MELANIE MUDEKUNYE
(A minor child represented by her legal guardian
Tafadzwa Raymond Mudekunye)
and
TAKAIDZA RAYMOND MUDEKUNYE
versus
GATEWAY PRIMARY SCHOOL
and
TRUSTEES FOR THE TIME BEING OF GATEWAY SCHOOL TRUST
and
ABSALOM GATSI (N.O)
and
B.A HULLEY (N.O)

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 17 May 2019

**Urgent Application**

*C Kwirira,* for the applicants
*F Mahere,* for the respondents

CHIRAWU-MUGOMBA J: On 17 May 2019, I gave judgment *ex tempore.* The respondents have appealed against the provisional order and I am now required to give reasons.

After hearing the parties I granted a provisional order on the following terms:

**TERMS OF FINAL ORDER SOUGHT**

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

1. The 1st applicant be and is hereby re-admitted to the school by the 1st and 2nd respondents until she completes her primary education.
2. The 1st, 2nd, 3rd and 4th respondents to pay the costs of this application on the scale of legal practitioner to client scale if they oppose this application.

**TERMS OF INTERIM RELIEF GRANTED**

That pending the determination of this matter on the return day, the 1st and 2nd applicants be and are hereby granted the following relief;-

1. The 1st and 2nd respondents through their functionaries, the 3rd and 4th respondents are ordered to set aside and withdraw their decision to terminate the contract between 2nd applicant and 2nd respondent.
2. The 4th respondent is ordered to re-admit the 1st applicant into school forthwith and allow her to continue normal lessons, unless there is a valid court order terminating the contract between 2nd applicant and 2nd respondent in accordance with HC 8214/18.
3. The 3rd respondent is ordered to issue a formal withdrawal of the purported termination of contract between 2nd applicant and 2nd respondent.

**SERVICE OF PROVISIONAL ORDER**

1. That leave is hereby granted to the Applicants' Legal Practitioners to serve a copy of this order on each of the respondents.

The urgent application has its roots in a long dispute between the second applicant and the respondents over WhatsApp messages which has invariably affected the first applicant. The respondents have on previous occasions 'cancelled' the contract between the second applicant and the school which has resulted in the latter issuing notices 'expelling' the first applicant on the basis that her place at the first respondent is based on the contract and if it no longer exists, she does not have the legal right to remain at the school. On 17 July 2018, the applicants obtained an order in HC 6567/18 against the 2nd respondent by consent before DUBE J on the following terms:

1. The termination notice by the respondent dated 25 April 2018 of the contract entered into between applicant and the respondent on the 23 September 2014 be and is hereby withdrawn and the child shall be allowed to **continue with her education with Gateway Primary School until she finishes grade seven.**
2. Takaidza Raymond Mudekunye shall up until Melany Mudekunye **finishes grade 7,** not interfere with the running of Gateway Primary School in particular he is prohibited from writing articles about the school, the headmaster, trustees, teachers,

the tuckshop or publishing anything about the school on public WhatsApp, radio, newspaper, email platforms or any other platforms such as the free speech body. He shall be allowed to participate in other ordinary school activities with other parents as well as engage the school authorities privately on matters directly concerning his child.

3. Each party shall bear its own costs.

The order in HC 6567/18 seems not to have doused the fires resulting in another order in HC 8214/18 by consent that was granted by CHITAKUNYE J on 13 September 2018 as follows:

1. Mr Takaidza Raymond Mudekunye issues a statement on WhatsApp platform disassociating himself from free Speech Body UK and Free Speech Body USA and the contents of articles issued by these two organizations from 4 September to 9 September 2018.

2. The 1st applicant be and is hereby admitted back to school upon granting of this consent order **until she completes her primary school education.**

3. 2nd applicant abides by paragraph 2 of the High Court order by consent granted on 17 July under case no. HC 6567/18.

4. If 2nd applicant is found to have breached the order by consent under HC 6567/18, the respondents shall seek an order terminating their contract with the 2nd applicant.

One would have thought that the dispute came to an end in HC 8214/18 but the appetite for litigation between the parties shows no signs of abating. In HC 2987/19, the second respondent has instituted contempt of court proceedings against the second applicant alleging breach of paragraph 2 of the order in HC 6567/18. That matter has not been finalised.

By way of a letter dated 14 May 2019 and signed by the third respondent, the second applicant was informed that the second respondent had found it necessary to terminate forthwith the agreement between the parties. The second applicant was offered a refund of all fees paid for the second term of 2019. The fourth respondent addressed a letter to the 2nd applicant dated 15 May 2019 informing him that due to the termination of the contract, he should collect the first applicant from the school. Irked by these developments, the first and second applicants lodged an urgent chamber application.

The respondents filed a notice of opposition and opposing affidavits. The major averments were that the second applicant had approached the court with dirty hands because he had breached previous court orders. Further that the actions of the respondents were justified as they were in the best interests of the other minor children at the school. The respondents gave a long history of the dispute between the parties using unsavoury language in part of the response. All sorts of accusations were made against the second applicant. At the hearing and in motivation of the application, *C Kwirira* for the applicants made the following submissions: - That the court order granted by consent on 13 September 2018 clearly stated in para 4 that if the second applicant was found to have breached the order by consent under HC 6567/18, the respondents shall seek an order terminating their contract. No such order had been sought but the respondents had proceeded to unilaterally terminate the contract. This resulted in the respondents effectively expelling the first applicant from school. The notice of opposition by the respondents raises the same issues that are before the court in the contempt of court proceedings which matter is still pending before the court. The actions of the respondents have caused serious prejudice to the first applicant who is in the seventh grade and is due to sit for examinations towards the end of the year. Even if she were to transfer to another school, she would still need to come back to Gateway Primary School to sit for the examinations. The respondents should prove that the second applicant has come to court with dirty hands in the pending contempt of court proceedings. The actions of the respondents amounted to circumventing the contempt of court proceedings. Even if the second applicant has come to court with dirty hands, s 85 (2) of the Constitution does not bar him from approaching the court for relief. Section 81 of the Constitution addresses rights of children including the right to education. What is paramount is the best interests of the child.

In response, *F Mahere* for the respondents raised a point *in limine* that the applicants had not complied with R249 which requires that in anything done on behalf of a minor, a curator *ad litem* should be appointed first. Based on the well- established requirements for the granting of an interdict, the applicants had failed to meet such requirements. Relations between the school and the second applicant are governed by a contract. Section 75 speaks to the right to education in the context of state funded and not private school education. The applicants are therefore not covered by this constitutional provision. The respondents have a right to dignity and respect and not to be "toxified" by the second applicant. The reputation of the school is at stake. Further that it is not in the best interests of the first applicant to be in such an environment. The courts cannot force the parties into a contract that has clearly

broken down. The second applicant can secure a place at another school for the first applicant given the remaining time frame of five months between the expelling of the child and the sitting of examinations.

At the end of the hearing, I granted the provisional order sought with a slight variation in para 2 of the interim relief. I found no merit in the point in *limine* that the second applicant should have sought the appointment of a curator *ad litem* to represent the first applicant. I found the submission strange in view of the fact that applicants and the first and second respondent have two court orders obtained by consent. None of the orders make reference to the need for the appointment of a curator *ad litem.* In any event, R4C allows a departure from any provision of the rules in the interests of justice. The fate of the first applicant with regards to schooling is at stake especially given the fact that she is in a crucial year of her school life. The appointment of a curator *ad litem* in terms of R249 is a process which commences with the filing of a chamber application annexing the written consent of the person proposed to be appointed. Such application is served on the Master of the High Court who shall make a written report. I found the submission by *F Mahere* that such an application should have been filed simultaneously with the urgent chamber application to be preposterous for the simple reason that filing of the application and the granting of the order sought are two different issues. I specifically posed a question in relation to what the first applicant would be expected to be doing whilst waiting for the outcome of the application for the appointment of a curator *ad litem.* In my view, the kind of situation pertaining to the first applicant does not require the appointment of a curator *ad litem.*

The well settled requirements for an interim interdict are as follows – see *Setlogelo* v *Setlogelo* 1914 AD 221 at 227.

a) a *prima facie* right, though open to doubt;
b) that there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing the right;
c) the balance of convenience favours the granting of interim relief, and
d) that the applicant has no other satisfactory remedy. See also *Cool* v *Minister of Justice* 1955 (2) SA 682 (C) at 688.

In my view, the applicants have met all the requirements for the following reasons:-

a. The respondent's reliance on s 75 of the Constitution as meaning that the first applicant is not entitled to the right to education since the first respondent is a private school is fallacious. It borders on arrogance and a lack of appreciation of the broad

fundamental rights of children. Section 81 (2) of the Constitution is the bedrock of all children's rights in Zimbabwe. It unequivocally states that, "a child's best interests are paramount in every matter concerning the child". The courts have pronounced in a plethora of cases what the best interests of the child entail. One of these indicators is the right to education. Further section 81 (1) (f) specifically mentions the right to education. I do not see how 'expelling' the first applicant willy-nilly promotes her right to education. In any event, the two orders in HC 6567/18 and HC 8214/18 which were issued by consent are alive to the fundamental right of the first applicant to education. The second paragraph of HC 8214/18 states in no uncertain terms that, "the first applicant be and is hereby admitted back to school upon the granting of this consent order until she completes her primary education'. The first paragraph of HC 6567/18 states as follows: - 'The termination notice by the respondent dated 25 April 2018 of the contract entered into between the applicant and the respondent on the 23 September 2014 be and is hereby withdrawn and the child shall be allowed to continue with her education with Gateway Primary School until she finishes grade seven". In my view, it is hypocritical for the respondents to take action against the second applicant (especially in the absence of a court order) that has the effect of interfering with the right of the first applicant to complete her education at the first respondent until she finishes grade seven. The first applicant therefore has established a *prima facie* right.

b. The issue of whether the second applicant has breached the order in HC 6567/18 is pending before the courts. The respondents seemed to have placed a lot of emphasis of the alleged breach by the second applicant when all they need to do is to prosecute the contempt of court proceedings to the full. The notice of opposition is simply a regurgitation of the contempt of court proceedings. The dirty hands assertion therefore falls away. Even if the second applicant is found to have been in breach, the first and second respondents 'shall seek an order terminating their contract with the second applicant.' This is as *per* the 4th paragraph of HC 8214/18. In *casu*, the respondents proceeded to unilaterally terminate the contract in the absence of a court order. The second applicant has therefore established a *prima facie* right.

c. The first applicant will suffer irreparable harm if an order re-instating her is not granted. She is a grade seven pupil and is expected in a period of five months or so to sit for examinations that will determine her entry into high school education. She

cannot be treated like an object that is one day in class and the next day removed from the school. She deserves consistency in her educational life. By issuing a 'fresh' notice of termination of the contract in the absence of a court order, the respondents have interfered with the second applicant's constitutional right to equal protection before the law. Their action amounts to usurping the powers of the court to make a determination on the contempt of court proceedings.

d. The balance of convenience favours the granting of the interim relief sought. There was no evidence that the first applicant had breached any court order. There was no evidence that the continued presence of the first applicant at the first respondent was a danger to herself or was disturbing the learning environment. Considered realistically, the actions of the respondents are tantamount to punishing the first applicant for the alleged 'sins' of her parent, in this case the second applicant. As already stated, the allegations of breach of the order in HC 6567/17 against the second applicant remain just that- allegations unless and until the application for contempt of court is finalised. The real reason why the respondents want the first and second applicants out was revealed in the para 12 of the opposing affidavit that, 'the school and its authorities are tired of this issue and cannot stomach it anymore'. The respondents who have pending cases against the second applicant before the courts are exercising their constitutional right to pursue legal remedies. What they cannot be allowed to do is to act in defiance of court orders that were issued by consent to seek to circumvent court processes.

e. There is no other satisfactory remedy. This is premised on the fact that there could be other remedies but are they satisfactory? The averment that the second applicant should look for an alternative place for the first applicant ignores the fact that even if the first applicant transfers, she will still have to write the examinations at the 1st respondent since that is where she is registered. She cannot be expected in a period of five months to enrol at another school, get used to the new environment and sit for examinations.

Rule 246 (2) specifically states that a provisional order is granted subject to a judge being satisfied that the papers establish a *prima facie* case – see *Chitiyo N.O* v *Chiguba and Ors*, HH-292-17.

In the *Balasore Alloys Ltd* HH-228-18, CHITAPI J stated as follows:-

> 'A *prima facie* case in my view can be holistically described as one that does not merit absolution from the instance. …….In determining whether a *prima facie* case is established the focus should not be to determine whether the applicant has provided evidence to establish what the applicant must finally establish. The approach is to determine whether the applicant has placed evidence before the judge from which a court properly directed and applying its mind to the evidence could or might find for the applicant. The standard of proof required to establish a *prima facie* case is much lower than proof on a balance of probabilities. In other words, the judge only needs to be satisfied that there is a case made by the applicant which merits referring to the court for further and fuller argument so that a final determination is made by the court which still hears full argument. It is seldom though that urgency of a matter can be divorced from a finding on the existence of a *prima facie* case.'

I was satisfied that the applicants had established a *prima facie* case and I accordingly granted the provisional order as varied.

These are my reasons.

*Magwaliba & Kwirira,* applicants' legal practitioners
*Mundia & Mudhara,* respondents' legal practitioners