PROFESSOR E. MWENJE
versus
MRS P MAKONI N.O.
and
THE ARUNDEL SCHOOL TRUST

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 28 December 2016; 4, 5, 13 January 2017

Urgent chamber application

K Ncube, for the applicant
F Mahere, for the respondents

CHITAPI J: At the centre of this application is a minor child called Michelle Deborah Mwenje. Her right to academic freedom as enshrined in s 61 (1) (c) of the Constitution stands threatened and at risk of being breached by squabbles between the applicant and the respondents. Surprisingly the respondents are in the best position to and no doubt appreciate that the minor child is the loser in the debacle. When the matter of the parties' dispute was argued before me, I pointed out to the parties that this was a matter over which they needed to recognise that a third party the minor child stood to suffer an infringement of her rights. The parties were given time to try and reach out to each other and I postponed making my determination after argument. I had hoped that some acceptable arrangement could be reached by the parties. They failed to agree. I accordingly now give my determination on the application.

The application

The applicant seeks an order as set out in the provisional order as follows:

"TERMS OF THE FINAL ORDER SOUGHT

It be declared that:

i) The actions of the 1st respondent in declining to issue a clearance letter for fees and levies in respect of Michelle Deborah Mwenje are unlawful.

ii) Clause 2 of the enrolment contract dated 2 August 2012 between applicant and 2nd respondent does not apply in instances were a child has completed 'O' levels.
iii) The refusal to issue a Clearance letter to the applicant for his aforesaid minor child amounts to an unlawful; violation of the minor child's right to education enshrined in section 81 (1) (f) of the Constitution of Zimbabwe. Amendment (No. 20) Act 2013 as well as a violation of section 4 (2) (a) of the Education Act [*Chapter 25:04*].
iv) The respondents to pay the costs of suit on the attorney and client scale jointly and severally one paying the other to be absolved.

TERMS OF THE INTERIM RELIEF GRANTED
Pending confirmation or discharge of this provisional order:
i) The respondents be and are hereby ordered and directed to forthwith issue a clearance letter for Michelle Deborah Mwenje confirming that there are no fees, levies and other charges due and owing to Arundel School in respect of her.

SERVICE OF PROVISIONAL ORDER
Service of this Provisional Order shall be effected upon the respondents by the Sheriff of the High Court or the applicant's legal practitioners."

The applicant is the Vice Chancellor of Bindura University. He is the father and legal guardian of Michelle Deborah Mwenje (hereinafter called 'Michelle').

The first respondent is the headmistress of Arundel School. It is in such capacity that she was joined to the application.

The second respondent is described as a Trust with power to sue and be sued. It would appear that the second respondent owns Arundel School or controls it.

The facts founding the application are not complex. A summary of the same will suffice as follows:

Deborah was enrolled as a form one student at Arundel School in 2012. She sat for her O-level examinations in November, 2016. She awaits the results.

Deborah would like to proceed to A-level. She however wants to study for her A-levels at Peterhouse School. In other words she does not wish to continue with her A-level studies at Arundel School.

An application for placement in A-level class at Peterhouse has since been made. Peterhouse School has provisionally reserved a place for Deborah to study her A levels there. Peterhouse School however requires among other things, a clearance letter from Deborah's last school which in this case is Arundel School. The clearance letter is a document which in this case would be required to be issued by the first respondent clearing Deborah of outstanding fees and other charges which may be due to her old school in respect of her education thereat.

I need to observe here that I did not get an explanation on the papers as to why such a certificate is a necessary document which a student must produce before such student is

enrolled in another school. I asked the parties to explain to me the rationale of requiring such a clearance as opposed to a letter of transfer which as the parties and myself understood would be a document confirming that the student would have attended the last school and confirming *inter-alia* that such student would have completed the level which entitles him or her to embark on the next level for which a place at a new school is sought.

The applicant's legal practitioner submitted that in his understanding there existed an association of Trust schools. The association or grouping of the Trust Schools require that a student transferring from one of their associate schools to another one within the group, must have cleared any fees or charges due to the last school that such student was attending. The second school to whom the student has applied for placement will not confirm or take the student into its establishment if fees or other charges are owed to the last school. The first and second respondent did not deny that this was the practice obtaining.

The dispute in this application centres on the so called clearance letter or certificate which the first respondent allegedly refused to issue for reasons which will be dealt with later. It also emerged during the course of the hearing that the first respondent had in fact issued a "clearance letter" which was qualified as it purported that some money was still due to the student's last school.

I shall again pose to comment that the qualified clearance letter is in my view not a clearance letter because it does not clear the student. It is an informative letter but not a clearance letter. In fact, why issue it if it does not clear the student of other charges due to the last school attended. I shall come back to this point.

From copies of e-mails attached to the applicant's founding affidavit, the Registrar of Peterhouse Girls School advised the applicant as follows on 28 November, 2016.

> "The offer letter for Michelle is ready for sending. Please may you advise the progress of your fee clearance with Arundel. As a member of ATS Chisz Schools we are required to obtain a fee clearance before a student transfers from one Chisz school to another …."

Earlier on the first respondent had by e-mail dated 15 November, 2016 to the academic registrar or responsible officer at Arundel School advised the latter as follows after being advised of Deborah's intentions to leave Arundel School for Peter House, the e-mail being copied to the applicant:

> "Dear Prof Mwenje
>
> Thank you for this notification. Please note that as we appear not to have received the requisite withdrawal of notice, a terms fees in lieu of notice will be needed so that we can write the necessary fee clearance letter."

The applicant took up the issue with his legal practitioners who in a letter dated 12 December, 2016 demanded that the first respondent should issue the fee clearance because the applicant did not owe anything in respect of fees". It was pointed out in the letter of demand that the applicant had not signed a 6 year contract to cover forms 1 to 6 and that since a student's progression from form 4 to form 5 was not automatic, but a choice issue, it could not be assumed that Deborah would be attending form 5 let alone at the same school.

The respondents also engaged their legal practitioners who responded to the letter of demand on 14 December, 2016. They did not agree with the interpretation espoused by the applicant's legal practitioners. The argument they advanced which is difficult to understand appeared to be that if the student withdrew from the school for whatever reason it amounted to a withdrawal and notice was required to be given because the student was eligible to proceed to form 5.

Having considered the affidavits filed by the parties as well as the submissions made by their respective legal practitioners, it is clear that the applicant does not owe any fees or levies to Arundel School on account of Deborah's attendance thereat as at the time that she completed O-levels and sat for her 2016 examinations.

The Arundel School enrolment contract for Deborah which the applicant signed and is Annexure A to the applicant's papers is dated 2 August, 2012. The relevant clauses of the contract for purposes of this application are clauses 1 and 2 which read as follows:

> "I Prof. E. Mwenje being the parent/legal guardian of the above named student, acknowledge that I am responsible for all fees, levies and deposits; and understand that she has been accepted for entry as a boarding student at Arundel School in the first term of 2013 on the following express terms and conditions:
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> 1. That once a place is offered and accepted, the acceptance fee stipulated must be paid to secure the place. This acceptance fee shall be non-refundable. In the event of failure to take up an accepted place, the full acceptance fee will be forfeited.
> 2. That a full term's notice of withdrawal shall be given in waiting and handed to the Head not later than noon on the first day of the term in question failing which the full fees for the following term will be charged. The foregoing shall likewise apply to any change in status from boarding to day pupil."

The respondents' counsel argued that clause 2 as aforesaid obliges the applicant to give a term's notice before withdrawing Deborah. The parties however accept that there are no fees due by the applicant for Deborah as at the end of the third term when the student wrote her O-levels. The next term when assuming Deborah qualifies to enrol for form 5 will obviously commence in January, 2017. Clause 2 of the form provides that a notice of withdrawal be

given in writing not later than noon on the first day of the term in question. Deborah does wish to continue into form 5 at Arundel School this year and the term would start in January, 2017. The applicant notified the school well before the first day of this term. I am not able to understand how the penalty clause should come into play because the penalty refers to the term in question which the student does to intend to learn at the school. The way the clause is framed appears to require that such notice of withdrawal is given "no later than noon on the first day of the term in question…." The term in question can only be the term that the student wishes not to attend. On this interpretation of clause 2 above, I would hold that the school has no reason to insist on a penalty because notice of withdrawal was given well before the term of withdrawal.

There are several other arguments which the applicant has raised on the papers. These include the fact that the enrolment contract should be construed as excluding a student's enrolment into A-level after O-levels. The applicant also seeks to argue that the respondents' refusal to issue the clearance letter infringes upon the minor child Deborah's rights and constitutes a violation of s 81 (1) (f) of the Constitution as it interferes with the child's rights to education. The applicant also argues that the respondents' actions violate s 4 (2) (a) of the Education Act, [*Chapter 25:04*]. Further arguments are made that the proposed penalty will result in Arundel School being unjustly enriched.

The first respondent in her opposing affidavit raised a point *in limine* in the nature of a procedural defect in the applicant's papers. She argued that the application did not comply with r 241 (1) of the High Court Rules as there is no summary of the grounds of the application. Rule 241 (1) provides that the chamber application be accompanied by form 29 B. Form 29 B requires that grounds of the application be set out. A close analysis of the applicant's application shows that although he did not follow to the letter, the wording set out in form 29 B, there was substantial compliance because the grounds of the application were included by the applicant in his notice of application. The respondents did not allege or prove that they suffered any prejudice as a result of the non-strict compliance by the applicant with r 241 (1). I was also moved by the applicant to condone the applicant's failure to strictly comply with the requirements of such rule. In terms of r 4 c, a court or judge has a discretion to condone a departure from the rules in the interests of justice. I was persuaded to condone the applicant's failure to strictly comply with following the wording of form 29B. Whilst condonation should be an exception rather than the norm, I ruled that the extent or degree of

non-compliance was not great and more importantly the applicant did not stand prejudiced by the non-compliance. I therefore dismissed the point *in limine*.

The first respondent also argued that the court should as a rule hold parties to their contracts. I do agree that as a general rule, a party who enters into a covenant or contract with another should be held to the contract. This approach should be adopted where the parties' rights and obligations to the contract are clear or agreed. I have already commented on the purport of clause 2 of the enrolment contract. The applicant also raised several other legal arguments on the constitutionality and legality of the penalty clause. The arguments are not frivolous and require full ventilation on the return date should I grant the provisional order sought by the applicant.

I need to comment that the first respondents' conduct deserves of censure. It was mischievous of her to issue a purported qualified clearance letter as I was made to believe. The effect of such a letter was to indicate to the other school (Peterhouse) that the applicant owed some money to her last school. She issued the letter in the full knowledge that there was a dispute as to whether the money was due. It was submitted that the first respondent issued the letter on 15 December, 2016. By that date the applicants' legal practitioners had made demand and the respondents' legal practitioners had insisted on the payment. The first respondent should simply have refused to issue the clearance rather than inform the proposed next chosen school for the continuance of the students' education that the student still owed money. The first respondent became a judge in the cause and one hopes that the letter was not written *mala fides* or as a ploy to force the applicant to pay what he disputed or risk the student being denied a placement at the student and the applicant chosen new school. If the applicant was properly advised she would simply have held her ground and not issued a clearance until her school's demands were met.

In an urgent chamber application which a judge has ruled to be urgent and he or she hears it, and the applicant seeks a provisional order, the judge is obliged in terms of r 246 (2) of the High Court Rules to grant the provisional order as prayed for or as varied by such judge. The judge is obliged to grant the provisional order as aforesaid where such judge is satisfied that the applicants' papers establish a *prima facie* case. The applicant managed to do so on the papers and arguments presented to me. The applicant does not owe Arundel School any fees or levies. Arundel School seeks to claim damages for an alleged contractual breach with respect to a notice of withdrawal. The damages cannot constitute fees or levies which the applicant fully paid. A certificate which stipulates that no fees or levies are due by the

applicant on account of Deborah's attendance as a student at Arundel as at the time that she completed her O – Level examinations should therefore be issued without qualification. Such stipulation cannot defeat any claim for damages which the respondents may be advised to bring against the applicant.

The applicant's counsel applied to amend the applicant's draft provisional order in the interim relief to specify that the clearance letter should be unqualified. In the course of negotiations between the parties, the applicant undertook that he would not raise estoppel as a defence by producing or pleading that the clearance letter amounted to a waiver of the respondent's claim for damages if Arundel School decided to pursue a claim for damages against the applicant. The applicant's counsel furnished the respondents with a written undertaking to that effect.

By the parties admission there are in fact no fees, levies or other charges owed by the applicant to the school. Even if one was to argue that the penalty would amount to a charge, the liability for the penalty has been disputed and until such time that the court rules that, the applicant is liable to pay a penalty, it cannot be said to be due. I am mindful that in a letter dated 5 December 2016 generated by the applicant, he asked for a waiver of notice. He also pleaded impossibility of his ability to give due notice due to circumstances beyond his control. The letter shows that the clearance was sought in November 2016. The evidential value of the letter is a matter best left to full argument on the return date. I say so in view of my *prima facie* view of the interpretation to be placed on clause 2 of the contract. My *prima facie* view can of course be upheld, set aside or corrected by the court after full argument.

Having ruled that the applicant has established a *prima facie* case, I accordingly issue the interim provisional order in terms of the draft as amended.

Kossam Ncube & Partners, applicant's legal practitioners
Gill Godlontong & Gerrans, 1st & 2nd respondents' legal practitioners