IN THE HIGH COURT OF LESOTHO

CIV/APN/18/2021

HELD AT MASERU

In the matter between

ITUMELENG LENGOASA & 56 OTHERS **1 APPLICANT**

AND

PRORIETOR OF KAY CEES PRIMARY SCHOOL **1st RESPONDENT**

THE PRINCIPAL OF KAY CEES PRIMARY SCHOOL **2nd REPONDENT**

KAY CEE PRIMARY SCHOOL **3rd RESPONDENT**

JUDGMENT

Coram **:** **MOKHESI J**

Date of Hearing **:** **25TH FEBRUARY 2021**

Date of Judgement **:** **25TH MARCH 2021**

Neutral Citation: Itumeleng Lengoasa & 56 Others v Proprietor of Kay Cee Primary School and 2 Others (CIV/APN/18/21) [2021] LSHC Civ. 36 (25th March 2021)

SUMMARY

PRIVATE LAW: *Parents challenging the school's demand for payment of school fees-Enforcement of contract being challenged on the grounds that it is unfair, unreasonable and inequitable to enforce it during the incumbency of coronavirus when teaching is proceeding remotely and virtually, and parents are participating in the teaching and are bearing the financial brunt for providing resources for such remote learning- Held, contract enforcement cannot in law be resisted on the grounds of unfairness and unreasonableness.*

ANNOTATIONS:

LEGISLATION:

Education Act No. 3 of 2010

CASES:

AB and Another v Pradwin Preparatory School and Others (CCT294/18) [2020] ZACC 12; 2020 (9) BCLR 1029 (CC); 2020 (5) SA 327 (CC)

Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others (CCT109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC)

National Director of Public Prosecutions v Zuma (573/08) [2009] ZASCA 1: 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA)

INTRODUCTION

[1] The advent of Coronavirus pandemic has brought with it a seismic shift to the way private and public activities are conducted. The workspace is no longer what we are all used it to be. In order to curb the spread of this virus, in certain instances people work from home as a result of Government-imposed locked-downs. The schools are no exception to the permeative effects of this virus in terms of the way teaching and learning are conducted. The school environment, from perspective of the orthodox way students are taught, has also become a casualty. Now students have to be taught remotely via technological platforms such as Google meet, Cisco Webex, WhatsApp etc, instead of face-to-face teaching method that we have all become accustomed to since time immemorial. Remote teaching essentially means parents have to moon-lite as teachers` assistants within the home setting and consequently, have to bear the financial brunt of facilitating this new way of teaching and learning. It is this paradox which has been brought by the current health circumstances which present a setting for this application as will be elucidated below.

[2] BACKGROUND FACTS.

The applicants are parents of learners in the 3rd respondent school. The 3rd respondent is an independent school within the meaning of Section 12 of the **Education Act No. 3 of 2010** (the `Act`) commonly known as the private schools. They have lodged this application against the 1st respondent for the following reliefs:

1. The modes and times of service of Court`s process prescribed by the rules of this Court are hereby dispersed with on account of urgency hereof.

2. That a rule nisi be issued returnable on the date and time to be determined by this Honourable Court calling upon the Respondent to show cause, if any, why an order in the following terms shall not be made absolute.

3. An order interdicting and refraining Respondents from causing parents/ and or, learners of the school of Respondent, to pay full amount of school fees during the times when Covid-19 Government-imposed restrictions are that learners should stay home and not go to school.

4. An order interdicting and or restraining the Respondents from causing parents/ and or, returning learners of the school of the Respondent to pay registration fee for the year 2021 and the subsequent year pending finalization of this case.

5. An Order directing and or restraining the Respondents from causing parents and/ or returning learners of the school of the respondent to pay registration fee for year 2021 and the subsequent year pending finalisation of this matter.

6. An order directing Respondents to appoint school Board before the lapse of ten working days of the order of Court.

7. An order directing that standard seven of the Respondent`s School class be dropped, and the Respondents provide Credentials and or testimonials for the standard seven learners to be admitted at High Schools.

[3] Adv. Malefane, for the applicants, dropped pursued of prayers 5 and 7 above. Essentially the applicants are seeking this Court`s intervention in the manner prayed for because they say their children are taught through WhatsApp and that as parents, they have help in the teaching of the children even though they are unqualified to do so. The setting of the applicants` case/argument is provided in paragraph 5 of the founding affidavit where a deponent thereto avers that:

> *5.1 Despite all these shortcomings, the management of the school has issued demands to us parents that the school fees be paid in full on or before the 1st of February of 2021 with what they call grace period up to the 8th of February 2020 (sic), for the new school year. This the management of the school does despite the fact that the learners will still be locked down at home due to the Covid-19 restrictions imposed by the Government. The school requires us to pay full school fees yet they would not be teaching children, the teaching would be expected to be done by parents under the circumstances explained above that we parents are not trained to teach, some of us have not gone to school beyond standard seven and that we go to work during the day and do not have time to babysit the children. The Respondent`s school want to cause us to pay full amount, yet they do not buy smart phones and data for us. I ended up forming opinion that all the school wants is money and they do not care whether this is mode of teaching is working or not. We tried everything to get the school to the table to discuss our proposal that we pay half of the amount of school fees, but the school refused to meet with us. Even our letter in which our grievances as parents were articulated, had to be delivered*

through WhatsApp. This is clear testimony that this is not justice and it is on the basis thereof that we request the intervention of this Honourable Court.

[4] In opposing this matter, the respondents raised the so-called points in *limine, viz,* (a) Locus standi of the applicants to bring this matter, (b) Non-exhaustion of local remedies; the argument being that the applicants have not exhausted the remedies provided in the Act for dealing with their grievances , even though no specific reference to sections in the Act dealing with such matters was made ; (c) jurisdiction; this point is linked to remedies being sought: (d) lack of urgency; (e) Disputes of fact. These points needed to be tabulated only to be rejected as meritless, and more need not be said about them. I turn now to deal with the merits of this application.

[5] The issues to be decided according to the applicants and the perspective of their arguments have been articulated thus, *"The question that followed, and it is the same issue that this Honourable Court is called upon to decide, whether in the circumstances where children were locked down at home, the school was entitled to claim full amount of school fees. This question is easy to answer if answered in contract context. In our law of contract, the party pays for delivery of what s/he bargained for. In this case the parents bargained for the children to be taught by teachers face to face, in class and or on close contact or management. It is obvious that parents are not getting what they bargained for or they are getting so less of what they bargained for hence their argument that they pay commensurate with less they are getting from the school, it is submitted should not be allowed to carry itself in manner as if there is (sic) Covid*

restriction. It is submitted further that is against the principle of unjust enrichment whereby the school will be charging the more money for services that they are not rendering." I purposefully reproduced the applicants' argument in this regard in order to lay bare the conceptual legal premise from which this application was conceived.

ISSUES TO BE DETERMINED

[6] This formulation of issues to be determined, by the applicants, brings into a sharp focus the contractual nature of the relationship between the school and the parents of the learners` and the role that is played by considerations of equity, fairness and reasonableness, in this context. As I understand it, the thrust of the applicants` case is that it is inequitable, unfair and perhaps unreasonable for the school to levy school fees not reflective of the fact that the children are being taught remotely via virtual means. To me, the issue for determination is whether in view of the contractual nature of the relationship between the school and the parents, this Court should order the school to reduce its fees on account of Covid-19 restrictions' impact on the in-contact method of teaching. It is doubtless that the relationship now in issues is contractual in nature **(**see: **AB and Another v Pradwin Preparatory School and Others (CCT294/18) [2020] ZACC 12; 2020 (9) BCLR 1029 (cc); 2020 (5) SA 327 at para. 214)**

[7] The starting point to answering this question is Section 12 of The Act which defines public and independent schools: Section 12 provides that:

"12. The Minister shall classify schools in accordance with the following categories: -

(a) Public schools-

(i) Whose admission requirements comply with such public policy as determined by the Minister and are bound by Government rules and regulations;

(ii) Which are funded by the Government and charge such fees as approved by the Minister, and

(iii) Who teachers are in the Teaching service;

(b) Independent Schools: -

(i) Whose admission policy is determined by its governing bodies;

(ii) Which are managed in terms of their own constitution approved by the Minister upon registration of the school or upon application to change the classification of such a school;

(iii) Which are free to leverage fees determined by their school boards; and

(iv) May receive such conditional subvention or grants as the Minister may decide in consultation with the Minister responsible for finance;"

[8] Two things are apparent from the S. 12 (a) and (b): Public schools operates to offer education to the Public and fall directly under the aegis of the government when it comes to hiring of teachers, levying and determination of fees, formulation of admission policies and for maintenance of such schools. On the one hand independent schools' relationship with parents who bring their children to them, is contractual. They have a discretion whether to admit a child into their school. These schools are not owned by government, but private entities or individuals. They may be run for purposes of making profit or religious

reasons or for combination of these purposes. The costs for running these schools is squarely on the shoulders of the schools and may be offset by government's subvention where such method of funding is opted for and government has approved it. Undoubtedly, independent schools have the freedom to fix school fees taking into account the costs of running the schools and their general upkeep. They must also be able to generate surplus from the levying of such fees for its deployment in growing the school. Seen in this light, independent schools have to engage in cost and price analysis exercise.

[9] The relationship between the cost of running the school and the price (fees) is not always easily correlative and may not be readily easy to discernible to an untrained mind, and this is even more pronounced when schools are not offering an in-contact teaching. The parents do have a valid point that the costs of running schools during the lockdowns may not necessarily be the same as during normal times. The determination of fees is an economic balancing exercise which must be undertaken by the schools in the light of factual matrix specific to each school. This balancing act, legitimately, has to account for the circumstances such as we find ourselves having to contend with as being our new education normal.

[10] As I understand the applicants` contention, they argue that it is unfair, or unreasonable for the school to be charging them school fees applicable during times when schools are running normally. It is common cause that the school and the parents did not reduce their agreement into writing when the school admitted the children. Tacitly, and this is common

cause, this an agreement for provision of services in terms the school teaches the applicants` children for a fee. All the fees payable were known by the applicants upfront. The school and the parents freely and voluntarily entered into this contract fully aware of its terms.

[11] The problem which the parents have with the contract between themselves and the school is not about its term that fees will be payable when the schools teaches their children. They rather have a problem with the timing for demand of school fees and other charges when their children are being taught remotely and virtually. In our law of contract, good faith, fairness and reasonableness are not considered grounds for refusing the enforcement of validly concluded contract. A survey of decisions espousing this position of the law was approvingly undertaken in **Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others (CCT109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC)** for present purposes suffice it to reproduce paragraphs 29 – 31 of that judgement:

> "[29] *In **Brisley**, the Supreme Court of Appeal laid the foundation for its approach to the roles of good faith, fairness and reasonableness in the law of contract in the new Constitutional era. It held that god faith does not form an independent or free – floating basis upon which a Court can refuse to enforce a contractual provision and that the acceptance of good faith as a self–standing ground would create an unacceptable state of uncertainty in our law of contract. According to the Supreme Court of Appeal, good faith is a fundamental principle that*

underlies the law of contract and is reflected in its particular rules and doctrines……..

[30] *The views expressed in* ***Brisley*** *were affirmed in* ***Afrox HealthCare****, where Supreme Court of Appeal explained that Courts do not make decisions regarding enforcement of contractual provisions on the basis of abstract considerations of good faith, reasonableness, fairness, although they form the basis for our legal rules, are not themselves legal rule. The Supreme Court of Appeal further held that freedom of contract is a Constitutional value that aligns with the principle that contracts freely and seriously entered should be judicially enforced. For this reason, it cautioned that Courts should approach their task of striking down, or refusing to enforce contracts, based on public policy with "perceptive restraint."*

[31] In ***York Timbers****, the Supreme Court of Appeal confirmed that abstract values, such as fairness and good faith, could not themselves be imposed as contractual terms. It confirmed that, while public policy was a cogent rationale for refusing to enforce contractual terms, good faith, fairness and reasonableness are not self-standing grounds for refusal to enforce otherwise valid contracts. It summarised its Jurisprudence in this area as follows:*

"[A]lthough abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that Courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through

established rules of the law of contract. They cannot be acted upon by the Courts directly. Acceptance of the notion that Judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity, will give rise to legal and commercial uncertainty."

[12] The parents` arguments as already seen from their pleadings and prayers sought, is essentially that it is unfair or unreasonable for the school to demand payment of fees when their children are being taught remotely. As I understand their argument, they are not saying that their children are not being taught but rather that they are being taught online which should naturally result in the reduction of fees. But as I understand it, the issue whether the fees should be reduced or not is an exercise which should be undertaken through consultation between the school management and the parents and cannot be effected through curial intervention. Whether levying fees in the circumstances is unfair, unreasonable or inequitable is not to be subject of curial determination when contractants themselves can and should negotiate to reach some sort of a middle ground on the issue. I think what made this negotiation unrealistic and hard to achieve thereby leading to the lodging of this application, out of desperation, is the issue which to which I now turn.

[13] **ABSENCE OF THE SCHOOL BOARD**:

Even though the school in issue is an independent school it is obliged by S. 23 of the Act to have the Board at the apex of its governance structure. It is the applicants` contention that the school does not have the Board. Interestingly, in reply, the deponent to the answering affidavit, Mr

Abimbola, on behalf of the school, answers to the allegation that the school operates without the Board, in the following manner:

> *8.2 Foremost, it is risky of malicious character tainting (sic) for Applicants to allege that 3rd Respondent`s school (an organisation of its calibre and standard) is Boardless, firstly because one wonders why a parent would bring their child to a school without a Board, secondly, assuming they neglected that necessity when they brought the children with the hope that it shall be made good, have they diligently researched and ascertain that indeed the school has no Board before bringing the aspersions in such a prominent forum? I attach herewith the constitution of 3rd Respondent school as annexure "CONST" to show that the 3rd Respondent is legally constituted with legal functionaries as demanded under the Education Act. Decisions taken by the 3rd Respondent are juristic acts performed by the relevant functionaries of power within the organisation, it is not true that parents are not consulted by the school.*

[14] With this answer, at first blush, an impression might be created that the respondents have raised a dispute of fact, when in actual fact there is none. A pointed allegation is made against the school that it operates without the Board, but when it answers to the allegation, the school Principal attaches the names of Interim Board members who held the positions when the school was first registered in 2014. The Principal does not say whether those people are still Board members to date, he rather makes a long and winded response which in my judgement is meant only to evade answering the allegation that the school is board-less. If the school has a board what

is so difficult about naming those members, instead of being this cryptic in responding to such a simple allegation. I consider this to be a bald denial.

[15] It is trite that motion proceedings are deployed for resolution of legal issues based on common cause facts, and that where disputes arise on the affidavits, a final relief will only be granted where the averments made by the applicant taken together with those admitted and those alleged by the respondents justify the order sought. There are of course exceptions to this rule, such as where the respondents raise fictious disputes of fact, makes bald or uncreditworthy demands, the respondent`s version is palpably implausible, far-fetched or no clearly untenable that the Court is justified rejecting them merely on the papers **(National Director of Public Prosecutions v Zuma (573/08) [2009] ZASCA 1: 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA) at para. 26.**

[16] In the circumstances, I consider that the applicants` version that the school operates without a mandatory statutory management structure justify the relief that the school be compelled to facilitate the appointment of the board. It will be observed that applicants are seeking a writ of *mandamus* against a private entity, but given that the school is obliged in in terms of S. 23 of the Act to have the board as part of its management structure, operating without it clearly violates the law and this Court is justified in issuing a writ of *mandamus* despite being a private entity. The school discharges a public function of delivering education and is obliged by the law to operate a management structure consisting of the board as the law decrees.

[17] **<u>COSTS:</u>**

The applicants have been successful in securing a relief that the board be appointed in compliance with the law. On the one hand the school was successful in resisting a curial injunction for reduction in school fees. Each party enjoyed an equal measure of success. The costs being in the discretion of the Court, I consider that each party must bear its own costs.

[18] In the result the following order is made:

a) Prayers 3 and 4 of the Notice of Motion are dismissed.

b) The Respondents are directed to facilitate the appointment of school board within ten (10) working days of this Order.

C) Each party to bear its own costs.

MOKHESI J

For Applicants: Adv. L. R. Malefane instructed by E. M. Sello Attorneys

For Respondents: Adv. Nzuzi instructed by K. D. Mabulu & Co. Attorneys