REPORTABLE (22)

(1) S. J. W. (in his capacity as legal guardian of minor child R. S. W)
(2) H. C. W. (in her capacity as legal guardian of minor child C. R. H. M)
v
(1) LOUISE MORRISBY (2) CARL STUART LAPHAM
(3) ST. CHRISTOPHERS SCHOOL
(4) TRUSTEES FOR THE TIME BEING OF ST. CHRISTOPHERS SCHOOL TRUST
(5) BOARD OF GOVERNORS OF ST. CHRISTOPHERS SCHOOL

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MATHONSI JA & CHITAKUNYE JA
HARARE: 16 JANUARY 2023 & 23 MARCH 2023

D. Tivadar, for the appellants

T. W. Nyamakura, for the respondents

MATHONSI JA: By judgment delivered on 5 October 2022, the High Court ["the court *a quo"*], dismissed the appellant's court application made in terms of s 27(1) (c) of the High Court Act [*Chapter 7:06*] ["the High Court Act"] as read with r 62 of the High Court Rules, 2021, for the review of disciplinary proceedings conducted by the respondents. This appeal is against that judgment.

THE FACTS

The appellants are the guardians of the minor children R. S. W. and C. R. H. M. respectively. In this judgment R. S. W. and C. R. H. M. are jointly referred to as "the children". Pitted against the appellants are the third respondent, a trust school registered as a non-

governmental school in terms of the Education Act [*Chapter 25:04*] [the "Education Act"], the first respondent who is the headmistress of the school and the second respondent who is the deputy headmaster. The fourth and fifth respondents are the trustees for the time being for the St. Christophers School Trust and the Board of Governors of the school respectively. In this judgment the respondents are jointly referred to as "the school", save where it is necessary to specifically identify any one of them.

In October 2021, the school learnt with profound concern that the appellants' children, then in the Fourth Form, had threatened to perpetrate something vicious. They planned to shoot a lady or girl and thereafter rape her corpse.

Having learnt of the alleged intentions of the children, which they had allegedly spoken of on several occasions, the school carried out investigations involving the pupils who had reported the matter, the appellants' children and the other students who were also alleged to have uttered the said words. On 29 October 2021, both appellants were invited to the school by e mail, together with their children. This was for the purpose of discussing the matter with the first and second respondents.

The appellants would have none of it. They vehemently opposed the invitation to discuss the matter. The first appellant, in particular, outrightly refused to attend the meeting. In a strongly worded letter dated 30 October 2021, he accused the school authorities of having delayed communicating the allegations against the children and of taking a predetermined position on the issue without affording the children a proper hearing after investigations. The first appellant demanded to be furnished with copies of the "number of complaints" which were

to be provided as written statements made by those making the allegations within five days from the date of his letter.

Since the proposed meeting failed to take place, the school authorities advised the appellants that they were continuing with further investigations which included obtaining written statements of the conversation of the children involved.

Thereafter, by an email of 2 November 2021, the second respondent specifically advised the first appellant that the school had compiled transcripts of the statements made by six pupils from the Form Four class. The first appellant and his son were also advised that they were at liberty to attend a meeting between themselves and the first and second respondents. During that meeting, they would be allowed to view the statements, whereafter the matter would be discussed further. Only then, on 3 November 2021, did the first appellant visit the school. He was shown the transcribed statements which had been gathered by the school. The school however, refused to allow the first appellant to make copies of the original statements, or to take the statements with him as they were "school property".

By this point, the battle lines between the school and the appellants were clearly drawn. The appellants' declared position was that they would not attend any further meetings with the school unless they were supplied with the original statements. Resultantly, on 9 November 2021, the first and second respondents made the position of the school clear in a letter to the appellants which reads in relevant part as follows:

> "To answer some of the questions from your last email [of 8 November 2021].
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> 1. The statements made by pupils will not be made available to you.
> 2. The statements made by pupils were transcribed by Mrs Morrisby and read back to the pupil in the presence of their guardian and Mr Lapham.
> 3. The week of 25-29 October used for investigation allowed Mrs Morrisby and Mr Lapham to gather verbal statements from pupils.

4. At your request, Mrs Morrisby and Mr Lapham had to ask pupils and their parents to come for a meeting to give their verbal statements which could be transcribed for your viewing.

In closing, with the evidence that has been made available to us a disciplinary body, we find that [your children have] not been truthful with us, and have not shown the necessary maturity to deal with [their] mistakes. As a Form 4 pupil moving into the senior section of the school we expected [them] to show some form of honesty, respect and maturity. Therefore, with this in mind we will not be offering [them] a place at St Christopher's School for Lower Six in 2022."

Although a letter was sent to each of the appellants, the contents of the letters were essentially similar and, thus, the letters were reproduced to read as the one above.

Through a follow-up letter of 8 December 2021, the school's legal practitioners advised the appellants' legal practitioners that there was sufficient evidence that a serious offence had been committed by the children which justified the conclusion reached by the school authorities. Consequently, in an effort to amicably resolve the matter, a number of conditions were proposed as remedial action for the children's conduct. The appellants rebuffed the offer. The end result was that nothing further was done on the issue but the school resolved not to offer the children Sixth Form enrolment.

PROCEEDINGS BEFORE THE COURT *A QUO*

On 21 December 2021 the appellants filed an application in the court *a quo* for the review of the disciplinary process conducted by the respondents against the children. As already stated, the application was made in terms of s 27(1) (c) of the High Court Act as read with r 62 of the High Court Rules, 2021. Several grounds for review were advanced in support of the application including that the children had not been informed of any specific charge preferred against them, that the children were denied their right to be heard with the assistance of their parents, that there was no disciplinary hearing or any other process which would have

afforded the children the opportunity to defend themselves, that the children were not found guilty of any particular offence, that the penalty meted out to the children was excessive and that they were not afforded the chance to mitigate it.

The respondents opposed the application. They raised several preliminary points ranging from the point that the application was moot and that the grounds of review were not clear and concise. On their part, the fourth and fifth respondents objected to the application on the basis that they had been unnecessarily joined to the proceedings.

On the merits of the application, the first respondent averred that the decision by the third respondent not to offer the children Lower Sixth Form places was a result of the appellants' uncooperative attitude towards the investigation. She specifically averred that:

> "25. At this stage 2nd Respondent and I felt we could no longer continue with the process as our investigations were already being attacked before we could even organise a disciplinary meeting or hearing. The standard of evidence and the strict formalism where "cross examination" of students by Applicants was demanded was unreasonable.
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> ……
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> 27. Applicants' children were never suspended nor was there a hearing held into the matter and were allowed to continue until the end of their exams and the term, at which point, they were automatically no longer students of the 3rd respondent."

The first and third respondents maintained that the process that the appellants sought to impugn remained an investigation and never, at any stage, morphed into a disciplinary hearing. They denied that the appellants' children were ever found guilty of any particular offence or that a penalty was "meted out" on the children. On the school's expressed decision not to offer the appellants' children Lower Sixth places, their position was that the

decision was discretionary and was, in any event, based on the uncooperative conduct of the appellants.

The second respondent separately deposed to an affidavit associating himself with the averments by the first respondent. All in all, the respondents prayed for the dismissal of the application with costs.

In its judgment, the court *a quo* dismissed all the preliminary points that had been raised. On the merits of the case, it regarded the case as being borderline. It made a specific finding that there had been a legitimate expectation or anticipation by the parties that the children would be enrolled by the school for their Lower Sixth Form. It also made a finding, based on its reading of the email of 9 November 2021 that the school had rendered a guilty verdict on the charges itemised in the email, namely, a lack of maturity, honesty and respect. To the court *a quo*, the penalty for the conviction on the foregoing charges was that the children would not be offered places for Lower Six in 2022.

The court *a quo* was content to hold that the respondents had reached their ultimate verdict on offences or acts of misconduct that were completely different from what the children had been accused of, what they had been investigating and what they had engaged the appellants on. The court *a quo* then concluded that it was manifestly irregular for the children to be accused and prosecuted for one offence and then be convicted of another for which they were not tried.

In its final analysis, the court *a quo* held that by according the appellants the opportunity to read the written statements, the school had fulfilled the requirements of the *audi*

alteram partem rule of natural justice. The court *a quo* also made the finding that the respondents could not have breached the *nemo judex in sua casua* rule of natural justice. Overall, the essence of the court *a quo's* conclusion was that:

> "... the respondents breached none of the rules of natural justice *audi alteram partem*, or its adjunct, the legitimate expectation doctrine. Given the obstructive conduct of the applicants, the respondents should be excused for the decision that they finally took, namely to inform the applicants that their children would not be allowed back for Lower Six at the third respondent's school."

Though being quite at variance with its earlier findings, it was finally the court *a quo's* view that there had not been disciplinary proceedings against the children capable of being set aside. Thus, the application was dismissed with costs.

PROCEEDINGS BEFORE THIS COURT

Irked by the judgment of the court *a quo*, the appellants have appealed to this Court on the following grounds of appeal.

1. The Court *a quo*, having found that (i) the Respondents had failed to undertake a disciplinary process and (ii) the respondents had reached a verdict that was 'manifestly irregular', erred by refusing to order the Appellants' conviction and sentence to be struck from the Respondents' records.

2. The Court *a quo* erred by failing to take into account First Respondent's admission that the appellants were punished due to their parents' attitude and conduct not due to the appellants' own attitude and conduct.

3. The Court *a quo* erred by failing to distinguish between the conduct of the Appellants, who are minors, and the conduct of their legal guardians.

4. The Court *a quo* erred by failing to have regard to the Appellants' right as children which rights the Court *a quo* was compelled to protect as the Appellants' upper guardian.

5. The learned judge in the Court *a quo* misdirected himself in not dealing with the argument that the parties who made the decision and handed down the penalty against the minor children were not authorized to do so.

Notwithstanding that multiple grounds of appeal have been advanced, they essentially coalesce into one issue for determination. It is whether or not the court *a quo* erred in failing to take into account the gross irregularities in the disciplinary proceedings by the school if ever there were any?

At the hearing of the appeal, Mr *Tivadar*, for the appellants, motivated the appeal in two parts. First, he submitted that once the court *a quo* concluded that the finding of guilt was irregular, it had to be set aside. Against a background of questions by the Court on the subject of review *a quo*, Mr *Tivadar* submitted that what initially was being reviewed was the disciplinary process. Asked to address the Court as to whether any formal disciplinary proceedings were carried out, counsel suggested that the appellants only sought the verdict to be expunged from the school record of the children.

Second, Mr *Tivadar* contended that the children's entrenched constitutional rights were ignored by both the school and the court *a quo*. Citing s 81 of the Constitution [providing for the rights of children], he submitted that no consideration had been given to the best interests of the children by the school and the court *a quo*. In counsel's view, it is not in the best interests of the children for the letter of 9 November 2021 to remain part of the school record. It should be removed as it was not preceded by a fair hearing or no hearing at all.

Per *contra*, Mr *Nyamakura*, for the respondents, proceeded from the premise that the appeal ought to be dismissed because it was presented on a different basis from the one in the court *quo*. Counsel emphasised that the relief which was sought *a quo* was the setting aside of the disciplinary process.

Mr *Nyamakura* drew attention to the crisp point that there was no disciplinary record of the children's guilt which the appellants sought to have expunged. In counsel's view, the school never invited the appellants to a disciplinary hearing but to a meeting. Counsel characterised the appeal as a misreading of the school's letter of 9 November 2021, which letter embodied an opinion that the children had not been honest and mature. In any event, counsel stressed, the school considers the best interests of the entire school. On these grounds, counsel submitted that the order of the court *a quo* dismissing the application was justified.

THE LAW

The appellants filed the application for review in terms of s 27 of the High Court Act, which reads thus:

> "(1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be—
> (a) ……
> (b) ……
> (c) gross irregularity in the proceedings or the decision."

Section 27 of the High Court Act is a sequent of s 26 of the same Act, which provides that, subject to that Act and to any other law, the High Court has the "power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe".

Ordinarily, where there is an irregularity in the proceedings or decision, those proceedings would have to be set aside on review. That however is not all. One has to consider the question of what constitutes disciplinary proceedings, a decision or irregularity.

The proceedings supposedly sought to be reviewed in this case were those of a disciplinary body established by a private institution i.e. a domestic tribunal. It is settled law that the High Court generally has the jurisdiction to review the proceedings and decisions of domestic tribunals. See *Jockey Club of South Africa* v *Forbes* 1993 (1) SA 649 (A) and G Feltoe, *Administrative Law and Local Government Guide,* 2020 at p 101. The principles of natural justice will largely apply to the proceedings of domestic tribunals, the application of which is relevant when the court considers a review application. See *Vice-Chancellor, University of Zimbabwe & Anor* v *Mutasah & Anor* 1993 (1) ZLR 162 (S) at 169 and *H* v *St John's College* 2013 (2) ZLR 621 (H) at 628E.

In this regard, the nature of what constitutes a gross irregularity remains the same even during the review of proceedings of a domestic tribunal. In *Nyahuma* v *Barclays Bank Zimbabwe (Pvt) Ltd* 2005 (2) ZLR (S) at 438E – H this Court stated that:

> "I wish to state that it is not all procedural irregularities which vitiate proceedings. In order to succeed in having the proceedings set aside on the basis of a procedural irregularity, it must be shown that the party concerned was prejudiced by the irregularity.
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> This point was made by TINDALL JA in *Jockey Club of South Africa & Ors* v *Feldman* 1942 AD 340 at 359 as follows:
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> > 'I am not prepared to accept, as a rule applicable to all cases of irregularity in the proceedings of private tribunals, the proposition that an irregularity which is calculated to prejudice a party entitles him to have the proceedings set aside. No doubt such irregularity *prima facie* gives him such right, but if it is clear that in the particular case the irregularity caused such party no prejudice, in my judgment he is not so entitled.'"

It must however be appreciated that a distinction may often exist between the disciplinary proceedings or decision of a tribunal and the investigative processes preceding such disciplinary proceedings. While the rules of natural justice would still apply during an investigation and to bodies that collect evidence as held in the case of *Moyo* v *President, Board*

of Inquiry 1996 (1) ZLR 319 (H) at 333, it does not invariably follow that an investigation will also constitute the disciplinary proceedings. The same is true for any opinion formed in an investigation. The mere fact that an investigator forms an opinion that there is a high likelihood that an act, omission, conduct or misconduct may have been made is not itself a verdict.

Generally, due to the flexibility that domestic tribunals enjoy in the procedure that they may apply in conducting disciplinary proceedings, there are no clear-cut characteristics by which the disciplinary proceedings may be identified or distinguished from investigative proceedings. The point at which investigative proceedings end or become disciplinary proceedings will always be determined by the facts of each case. To my mind, there are some special characteristics of disciplinary proceedings that may be relied on as helpful pointers as to whether disciplinary proceedings have commenced or exist. These include a sufficiently clear charge as opposed to a complaint in investigative proceedings, adequate notice of an impending hearing, a timeous hearing, an adequate opportunity to present the case, disclosure of prejudicial allegations and information and allowing a right to address or to sum up. See Feltoe, *op cit.* at pp 73 – 78 and *Rwodzi* v *Chegutu Municipality* 2003 (1) ZLR 601 (H). Sight must not be lost of the fact that the distinction between investigative proceedings and disciplinary proceedings in domestic tribunals may often be blurred because it is not uncommon for such tribunals to carry out both investigative and disciplinary roles in one go.

EXAMINATION

In considering the facts of this case, one has to proceed from the principle that an application stands or falls on its founding affidavit. See *Austerlands (Pvt) Ltd* v *Trade & Investment Bank Ltd & Ors* 2006 (1) ZLR 372 (S) at 377G. Before the court *a quo*, the first

appellant, in the tenth paragraph of his founding affidavit, specifically stated that the application was for the review of the disciplinary process undertaken by the respondents. Hence, the court *a quo's* review jurisdiction was directed towards the supposed disciplinary process that was undertaken by the school.

It stands to reason that the *sine qua non* to the review of any disciplinary proceedings is that there must actually have been disciplinary proceedings. The findings of the court *a quo* on the inherent question of whether there were disciplinary proceedings are, quite frankly, contradictory and difficult to understand. It first held that the school rendered a guilty verdict on the charges itemised in the email, namely, a lack of maturity, honesty and respect and later on, indirectly disowned this conclusion, preferring to conclude that there was no disciplinary process capable of being set aside.

I take the considered view that the finding by the court *a quo* that there was a charge and a verdict of guilty is incorrect. At no point during the entire chain of events did the school purport to carry out a disciplinary process. The appellants were never invited to attend any disciplinary process in their capacity as the legal guardians of the children. No formal charges were ever levelled against the children and no verdict could have been issued. In any event, during oral submissions, Mr *Tivadar* submitted that the appeal was only directed against the verdict, which they sought to be expunged from the school's record, which is contained in the school's letter of 9 November 2021. That position was a departure from the draft relief sought in the court *a quo* to set aside the disciplinary process. In the circumstances of this case, the submission by Mr *Tivadar* was, in fact, a concession that there were never any disciplinary proceedings.

Of course, by the above conclusion, I do not mildly attempt to suggest that the existence of the foregoing circumstances in a case would constitute disciplinary proceedings. Instead, the essential conclusion is that there were no indicators at all that the school, in its actions between October and November 2021, was undertaking a disciplinary process. Therefore, I accept, on a balance of probabilities, the averment by the first respondent that the school was carrying out investigative processes, to be more probable than not.

Given that there was hardly any indication in the evidence that was before the court *a quo* that the school was carrying out disciplinary proceedings, the finding that the contents of the email of 9 November 2021 constituted the charges against the children and a verdict is incorrect. That finding is so off the mark on an examination of the facts that were before the court *a quo* that it exhibits a clear misinterpretation of the facts before it. See *Hama* v *National Railways of Zimbabwe* 1996(1) ZLR 664 (S) at 670.

I turn now to the suggestion that the decision by the school not to re-enrol the children for Lower Sixth Form was a penalty, which also deserves interrogation. All the circumstances of the case surrounding that decision have to be considered before it can be characterised as a penalty. The starting point is to observe that the applicants had declared that their children and themselves would be subject to all the regulations, rules and discipline of the school. This position is undergirded by s 2 of the Education (Disciplinary Powers) Regulations, 1998 [Statutory Instrument 362 of 1998], which is extant, and states that:

> "*Standard of discipline*
> 2. Every pupil who enrols in a Government or non-Governmental school shall conform to the standard of discipline enforced at that school, and shall render prompt obedience to the school staff."

On its part, the school stood *in loco parentis* of all the pupils enrolled with it. It was entitled to act upon the conduct of the children and the appellants during its investigations. Thus, even if the allegations against the children and the investigative process that ensued were the proximate background of the decision by the school, it does not follow that that decision was a penalty.

Hence, I conclude that there was no disciplinary process undertaken by the school, which could be reviewed by the court *a quo*, as had been pleaded by the appellants. That finding obviates any need to consider whether there were gross irregularities in the proceedings as alleged by the appellants because there were never any proceedings. Equally, the argument that s 68 A (4) of the Education Act was not complied with becomes unnecessary to consider because that provision would have been engaged only if the school had contemplated to suspend the children by carrying out the requisite disciplinary process.

For completeness, I turn now to the constitutional arguments by the appellants. I have already adverted elsewhere to the fact that the application before the court *a quo* was in terms of s 27 (1) (c) of the High Court Act. It was not a constitutional application. Although there were references to the violation of fundamental rights such as the right to education in the first appellant's founding affidavit, those references were anecdotal and cannot be reasonably regarded as having been made in support of a constitutional application.

It is trite that a constitutional matter cannot arise for the first time on appeal. See *Ndewere* v *President of the Republic of Zimbabwe & Ors* S–13–23 at p 21 and *Bere* v *Judicial Service Commission & Ors* CCZ–10–22 at p 14. Thus, considering that there was no constitutional matter before the court *a quo* and that the court *a quo* did not determine the

application on a constitutional basis, it would not only be inappropriate but also unprocedural for a constitutional question to arise at this stage. Accordingly, the appellants' constitutional arguments cannot, on procedural grounds, succeed.

DISPOSITION

The appellants have not been able to show that there was a disciplinary process undertaken by the school. Resultantly, no review process could have been undertaken in respect of a non-existent disciplinary process. The court *a quo* could not have erred in dismissing an application for the review of a disciplinary process that never was. In saying that I am mindful of the fact that the court *a quo* arrived at a different conclusion but still dismissed the application. It being trite that one does not appeal against the reasons for judgment but the order, it therefore follows that the appeal stands to be dismissed.

On the question of costs, my considered view is that this is an appropriate case where each party should bear its own costs. This is because the judgment sought to be impugned may have constrained the appellants to appeal by its findings on the existence of charges and verdicts which have been found to have been the product of a misinterpretation of the facts. It is appropriate that each party must bear its own costs.

In the result, is ordered as follows:

"The appeal is dismissed with each party bearing its own costs."

GWAUNZA DCJ **:** I agree

CHITAKUNYE JA : I agree

Gill, Godlonton & Gerrans, appellants' legal practitioners

M. B. Narotam & Associates, respondents' legal practitioners