not give the reasons nor why it must be compelled by the court to give reasons.

The first respondent argument's that the applicant has an alternative remedy to seek an order to compel the first respondent to give reasons why the layout out plan was approved by the same first respondent is perplexing and I make the same comments I have made in respect to the first point of objection. The first respondent does not explain why there would be need to take it to court to provide reasons for adopting the layout plan. Once the applicant had raised issue

with the layout plan, the first respondent had a duty as a public entity to be accountable. It was clear from the papers that there was disagreement between the applicant and other residents of the area over the validity of the layout plan as the applicant relied on another plan. The duty to account arose then. The first respondent does not require a court order to compel it to account to the rate payers or residents within its municipal area.

The first respondent sought to rely on the provisions of s 6 of the Administrative Justice Act, [*Chapter 10:28*] to the effect that a person whose rights or expectations one adversely affected by the failure of an administrative authority to supply reasons for the actions concerned may apply in the High Court for a compelling order to supply reasons for the action concerned within a time given in the enactment in terms of which the authority would have acted or within a reasonable time if the enactment does not provide for the time limit within which to supply the reasons. It is clear from the provisions of s 6 that the seeking of an order to compel the administrative authority to furnish reasons are directory. The affected person is given a right to petition the court for a compelling order to supply reasons. It is not a requirement that the supply of reasons is a condition precedent to the filling of an application as in this case for a declaratory and /or *mandamus*. The circumstances of each case will determine whether or not the applicant should have sought reasons. *In casu* , the first respondent as evident from correspondence sought to it did not supply reasons in clear circumstances which it was supposed to supply them. The points *in limine* were therefore dismissed.

On the merits, the facts of the matter are not in serious dispute contrary to what the first respondent submitted as another point *in limine* that there were serious disputes of fact not capable of resolution on the papers. The first respondent submitted in relation to this objection *in limine* that the applicant's case was fraught with irresoluble disputes of fact which should result in a dismissal of the case. I do not agree. The first respondent simply raised the issue of a dispute of fact as a matter of course. The disputed facts were not pointed out nor listed which should be the norm. A litigant does not simply aver that there are disputes of fact and leave it to the other party and the court to engage in conjecture on what the disputed facts are points *in limine* should not be raised as routine or perfunctorily by legal practitioners. In the case of *Telecel Zimbabwe (Pvt) Ltd* v *Potraz and Ors* HC 3975/15 MATHONSI J (as then he was) bemoaned the practice of legal practitioners to raise points *in limine* routinely where those points do not assist to resolve the

dispute placed before the court. The learned judge stated that it may be necessary to reign in legal practitioners who abuse the court process in that manners by ordering a costs order dubious proprus's against them.

A warning is given to the legal practitioners of the first respondent who prepared the opposing affidavit that a repeat of such despicable conduct wherein a point *in limine* is just made and not developed is unacceptable. It constitutes pleading in *terrorum* where the aim is to simply terrorize or harass the applicant by raising unmerited defences. It is not even necessary to deal with the issue of what constitutes a dispute of fact as would be incapable of resolution. This is so because the first respondent did not deal with the fact which can be said to be in dispute. The so called dispute of fact remained imagined and illusory, only existing in the head of the legal practitioners concerned. Lest it be wondered why the court has made serious criticism of the legal practitioners concerned only identified as RZ of the first respondent legal practitioners, this is what the first respondents states in the founding affidavit which the legal practitioner either proposed and /or passed as properly stated.

> "5. Secondly there are material disputes of facts which cannot be resolved on paper. The first respondent has already reserved a primary school on a stand adjacent to Tynwald South being Stand 16106, which is within a walking distance from Tynwald South."

The above quoted is all which the deponent stated on that issue. The next time that the issue was dressed was in the heads of argument by the first respondent's legal practitioners. To be fair to the legal practitioner, this is what is stated in the heads of argument in relation to the alleged existence of a material dispute of fact.

> "**MATERIAL DISPUTES OF FACT**
>
> 10. The 1st respondent has already reserved land for a primary school on land adjacent to Tynwald South. This distance is within a walking distance from Tynwald South. The resolution (see resolution attached tin the application) that led to the reservation is very clear that such reservation is was being made in light of the failure to have a public school in Tynwald. There is no land to accomodate a school in Tynwald. It is therefore denied that there was nothing done by the 1st respondent to address the issue. Only through the testimony of 1st respondent witnesses can it be demonstrated that the reserved school is just across the road from Tynwald South and also that there is no space for another primary school to enable the layout plan to the amended/adjusted to accommodate such."

From the submission, the dispute of fact(s) remains undisclosed. In any event whatever dispute of fact the first respondent may have perceived should have been stated in the applicant's

depositions. *In casu*, the legal practitioner's submissions amounted to giving evidence by the legal practitioner as opposed to the litigant giving evidence.

Rule 59(18) of High Court Rules 2021 provides as follows:

> "18. If, at the hearing of an application , exception or application to strike out, the applicant or recipient, as the case may be, is to be represented by a legal practitioner.
>
> (a) before the matter is set down for hearing, the legal practitioner shall file with the Registrar heads of argument clearly authorizing the submissions he or she intends to rely on and setting out the authorities, if any, which he or she intends to cite; and
>
> (b) ….. "

It should be clear to the legal practitioner if properly guided by the quoted rule that the heads of argument are constituted of submissions by counsel. The submissions derive from the affidavits and other documents filed by the parties in support or defence of their cases. They do not provide a window for the parties through counsel who prepares the heads of argument to sneak in evidence.

In regard to the preparation of the heads of argument and I make this point as an aside, the quoted rule provides that the party's legal practitioners shall prepare heads of arguments. In my view the legal practitioner concerned should identify himself or herself by name on signing the heads of argument. *In casu*, the heads of argument are signed off by inserting the means of the legal firm. This is wrong since a firm cannot prepare heads of argument. This issue does not arise where advocates prepare heads of argument. They always identify with the heads by signing them off in their names. This practice must be observed by all legal practitioners who prepare heads of argument so that it is clear to the court that a named legal practitioner prepares the heads of argument. If the name of the legal firm must be included, fair and well but still the individual legal practitioner's name should be included.

On the merits of the application, the applicant averred a common cause legal position in tandem with international instruments and the constitution of Zimbabwe, the right to basic State funded education is guaranteed. The applicant made reference in paragraph 30 to the alleged failure by the "respondents" to perform the obligations in terms of what the applicant called numerous Treaties to which Zimbabwe is a signatory. The International Treaties cited therein are – Article 28(1) of the Convention on the rights of the Child, 1989; Article 13(2) (a) of the International

Covenant on Economic, Social and Cultural Rights, 1966. Article 17(1) of the African Charter of Human and People and Human and Peoples Rights. Article 111(3)(a) of the African Charter on the Rights and Welfare of the Child. It was alleged that Zimbabwe was a signatory to the Dakar Framework for Action, Education for ALL 2000 wherein States committed to provide education for all citizens. The applicant averred further that s 46 of the Constitution provides that the court should take into account international treaties and covenants to which Zimbabwe is a party when undertaking and applying constitutionally guaranteed rights and ensuring their protection and realization.

In my view, there is really no need for the court to entangle itself in matters of the interpretation of s 73 and the other provisions of the Education Act and the guaranteed right to education because that is the issue which I must determine is whether or not the first, second and third respondents have acted in violation of the rights of the children of Tynwald South to education contrary to the provisions of s 75, 81, 68 and 56 of the Constitution. The respondents do not deny that the children of Tynwald South and I would say just like every other children in whichever suburb or area have a right to education and the establishment of a public primary and secondary school depending on house hold density as clearly set out in the provisions of the Constitution, the Education Act and the circular and declared policy.

Starting with the second respondent, the Acting Permanent Secretary of the third respondent's led Ministry averred in the opposing affidavit that the third respondent was facing challenges to obtain space to construct a primary and/or secondary school in Tynwald South. The deponent submitted that whilst it was the mandate of the Ministry of Primary and Secondary Education to provide education to every citizen and permanent resident of Zimbabwe, the Ministry had not been allocated land suitable for consideration of the schools. The deponent averred that it is not a land authority and cannot allocate land. On that basis the third respondent averred that the court should not grant para 3 of the draft order wherein the applicant prayed that the first, second and third respondents should denigrate an appropriate, at minimum 3.5 hectares site in Tynwald South for the construction of a public primary school in consultation with Harare Residents Association Trust and Tynwald South residents. The third respondent also strenuously revisited para 4 of the draft order wherein the applicant seeks an order that the first, second and third respondents should in consultation with the applicant and Tynwald South residents establish a

school to be opened by January, 2022. The third respondent averred that even if land was to be allocated for the construction of a public school there would be need for the third respondent to mobilize resource, do planning works and construct the school. The time limit would therefore depend on these processes. The third respondent was therefore not aware nor did the third respondent deny the constitutional imperatives of the need to ensure the realization of establishing a public school(s) in Tynwald South. The stumbling block was the availability of land allocation for the construction of the school.

The first respondent from the opposing affidavit on the merits averred that there had been established private schools within Tynwald South suburb and that in any event there was a layout plan in place in terms of which Stands 1511, 1853 and 2260 were reserved for public primary schools or council creches. It submitted that the layout plan namely Tynwald Local Development Plan Number 24 was first approved in 1994; amended in 1998 and renewed in 2015. The first respondent attached as annexure "A" to its opposing affidavit a copy of the amended and renewed local development plan No 24/2. The plan is headed proposals plan. There is no indication that it was approved as it is not signed. It was averred that the plan was subjected to scrutiny and objections by residents an allegation denied by the applicant. I do not consider that this issue needs resolution now. The first respondent however averred that the development plan provided for stand 2164 as the reservation for the construction of a primary school. It was submitted that indeed a primary school was constructed namely a private school going by the name Mother Touch Primary School. The first respondent averred that the second respondent's directive did not distinguish between a private and /or public school. The argument as I understood it was that there has been compliance with providing access to education in that the first respondent allocated a Stand Number 2164 for a school and the school was built albeit a private school.

In regard to supporting its position that it had not violated the rights of children to education through an alleged failure to establish a primary school the first respondent tellingly responded in para(s) 10 and 11 of the notice of opposition as follows:

> "AD PAR 11-12
> 10. This is disputed. It is denied that stands 1511, 1853 and 2260 were reserved for public primary schools or council creches. There is nowhere on the layout approved plan that this was mentioned. The first respondent only retained public open spaces from the private developer. As such it was well within bounds to allocate the land for open spaces as it deemed fir for Town Planning. Stand 2164 was reserved as a primary school in the Tynwald Layout Plan number 24 and was since properly allocated to Mother Touch

> Primary School, which is a private school. All the other land in Tynwald South had already been allocated and there is no space or reservation for a public primary school, which as already pleaded is not a right and which reservation was out of the first respondent's control since the land was privately owned
>
> 11. It must also be noted that stands 16105 and 16106, although in Kuwadzana, have reserved for both primary school and a secondary school and are located adjacent to Tynwald South as well as being within a walking distance for the community. The first respondent, having observed the need for a public school specifically reserved this area, since it's adjacent to Tynwald South and easily accessible. The first respondent will ensure that the planned access of pedestrian lanes be maintained and developed concurrently as the schools are developed. As already pleaded, all objections were dealt with in terms of the law and the applicant has dismally failed to attach any written objections that were not dealt with in terms of the law to enable the first respondent to comment."

In summation the first respondent's position, can be said to be that it considers itself not to be at fault because it complied with the approved development plan in terms of which the first respondent retained only open spaces and the rest of the land was allocated to the land developer. It then reserved stand 2164 for a school which was built but is a private one. It pleaded that since all the space was taken up it was able to find land in the adjacent suburb of Kuwadzana being Stand 16105 and 16106 which the first respondent marked for establishment of a primary and secondary school respectively. It averred that the site chosen is also situated a walking distance from Tynwald South surburb.

In reply, the applicant denied the validity of the amended development plan. Although I have noted that the copy attached by the first respondent to its papers is not signed, I cannot determine the issue of its validity which the applicant questioned. That can only be done in a separate suit in the appropriate forum. The applicant relies on a layout plan which the first respondent denied as the one that was holding owing to its variation and amendment. The applicant depending for its argument on the plan annexure "D" to the founding affidavit averred that Stands 1411; 1853 and 2260 were reserved for creches. It submitted that the reservation of space for creches allowed for primary schools. This admission in para 15 of the answering affidavit would appear to give credence to the first respondent's averment that there was no provision made in the layout plan for primary schools. The applicant admitted that a primary school namely Mother Touch Primary School was established but that it was a private school which was not affordable to the generality of the poor members of the Tynwald South. It also averred that the primary school was not built on Stand Number 2164 because that stand which was reserved for a primary school

was allocated for residential flats. The applicant averred that Stand Number 2165 remained vacant and available for public use. There obviously remains a dispute on the alleged availability of Stand Number 2165 because the first respondent averred that there were no longer any available spaces for allocation, hence the decision to allocate stands in Kuwadzana for the establishment of the primary and secondary schools to serve Tynwald as well. The applicant respondent that not only would the planned be inconvenient to access, but that the residents of Kuwadzana would require those schools to themselves.

The applicant submitted that the allocation of stands for the establishment of the schools in Kuwadzana did not satisfy the right to accessible and affordable education of children in Kuwadzana. Whilst accepting the first respondent's contention that the right to education is not an absolute right, the applicant averred that the right could only be limited through a law of general application and that such law would need to be fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity and equality. Nothing really turns on this. I also do not consider that the question of absoluteness or otherwise of the right to education needs my determination. I say so because, notwithstanding the passing arguments on the existence of the right to education generally, the thrust of the dispute really turns on the non-availability of land in Tynwald South for the establishment of the primary school as averred by the first respondent on one hand and the averment by the applicant that land is available with for example Stand 2165 being still vacant and that the first, second and third respondent's should find the land through other means like buyouts and even state acquisitions. In other words the applicant takes the position that a plea that there is no longer any available land to allocate for the establishment of a primary school is not a valid ground to deny the enjoyment by the children of Tynwald South exercise and enjoy their right to education by building a primary school in Tynwald South.

The applicant averred that a resolution had been reached by the first respondent to release beer levy funds for construction of a school in Tynwald Suburb. The resolution which was attached as annexure "I" is an extract of the Financial and Development council committee meeting. The extract has a date stamp of 12 December, 2018. It was noted therein that children from Tynwald Suburb commuted to Dzivarasekwa and Kuwadzana to access affordable educational facilities thus endangering the children and overburdening existing schools. The

committee identified Stand Number 16106 Tynwald Township as the site to build the school using beer levy funds if the recommendation to use the funds for such purpose was approved in the sum of US$200 000.

In the view of the court, the matter for resolution which is the provision of the primary school for the benefit of Tynwald South resident's children is not in dispute. The real issue is the professed inability of the first respondent to get land to allocate for the purpose within Tynwald South itself all the land is taken up. If the land is taken up, the court cannot make an order that a particular piece of land should be allocated for the purpose without infringing on the rights of the holders of the land concerned without hearing them. The first respondent has committed to constructing a school and identified two sites which the applicant finds to be inconvenient. The applicant insists that the school should be established in Tynwald South. The provision of land for such a purpose where all the land is said to have been taken up is a process and not an event because the acquired rights of the persons from whom land may be acquired by purchase or otherwise cannot be ordered by the court. The same goes for the suggested solution by the applicant that the first respondent can exercise the power to change the use of privately owned sites in the area.

It appears that the bone of contention also lies in the applicants' contention that the first respondent has failed to consult the applicant and residents of Tynwald South before making decisions which affect them. The first respondent has not shown that it consulted the residents albeit just saying so. The first respondent argued that the court cannot assume administrative powers of the first respondent by ordering that a school be built at a particular site. Indeed the court does not usurp such a function but it can order that the first respondent should perform its functions interms of the law which mandates it to carry out the function. See *Affretair (Pvt) Ltd* v *M R Airlines (Pvt) Ltd 199(2) ZLR 15*.

It is regrettable that the second respondent did not participate in this application. The second respondent is the Minister who administers the Urban Councils Act [*Chapter 29:15*]. As correctly submitted by the first respondent's counsel in the heads of argument, the second respondent has power in terms of s 311 of the Urban Councils to resolve such problems as revealed herein. In terms thereof the Ministry may institute an enquiry to investigate and report on any matter which includes inter-alia the failure of a council to exercise good governance in an area

under council jurisdiction including a failure to undertake any function. The Minister has a discretion to institute the enquiry. The Minister can only act upon information being relayed to him and he considers it necessary to act. The applicant has not adverted to any attempts to chivvy the Minister to exercise his powers in relation to this dispute. It does not appears to the court that there has been an exhaustion of available remedies to correct the applicants' perceived wrong committed by the first respondent. The second respondent is supportive of and undertakes to establish a school subject to land being allocated for the purpose. The first respondent agrees to and has allocated land for the purpose albeit the land is not being situated in the heart of Tynwald Suburb.

The applicant essentially requires the court to make a declaration that the first, second and third respondents are in violation of the constitution in particular the right of children of Tynwald South to access affordable education by not establishing a primary school in the suburb of Tynwald South. I am not persuaded to make such a declaration principally because there has been no refusal or failure any of the respondents to establish the school. The issue concerns disagreements between the applicant and the first respondent over availability of land in the area preferred by the applicant *vis-a vis* that offered by the first respondent. Where the respondents are committed to and have undertaken to build the school but there is grumbling and disagreement over the site, this is a matter which can be resolved. It cannot be said that there has been a violation of the constitution where the issue is being tackled. I refuse to make the declaration sought.

In regard to orders sought in the draft order in para(s) 2 – 7 I refuse to grant them because they derive from the declaration which I have refused to grant that the constitution has been violated by the respondents. What is clear from the papers is that there is disagreement between the applicant and first respondent over siting of the school and not provision of land for the establishment of the school. The court is not in a position to order that a particular site should be designated for the establishment of the school. This is a dispute which the parties can resolve and one which can be separately brought to the appropriate forums for determination. The court does not consider that a case has been made to make other orders sought. It appears though that the second respondent may in his or her discretion interfere in the dispute using his powers in s 311 of the Urban Councils but the court cannot order him to do so. The court however suggests that this judgement be brought to the Minister's attention.

The courts' decision is to dismiss this application which is in the nature of a dispute as to where the envisaged school should be sited. A lot of arguments have however been brought into an otherwise straight forward matter. The applicant can properly bring a case to resolve the siting of the school. Evidence of suitability or otherwise can then be placed before the court. This leaves the question of costs. This is a public interest matter concerning the rights of children and taking into account as well that this court is the upper guardian of all minors in Zimbabwe, it would be in an extreme case that a litigant who brings a matter of this nature is penalized with a costs order.

Accordingly, the judgment of the court is that:

"It is ordered that the application is dismissed with no order of costs"

Zimbabwe Lawyers for Human Rights, applicants' legal practitioners
Gambe Law Group, first respondent's legal practitioners
Civil Division of the Attorney General's Office, third respondent's legal practitioners