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AMOS MAKANI & OTHERS
v
ARUNDEL SCHOOL & OTHERS

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC,
GWAUNZA JCC, GARWE JCC, GOWORA JCC,
HLATSHWAYO JCC, PATEL JCC & GUVAVA JCC
HARARE, JULY 29, 2015 & JUNE 29, 2016

T R.. Mafukidze and D.Chimbgwa, for the applicants

A. P. de Bourbon SC, for the first and second respondents

PATEL JCC: The four applicants are the fathers and guardians of their respective minor daughters, all four of whom are pupils at Arundel School, a private girls' school situated in Harare. The first and second respondents are the Trustees and Headmistress of the School. The third respondent is the Minister of Primary and Secondary Education, cited in his official capacity, and the fourth respondent is the Attorney-General, also cited in his official capacity.

The applicants seek various declarators and consequential relief in respect of the alleged violation of their daughters' constitutional rights. They also seek an order

for costs against the first and second respondents on a legal practitioner and client scale. The first and second respondents are opposed to the application and aver that it be dismissed with costs. The third and fourth respondents have indicated that they will abide by the Court's decision.

The Background

Before 2015 the long-established practice at the School was to commence the day with prayers in the School chapel. Pupils were free to attend if they so wished and a separate room was set aside for those of other faiths who did not attend chapel on religious grounds. This inter-denominational position was confirmed by the School's website on the internet.

The applicants and their daughters are all practising Jehovah's Witnesses. Their beliefs are not similar to those of other Christian denominations. Upon application to the School for the admission of their daughters, each of the applicants completed a standard application form in which they indicated that they were Jehovah's Witnesses. Their daughters were duly accepted for admission.

At the beginning of 2015, a new Headmistress was appointed to run the School. She sought to introduce compulsory chapel attendance for all pupils at the School in order to reinforce its collegiality. The applicants wrote several letters to the Headmistress as well as the School's lawyers to register their complaints. On 17 March 2015, after taking legal advice, the Headmistress wrote to the applicants

insisting that their daughters were required to attend chapel and that, if they failed to comply, they would be deemed to have been voluntarily withdrawn and removed from the School. On 19 March 2015, after the girls refused to attend chapel and surrendered their books, they were told to go home. The applicants then filed an urgent application to the High Court in Case No. 2717/15. Following a consent order granted on 27 March 2015, the girls were allowed to continue to attend the School, without being compelled to attend chapel, pending the determination of the present application.

The applicants aver that freedom of conscience includes the right to practice and propagate one's religion as well as the right not to be compelled to subscribe to any religion. In this respect, the actions of the Headmistress violate their daughters' freedom of conscience and their right to protection against discrimination on the ground of religion. Moreover, although any person is entitled to establish and maintain an independent educational institution, he or she cannot discriminate in the manner in which the institution is administered. Thus, the conduct of the Headmistress also violates their daughters' right to education. The applicants accordingly seek declarators that the respondents' actions are in violation of their daughters' freedom of conscience and religion, right to protection against discrimination and right to education. They also seek an order precluding the respondents from refusing the admission of their daughters to Arundel School on the basis of their religious beliefs and failure to attend chapel.

On behalf of the School, the Headmistress relies upon the standard enrolment form signed by the applicants upon the admission of their daughters into the

School. She avers that this agreement, which constitutes a binding contract, expressly provides that any latitude from chapel attendance is at her sole discretion and that her decision in that regard is final and binding. The agreement also provides that any changes to the School rules must be observed and followed by the signatory parents and their daughters. One of her functions is to articulate the values of the School and morning chapel is the only time when pupils come together in an environment most conducive for the values and ethos of the School to be properly impacted upon them. It is not compulsory for any pupil to participate in any activity such as singing or praying or to abandon her beliefs during chapel. What is compulsory is that all pupils attend and evince respectful behaviour in chapel. The applicants were not forced to enrol their daughters at the School. They should respect the rights of the School's founding members who established an educational institution that conforms with and pursues their own values and beliefs. The School authority is constitutionally entitled to establish and maintain the School and impose reasonable rules to be followed at the School. It should not be precluded from pursuing its religious beliefs and insisting on anyone who joins the School to respect its views. Such policy is reasonable and those who agree to join the School despite their religious views must be taken to have necessarily waived their own constitutional rights.

For the sake of completeness, it is necessary to set out the relevant provisions of the standard application form of admission to the School. Upon signature, each of the applicants acknowledged and understood that his daughter had been accepted for entry as a day student at the School on the following express terms and conditions:

“4. That the School’s rules and regulations, as amended from time to time, shall bind and be observed by my daughter and, insofar as they concern me, also by me. I further accept that by signing this enrolment contract I will be bound by the Arundel Parents’ Association constitution, which is available to me on request.

5. That the School is founded on Christian principles, and all pupils are expected to comply with the rules and routines thus implied. No exemption from any part of the curriculum will be considered on religious grounds. Any latitude concerning Chapel attendance, holy days, special meal requirements, dress codes etc. will be at the sole discretion of the Head, whose decision will be accepted as final and binding on my daughter.”

Relevant Constitutional and Statutory Provisions

Section 2 of the Constitution reaffirms the supremacy of the Constitution, in terms that are significantly wider and more inclusive than those embodied in its precursor in the former Constitution, as follows:

“(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.
(2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.”

Also relevant for present purposes is s 47 of the Constitution which recognises the existence of rights other than those contained in the Declaration of Rights:

“This Chapter does not preclude the existence of other rights and freedoms that may be recognised or conferred by law, to the extent that they are consistent with this Constitution.”

As I have already indicated, the specific relief sought by the applicants relates to the alleged violation of their daughters’ freedom of conscience and religion, right to protection against discrimination and right to education, as enshrined in ss 60, 56 and 75 of the Constitution. These sections, in their relevant portions, provide as follows:

“56 Equality and non-discrimination

- (1) All persons are equal before the law and have the right to equal protection and benefit of the law.
- (2)
- (3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.
- (4) A person is treated in a discriminatory manner for the purpose of subsection (3) if—
 - (a) they are subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected; or
 - (b) other people are accorded directly or indirectly a privilege or advantage which they are not accorded.
- (5) Discrimination on any of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.
- (6)

“60 Freedom of conscience

- (1) Every person has the right to freedom of conscience, which includes—
 - (a) freedom of thought, opinion, religion or belief; and
 - (b) freedom to practise and propagate and give expression to their thought, opinion, religion or belief, whether in public or in private and whether alone or together with others.
- (2) No person may be compelled to take an oath that is contrary to their religion or belief or to take an oath in a manner that is contrary to their religion or belief.
- (3) Parents and guardians of minor children have the right to determine, in accordance with their beliefs, the moral and religious upbringing of their children, provided they do not prejudice the rights to which their children are entitled under this Constitution, including their rights to education, health, safety and welfare.
- (4) Any religious community may establish institutions where religious instruction may be given, even if the institution receives a subsidy or other financial assistance from the State.”

“75 Right to education

- (1) Every citizen and permanent resident of Zimbabwe has a right to—
 - (a) a basic State-funded education, including adult basic education; and
 - (b) further education, which the State, through reasonable legislative and other measures, must make progressively available and accessible.
- (2) Every person has the right to establish and maintain, at their own expense, independent educational institutions of reasonable standards, provided they do not discriminate on any ground prohibited by this Constitution.

(3) A law may provide for the registration of educational institutions referred to in subsection (2) and for the closing of any such institutions that do not meet reasonable standards prescribed for registration.

(4) The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of the right set out in subsection (1).”

In support of their contention that their daughters’ right to education has been violated by the School, the applicants also rely upon section 4 of the Education Act [Chapter 25:04] which provides as follows:

“(1) Notwithstanding anything to the contrary contained in any other enactment, but subject to this Act, every child in Zimbabwe shall have the right to school education.

(2) Subject to subsection (5), no child in Zimbabwe shall—

(a) be refused admission to any school; or

(b) be discriminated against by the imposition of onerous terms and conditions in regard to his admission to any school;

on the grounds of his race, tribe, place of origin, national or ethnic origin, political opinions, colour, creed or gender.

(3)

(4) Any person who contravenes subsection (2) shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

(5) It shall be a defence in any criminal proceedings for an offence under subsection (2) for the accused person to show that, though he committed the act alleged against him—

(a) he committed the act on the grounds of the creed of the child against whom the act was committed, but he did so because the school concerned is controlled by a bona fide religious organization and members of that religious organization or adherents of a particular religious belief are accorded preference in admission to that school; or

(b) he committed the act on the grounds of the gender of the child against whom the act was committed, but

Lastly, but very importantly, there is s 86 of the Constitution which permits the limitation of fundamental rights in the following circumstances:

“(1) The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.

(2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right or freedom concerned;
- (b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
- (e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and
- (f) whether there are any less restrictive means of achieving the purpose of the limitation.

(3) No law may limit the following rights enshrined in this Chapter, and no person may violate them—

- (a) the right to life, except to the extent specified in section 48;
- (b) the right to human dignity;
- (c) the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment;
- (d) the right not to be placed in slavery or servitude;
- (e) the right to a fair trial;
- (f) the right to obtain an order of *habeas corpus* as provided in section 50(7)(a).”

As appears from subs (3) of s 86, none of the rights allegedly violated *in casu* falls into the category of inviolable rights enumerated in that subsection. Accordingly, in the event that the applicants are able to establish any violation of their rights, it will be necessary to measure such *prima facie* violation as against the rights and freedoms of others, in terms of subs (1), and within the context of the permissible derogations contemplated in subs (2).

Right to Education

The gist of the appellants' argument, as I understand it, is that the Headmistress of the School, through her ultimatum to attend chapel, effectively expelled their daughters from the School. In so doing, she violated their right to education in terms of s 75 of the Constitution, as read with s 4 of the Education Act. In this respect, Adv. *Mafukidze* relies in particular on s 4(2) of the Act which prohibits discrimination on the grounds of, *inter alia*, race, tribe, creed or gender, with regard to the admission of any child to any school. He argues that this provision extends to contracts of admission and, by necessary implication, to the discriminatory imposition of onerous conditions after admission. Admission in this sense is not limited to entry into the school but also includes the right to remain in the school for the duration of one's studies. The gravity of such discriminatory conduct is demonstrated by the fact that it is criminalised by s 4(4) of the Act. In the instant case, the applicants' daughters, as adherents of the Jehovah's Witness faith, are discriminated against by having to attend the observance of a contrary faith that they do not adhere to, unlike the majority of the girls at the School who belong to the Anglican faith. This prohibition against discrimination is reinforced by s 75(2) of the Constitution which prohibits independent educational institutions from practising such discrimination.

In my view, this argument is fundamentally flawed in relation to the scope of section 4 of the Act and the notion of discrimination prohibited by that section. Firstly, what s 4(2) prohibits is the refusal of or discrimination against any child in regard to his

admission to any school on the grounds of his creed, etc. The plain wording of this subsection is silent as to any discrimination that might occur after the child has been admitted to the school. It would, in my view, be improper to extend the express language of the provision to cover conduct that is omitted, particularly where its contravention imports criminal sanction in terms of subs (4). This view is fortified by paragraph (a) of subs (5) which affords the accused person a defence against a criminal charge for an offence under subs (2) with specific reference to **admission to the school**. In short, the prohibition envisaged by s 4(2) does not extend to any allegedly discriminatory conduct committed after admission to the school.

Secondly, the defence contemplated by paragraph (a) of subs (5) is also very specific. It enables the accused person to justify his refusal to admit or discriminate on the ground of creed on the basis that the school concerned is controlled by a religious organisation and that members of that religious organisation or adherents of a particular religious belief are accorded preference in admission to that school. In effect, this provision expressly allows discrimination in admission to the school on the ground of creed or religion in the circumstances prescribed.

Of course, this does not mean that a child who is deliberately discriminated against on the ground of religion after his or her admission to the school is left without any legal recourse or remedy. Depending on the circumstances of the case, he or she will always be entitled to invoke the constitutional rights to freedom of religion

and protection from discrimination in order to challenge and counter any discriminatory conduct in violation of those rights.

In my view, s 4 of the Act, read in its entirety, does not give any succour to the applicants' cause. On the contrary, it counters and undermines their position vis-à-vis the right to education and freedom from discrimination on the ground of religion in the enjoyment of that right.

Nor can the applicants derive any sustenance from the right to education enshrined in s 75 of the Constitution. Subss (1) and (4) of s 75 make it abundantly clear that the right conferred is a right to education funded and availed by the State on a gradual and progressive basis. These subsections do not confer upon citizens and permanent residents any constitutional right to private education, and they cannot conceivably do so on any logical or practical footing.

Subsections (2) and (3) of s 75 deal separately with private or independent educational institutions. They permit the establishment of such institutions, subject to such State supervision and control as may be necessary to ensure that they meet prescribed reasonable standards. The right to establish and maintain an independent institution guaranteed by subs (2) must be construed not only in the physical and structural sense but to include as well the establishment and maintenance of educational and ethical standards. Conversely, the provision does not envisage any right to flout the rules and regulations designed by the institution to safeguard its educational and ethical

standards. The only qualification to the rights of an independent institution is that it must not discriminate on any ground prohibited by the Constitution. This is the aspect that I now turn to address.

Protection against Discrimination

The principal submission made on behalf of the applicants in relation to discrimination is that the change of policy on chapel attendance implemented by the Headmistress is not neutral. It is pointedly directed against the non-Anglican pupils who were previously exempted from attendance. As such, it is clearly discriminatory on the ground of religious belief contrary to s 56(3) of the Constitution. Moreover, it has not been shown that such discrimination is fair, reasonable and justifiable in a democratic society as contemplated by s 56(5).

Before adverting to the democratic fairness, reasonableness or justifiability of the change of policy by the School, it is first necessary to establish whether it is discriminatory within the meaning of s 56(3) as expatiated by s 56(4). There are two aspects to consider in this regard, firstly, the stipulations incorporated in the standard form of admission and, secondly, the application of the policy after admission.

With respect to the first aspect, the School's policy on admission is that all pupils are expected to comply with the Christian rules and routines of the School and that no exemption from any part of the curriculum will be considered on religious grounds. Given that this contractually agreed stipulation is intended to apply to all pupils without

distinction, I do not think that it is necessarily discriminatory on the ground of religion. Every parent who agrees to this condition does so willingly and actively chooses to abide by its implications. Thus, as I have stated earlier in relation to the right to education, it cannot be said that this mutually agreed condition *per se* amounts to discriminatory treatment at the point of admission to the School.

Insofar as concerns the stage after admission, I am inclined to agree with *Adv. de Bourbon* that the previous practice of the School in exempting pupils from attending chapel on religious grounds might be deemed to have been a form of reverse discrimination in that they were indirectly accorded a privilege that pupils of the Anglican faith were not being accorded. As for the present policy of insisting on chapel attendance by all pupils, I am not persuaded that the applicants' daughters are being treated differently from the other pupils on account of their religion. While I fully concur with the liberal and purposive approach to constitutional interpretation, I do not think it permissible to amplify or expand the clear language of the Constitution to encompass rights and obligations not provided for by the legislature either expressly or by necessary implication.

Having regard to the test of what constitutes discriminatory treatment as articulated in s 56(4), I do not perceive that the applicants' daughters are being subjected directly or indirectly to a condition, restriction or disability to which other pupils are not subjected or that other pupils are being accorded directly or indirectly a privilege or advantage which they are not accorded. On the contrary, it seems to me that they are

being treated equally and in the same manner as other pupils. Indeed, it is not inconceivable that even pupils of the Anglican faith might object to mandatory chapel attendance for reasons unconnected with their faith.

In construing s 56 as a whole, it is necessary to emphasise that discrimination is not defined by reference to the affected individual or group standing alone. Rather, it is defined by reference to the treatment that individual or group is subjected to as compared with the treatment accorded to other persons or groups. Where there is no such comparable differentiation, there can be no discrimination proscribed by the Constitution.

In the premises, I am satisfied that the applicants have failed to demonstrate any plausible basis for invoking the right not to be treated in a discriminatory manner in impugning the School's policy of compulsory chapel attendance by all pupils.

Freedom of Conscience and Religion

For the purpose of addressing the merits of this aspect of the matter, it is necessary to consider three separate but interrelated issues, to wit:

- the nature and scope of the applicant's freedom of religion as guaranteed by s 60 of the Constitution
- whether and the extent to which that freedom has been infringed by the School

- if so, whether any such infringement constitutes a permissible limitation by virtue of subs (1), (2) or (3) of s 86 of the Constitution.

Subsection (1) of s 60 defines the right to freedom of conscience as including, *inter alia*, freedom of religion or belief and freedom to practise and propagate and give expression to one's religion or belief, whether in public or in private and whether alone or together with others. Subsection (3) affirms the right of parents and guardians to determine, in accordance with their beliefs, the moral and religious upbringing of their minor children, provided they do not prejudice the constitutional rights of their children, including their rights to education, health, safety and welfare.

The essence of the applicants' religious credo, as appears from their founding papers, is that there is no hell of fire and torment, that places of worship should not contain any religious symbols, that religions and faiths should not be mixed, and that there can only be one truth from God which truth they hold. With specific reference to religious symbols at the School, they object to the three crucifixes atop, outside and inside the chapel, as well as the foundation stone at the entrance of the chapel. These symbols, so they believe, contravene the first Commandment against idolatry.

The fundamental doctrinal beliefs and practices of Jehovah's Witnesses may also be gleaned from the following article by John Gordon Melton in the online *Encyclopaedia Britannica*:

“Witnesses hold a number of traditional Christian views but also many that are unique to them. They affirm that God—Jehovah—is the most high. Jesus Christ is

God's agent, through whom sinful humans can be reconciled to God. The Holy Spirit is the name of God's active force in the world. Witnesses believe that they are living in the last days, and they look forward to the imminent establishment of God's kingdom on earth, which will be headed by Christ and jointly administered by 144,000 human corulers (Revelation 7:4). Those who acknowledge Jehovah in this life will become members of the millennial kingdom; those who reject him will not go to hell but will face total extinction.

The Witnesses' teachings stress strict separation from secular government. Although they are generally law-abiding, believing that governments are established by God to maintain peace and order, they refuse on biblical grounds to observe certain laws. They do not salute the flag of any nation, believing it an act of false worship; they refuse to perform military service; and they do not participate in public elections.

The Witnesses' distrust of contemporary institutions extends to other religious denominations, from which they remain separate. They disavow terms such as *minister* and *church*.

Witnesses also oppose certain medical practices that they believe violate Scripture. In particular, they oppose blood transfusions, because of the scriptural admonition against the consumption of blood (Leviticus 3:17).

In the early years of the movement, members met in rented halls, but under Rutherford the Witnesses began to purchase facilities that they designated Kingdom Halls. Each Kingdom Hall has an assigned territory and each Witness a particular neighbourhood to canvass. ”

The following excerpt from *Wikipedia*, as at 19 December 2015, elaborates Jehovah's Witnesses' aversion to the mixing of religions and their self-imposed injunction to remain separate from the world at large:

“Jehovah's Witnesses believe that the Bible condemns the mixing of religions, on the basis that there can only be one truth from God, and therefore reject interfaith and ecumenical movements. They believe that only their religion represents true Christianity, and that other religions fail to meet all the requirements set by God and will soon be destroyed. Jehovah's Witnesses are taught that it is vital to remain ‘separate from the world’. The Witnesses' literature defines the ‘world’ as ‘the mass of mankind apart from Jehovah's approved servants’ and teach that it is morally contaminated and ruled by Satan. Witnesses are taught that association with ‘worldly’ people presents a ‘danger’ to their faith, and are instructed to

minimize social contact with non-members to better maintain their own standards of morality.”

Adv. *Mafukidze* places great reliance upon the case of *Dzvova v Minister of Education Sports & Culture and Others* 2007 (2) ZLR 196 (S) for the broad submission that fundamental rights must invariably be respected. In that case, the Supreme Court affirmed the general proposition that the rules of the school in question could not be applied to derogate from the constitutional rights of its pupils, including their freedom of religion. However, the *ratio decidendi* of the Court was not predicated on any constitutional point but rather on the principle that the power to make rules on school discipline and to regulate the admission, punishment and expulsion of pupils was reposed in the Minister of Education and was therefore outside the remit of the school Head. Consequently, *Dzvova's* case does not, in my view, take the matter any further in resolving the issues at hand. Moreover, it is also distinguishable from the factual situation *in casu* in that the applicant in that case had not subscribed to any contract of admission entitling the school to interfere with the enjoyment of his child's freedom of conscience and religion.

Another more recent case involving facts similar to those in *Dzvova's* case is that of *Kapasula & Others v The Headmistress Hermann Gmeiner High School N.O. & Others* Case No. SC 153/10. The applicants' daughters in that matter were allegedly excluded from enrolment to the first respondent's school because their heads had not been shaven or trimmed for religious reasons. This was in apparent contravention of the school's rules and regulations stipulating that all pupils must always be smart with short

and neatly combed hair. The first respondent's opposition in the High Court did not address the merits of the matter, but merely relied on the preliminary objections that the application was not urgent and that, in any case, the laws prohibiting discrimination did not apply to the school since it was a private non-governmental institution. On referral to the Supreme Court under s 24(2) of the former Constitution, the Court was called upon to determine three issues: whether the refusal to admit the children into the school on the basis of their failure to shave or trim their hair was discriminatory on the ground of creed in contravention of s 19(1) of the former Constitution; whether the decision of the school to refuse admission into the school was done under the authority of a law as envisaged in s 19(5) of the Constitution; and, if so, whether such law was reasonably justifiable in a democratic society. The applicants argued that the first respondent's actions were clearly discriminatory and in contravention of s 19 of the Constitution. Furthermore, the school's rules and regulations did not constitute a law and were not made under the authority of any law, *i.e.* the Education Act or its subsidiary regulations. The application before the Supreme Court was not opposed by any of the respondents. In the event, the Court granted an order simply prohibiting the school from refusing the childrens' admission into the school on the basis of the length of their hair. There appear to have been no written reasons for the judgment.

As with the *Dzvova* matter, the *Kapasula* case is clearly distinguishable from the situation *in casu*. The school's rules and regulations were not authorised under any law within the contemplation of s 19 of the Constitution and were therefore patently *ultra vires*. More significantly, the applicants in both cases had not subscribed to any

binding contractual undertaking or commitment expressly and unequivocally relinquishing their rights and the rights of their children to abide by or enforce their religious beliefs and convictions without qualification.

Adv. de Bourbon submits, in reliance on a *dictum* drawn from *Wittmann v Deutscher Schulverein Pretoria & Others* 1998 (4) SA 423 (T) at 449, that “freedom of religion does not mean freedom from religion”. In the instant case, so he argues, the applicants’ daughters are not being persuaded to change their religion or subscribe to other religious beliefs but are simply being required to attend an activity that forms part of the School’s curriculum. Thus, the School cannot be said to have infringed any aspect of the right to freedom of religion as enunciated by the Canadian Supreme Court in *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 at 336D-G, where it was stated that:

“The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.”

In *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at para. 36, freedom of conscience and religion was regarded as being integral to the dignity, growth and self-worth of the individual:

“The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person’s dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awaken concepts of self-worth and human dignity which form the

cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.”

The importance of religious diversity in the educational sphere was highlighted by Langa CJ in *MEC for Education: Kwazulu-Natal & Others v Pillay* 2008

(1) SA 474 (CC) at para. 107 as follows:

“As a general rule, the more learners feel free to express their religions and cultures in school, the closer we will come to the society envisaged in the Constitution. The display of religion and culture in public is not a ‘parade of horrors’ but a pageant of diversity which will enrich our schools and in turn our country.”

Counsel for the applicants correctly notes that an essential component of the right to freedom of religion is the absence of coercion or restraint and that the freedom may be unjustly impaired by measures that compel anyone to act or refrain from acting in a manner contrary to one's religious beliefs. This absence of compulsion is emphasised even in the *Wittmann* case (*supra*) at 449D-G:

“Of course the right of freedom of religion (in the case of religious minorities) and the right to freedom of thought, belief and opinion (in the case of atheists and agnostics) entails that attendance may not be enforced. It must be voluntary. The right of non-attendance is expressly recognised in sections 14(2) of the interim Constitution and 15(2) of the Constitution. Attendance must be ‘free and voluntary’. There may be no coercion, neither by rules nor by action on the part of the authorities.”

Similarly, in the *Pillay* case (*supra*) at paras. 63-64, the underlying values of human dignity, equality and freedom are underscored in the pursuit of religious practices:

“A necessary element of freedom and of dignity of any individual is an ‘entitlement to respect for the unique set of ends that the individual pursues’. One of those ends is the voluntary religious and cultural practices in which we participate. That we choose voluntarily rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity.”

These sentiments against coercive conduct are also sagaciously captured in the *Big M Drug Mart* case (*supra*) at 337A-D:

“Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of ‘the tyranny of the majority’.”

To conclude on this aspect, there can be no doubt that the applicant’s children are entitled to hold and practise their religious beliefs, whether within or without their homes, and within the precincts of the School. It also cannot be doubted that the applicants are entitled, in accordance with their own beliefs, to shape the moral and religious upbringing of their children. The applicants aver that to compel their daughters to attend chapel is contrary to their religious convictions because it entails the mixing of religious practices and attending church services in a building strewn with religious symbols. Therefore, their daughters do not wish to be present in the chapel.

Having regard to the authorities cited above, I take the view that the School’s policy of compelling the applicants’ daughters to attend chapel services

constitutes a *prima facie* infringement of their religious beliefs. The practice and observance of their faith demands that they exclude themselves from any place of worship that contains any religious symbol, including the crucifix. It also demands that they abstain from any rite or ritual that involves the admixture of any religion other than their own. By being compelled to enter the School chapel and attend the predominantly Anglican services conducted therein, they are being called upon to renounce, albeit temporarily, certain fundamental tenets of their faith that are designed to enhance their peculiar sense of religious and cultural identity as well as their dignity as self-professed Jehovah's Witnesses. They can only be required to renounce those tenets if they choose to do so freely and voluntarily or in circumstances that are reasonable and justifiable having regard to the public interest or the rights and freedoms of others.

Permissible Limitation of Religious Freedom

The critical question for determination *in casu* is whether or not the compulsion to attend chapel imposed upon the applicants' daughters is constitutionally permissible in the circumstances under consideration. In terms of s 86(2) of the Constitution, fundamental rights and freedoms may be limited "only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society". In this respect, *Adv. de Bourbon* argues that the contract of admission signed by the applicants is the law envisaged in s 86(2) and that the School is entitled to enforce that contract accordingly. *Adv. Mafukidze* appears to implicitly accept this proposition by his lengthy written submissions interrogating the contract and the School's conduct under the criteria set out in s 86(2).

The proposition and its implicit acceptance are clearly misplaced. The term “law” is defined in s 332 of the Constitution to mean any provision of the Constitution, an Act of Parliament or a statutory instrument, or any unwritten law in force in Zimbabwe, including customary law. A private contractual stipulation is patently not a law as defined or as generally understood, let alone a law of general application within the meaning of s 86(2). Accordingly, I take the view that s 86(2) has no direct bearing on the constitutionality or enforceability of the contract of admission and does not take the matter any further in upholding or impeaching the School’s policy of compulsory chapel attendance.

As regards the extent to which the freedom of religion may be limited, *Adv. Mafukidze* contends that, although it may be permissible to limit the right to manifest religious or other non-religious beliefs, the right to hold such beliefs is to be considered as being inviolable. I am unable to discern any justification for this perceived distinction either in s 60 or in s 86 of the Constitution. In terms of s 60(1), the freedom of thought, opinion, religion or belief is accorded the same prominence and protection as the freedom to practise, propagate and give expression to one’s thought, opinion, religion or belief. Both are guaranteed in the same breath and without any express or implied differentiation as to the extent of their entitlement to protection. Equally significantly, s 86(3) specifically enumerates those fundamental rights which “no law may limit” and which “no person may violate”. These include the rights to life, human dignity, not to be tortured, not to be placed in slavery or servitude, to a fair trial, and to obtain an order of

habeas corpus. The right to freedom of conscience and religion is conspicuously absent from this list of absolutely sacrosanct and inviolable rights. The necessary implication is that freedom of religion is not inviolate or non-derogable.

The provision that I deem most apposite to the resolution of this matter, and which I now turn to consider, is s 86(1) of the Constitution. It declares that “fundamental rights and freedoms must be exercised reasonably and with due regard for the rights and freedoms of other persons”. The analysis of conflicting rights postulated by s 86(1) calls for an essentially unitary approach. The question whether a given right is being exercised reasonably is inextricably intertwined with the question whether it is being exercised with due regard for the rights and freedoms of others. What is required is the balancing of actually or potentially antagonistic rights, having regard to the nature of those rights, the manner in and the extent to which they impinge upon one another, and the circumstances in which they have been or are to be exercised.

It is trite that a contract concluded in contravention of the written or unwritten law, or one that is contrary to public policy, is susceptible to being struck down and rendered of no force or effect. The doctrine of sanctity of contracts is obviously subject to constitutional limits. As was observed in *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) at para. 39, every contract or institutional rule must pass constitutional muster. Again, in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para. 15, it was emphasised that:

“All law, including the common law of contract, is now subject to constitutional control. The validity of all laws depends on their consistency with the provisions

of the Constitution and the values that underlie our Constitution. The application of the principle *pacta sunt servanda* is, therefore, subject to constitutional control.”

Adv. Mafukidze submits that the School’s contract of admission contains unlawful and onerous terms and conditions targeted against members of different faiths. They are contrary to public policy and therefore cannot qualify as rules capable of enforcement. *Adv. de Bourbon* retorts that, although the School’s assemblies in chapel carry religious overtones, no pupil is obliged to participate in any religious activity. All the pupils are simply required to attend and be respectful. No one is victimised for not singing or praying. To this extent, the School is entitled to expect conformity and the applicants are equally entitled to remove their daughters to a school that does not offend their religious principles. This accords with the rights of establishment and maintenance explicitly preserved and conferred upon independent educational institutions by s 75(2) of the Constitution.

It is common cause that the religious status of the applicants’ children was known from the outset and that the previous policy of the School was one of religious tolerance and accommodation. In this respect, I am unable to accept the submission by *Adv. de Bourbon* that the applicants acted fraudulently in signing the contract of admission simply to gain the admission of their daughters into the School. This is because the previous policy was highlighted in the School’s website which, although outdated, appears to have been relied upon by the applicants. In this context, therefore, it cannot be said that their daughters’ refusal to attend chapel is unreasonable.

In any event, there is nothing in the opposing papers to show that the objective of collegiality that the Headmistress wishes to inculcate in the pupils was not previously attained. There is no evidence that the exemption from chapel attendance that was previously granted has negatively impacted on the collegiality or discipline of the applicant's daughters or the other pupils. Nor is there anything to indicate that compulsory collective chapel attendance is the most appropriate vehicle to entrench collegiality. This objective might be better achieved through regular attendance at social or sporting events or when all the pupils are gathered together in the dining hall, as happens at the School during the daily lunch break. As Adv. *Mafukidze* correctly submits, coercion as opposed to persuasion does not necessarily build collegiality. On the contrary, to forcibly conjoin persons of different faiths might serve to undermine the dignity of all concerned, the minority as well as the majority. As I have already noted, freedom of conscience and human dignity are inseparably linked and the denial of the former entails the denial of the latter.

As against the foregoing, it is not in dispute that the applicants were fully aware from the time that they signed the admission forms that their daughters had been accepted as pupils on the following terms and conditions: that the School's rules and regulations, as amended from time to time, would be binding and had to be observed; that the School's founding Christian principles would entail adherence to its rules on chapel attendance; that no exemption from the curriculum would be considered on religious grounds; and that any latitude concerning chapel attendance was at the sole discretion of

the School Head, whose decision was final and binding. Thus, the applicants were cognisant of the fact that any previous latitude or exemption granted in relation to chapel attendance was subject to being reversed and that they and their daughters would be obliged to comply with any such change in policy. In short, there can be no doubt that they willingly consented to the implementation and enforcement of the School's rules and regulations, even if they were altered after the admission of their daughters into the School.

In the *Wittmann* case (*supra*), the facts of which involved the enforcement of an enrolment contract in circumstances which are very similar to those herein, van Dijkhorst J, at 454-455, opined as follows in relation to parochial community schools:

“In respect of these educational institutions the fundamental freedom of religion of ‘outsiders’ is limited to the freedom of non-joinder. Outsiders cannot join on their own terms and once they have joined cannot impose their own terms.

This indicates that the waiver of the freedom of religion (for the limited duration of one's membership and within the limits of the institution's constitution) is not contrary to the provisions of the Constitution in the case of private educational institutions. Waiver *per se* of that freedom is therefore not unconstitutional.”

I note that this decision was premised on specific provisions of the South African Constitution which are not identical to the corresponding provisions in our Constitution and that, as far as I am aware, it has not been followed or applied by the Constitutional Court of South Africa. I also note, with the utmost respect, that the sentiments expressed by the learned judge might be criticised as being somewhat exclusivist, having been pronounced in the peculiar post-apartheid milieu of that country.

Nevertheless, I take them to be fairly instructive in the broader context of delineating the outer contours of religious freedom.

Another case of persuasive value is the decision of the European Court of Human Rights, apropos the European Convention on Human Rights, in *Valsamis v Greece* [1996] 24 EHRR 294, arising from facts which are not dissimilar to those *in casu*. The applicants in that case were Jehovah's Witnesses. Pacifism was a fundamental tenet of their religion which forbade any conduct or practice associated with war or violence, even indirectly. Following a written request, their daughter was exempted from attendance at religious education lessons and Orthodox Mass. However, in common with other pupils at her school, she was asked to take part in the celebration of the National Day, a day when the outbreak of war between Greece and Fascist Italy was commemorated with school and military parades. She requested the headmaster that she be excused from the celebration on religious grounds, in particular, on the basis of her pacifist convictions. Her request was refused but she nevertheless did not participate in the school parade. She was punished for her failure to attend with one day's suspension from school, a decision taken by the headmaster in accordance with a circular issued by the Ministry of Education and Religious Affairs.

She and her parents argued that they were the victims of a breach of the right to education under Article 2 of Protocol No.1, which requires the State to respect the right of parents to ensure that the education and teaching received by their children is "in conformity with their own religious and philosophical convictions". They also

complained that their “right to freedom of thought, conscience and religion” guaranteed by Article 9 of the Convention had been breached. Their complaints in relation to these two provisions were dismissed by a majority decision of seven votes to two.

The dissenting judges took a robust view of the rights allegedly infringed. In their opinion, Mr and Mrs Valsamis’s perception of the symbolism of the school parade and its religious and philosophical connotations had to be accepted because it was not obviously unfounded and unreasonable. Similarly, Miss Valsamis’s statement that the parade she did not participate in had a character and symbolism that were clearly contrary to her religious beliefs also had to be accepted and there was no basis for seeing her participation in this parade as necessary in a democratic society. The minority accordingly found that both Article 2 of Protocol No. 1 and Article 9 of the Convention had been violated.

As regards the right to education and its corollary of parental convictions, the majority judges were of the opinion, at paras. 31-33, that:

“Such commemorations of national events serve, in their way, both pacifist objectives and the national interest. The presence of military representatives at some of the parades which take place in Greece on the day in question does not in itself alter the nature of the parades.

Furthermore, the obligation on the pupil does not deprive her parents of their right ‘to enlighten and advise their children, to exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents’ own religious or philosophical convictions’.

It is not for the Court to rule on the expediency of other educational methods which, in the applicants’ view, would be better suited to the aim of perpetuating historical memory among the younger generation.

In conclusion, there has not been a breach of Article 2 of Protocol No. 1 (P1-2).”

On the freedom of thought, conscience and religion, the majority adopted the earlier decision of the Commission and opined, at paras. 36-38:

“The Commission considered that Article 9 (art. 9) did not confer a right to exemption from disciplinary rules which applied generally and in a neutral manner and that in the instant case there had been no interference with the applicant’s right to freedom to manifest her religion or belief.

The Court notes at the outset that Miss Valsamis was exempted from religious education and the Orthodox Mass, as she had requested on the grounds of her own religious beliefs. It has already held, in paragraphs 31-33 above, that the obligation to take part in the school parade was not such as to offend her parents’ religious convictions. The impugned measure therefore did not amount to an interference with her right to freedom of religion either.

There has consequently not been a breach of Article 9 of the Convention (art. 9)”.

Disposition

Before balancing the respective rights and freedoms of the parties, it is necessary to consider the waiver of constitutionally entrenched rights. *Adv. Mafukidze* argues that it is possible to waive certain rights, depending upon the right in question, for example, the right to trade which can be subjected to restraint by agreement. However, the right to entertain and manifest religious beliefs cannot be waived because it is characterised by the absence of compulsion or coercion, including indirect control. Accordingly, clauses 4 and 5 of the School’s admission form must be regarded as being *contra bonos mores* and therefore unlawful. *Adv. de Bourbon* accepts that public policy enables the scrutiny of private contracts in order to ensure their constitutionality. Nevertheless, it is possible to contractually waive one’s religious precepts in order to

achieve a specific social or material purpose, as the applicants have done by signing the contentious form of admission.

I am inclined to agree. As I have indicated earlier, I do not perceive the right to freedom of religion as being absolute or non-derogable. On that basis, I can think of no objection to its being voluntarily waived in circumstances where such waiver does not entail the fundamental eradication of one's religious or conscientious beliefs. The applicants cannot assert that their faith condemns the mixing of religious beliefs and practices and at the same time enrol their daughters at a school with an Anglican ethos and practices. The contract of admission that they signed categorically states that any latitude in chapel attendance granted to the pupils would not invariably exempt their attendance in future and that the decision of the Head in that regard would be final. In effect, the applicants chose to bend the tenets of their faith to a limit determined by themselves so as to gain admission to the School for their daughters. Once that limit has been exceeded, they now invoke the right to religious freedom in order to demand that the School should conform to their religious dictates. In other words, the applicants and their daughters are prepared to remain "separate from a contaminated world" only to the extent that they deem it expedient to do so. To use a well-worn adage, they cannot approve and simultaneously reprobate the School and its avowed ethos.

As I have already observed, freedom of religion is not an absolute right enforceable *erga omnes*, at all times and in every circumstance. It cannot override and must conform with the law of the land to the extent that such law is reasonably justifiable

in a democratic society. Moreover, its exercise cannot justify interference with the rights of others or countenance any harm to public interests. Thus, in the instant case, it is necessary to balance the religious freedom of the applicants and their daughters within their chosen educational environment as against the rights and interests of the School and its institutional values as propounded by its founders.

The ethical foundation of freedom of conscience, as guaranteed by section 19 of the former Constitution, was lucidly expounded by Gubbay CJ in *In re Chikweche* 1995 (1) ZLR 235 (SC) at 242-243:

“... I am of the view that the reference in s 19(1) to freedom of conscience is intended to encompass and protect systems of belief which are not centred on a deity or religiously motivated, but are founded on personal morality.”

Having regard to this ethical dimension, it seems to me that every religion, be it Judaeo-Christian, Muslim, Buddhist or Hindu, is essentially rooted in the precepts of morality. The forms of moral expression and observance adopted by each religion may vary according to time, place, culture and tradition. But the transcendent values that animate every religion are universal. They are embedded in the quintessential humanity of its protagonists. Apart from each individual's personal relationship with his or her own deity, there is the collective bond of human commonality that informs and guides his or her relationship with others. In a libertarian society, what this bond demands is mutual respect and tolerance between individuals, social groups and communities, with the ultimate objective of attaining a truly pluralistic polity.

Reverting to the question at hand, what is envisaged by s 86(1) of the Constitution is precisely that mutuality of rights and freedoms, to be enjoyed and exercised in a manner that is reasonably justifiable in a democratic society. In the specific context of freedom of religion, what this entails is that the scope and extent of one's spiritual rights must be measured within the temporal environment in which they operate.

The position of the applicants and their daughters *in casu* is no different. They have willingly chosen to join and participate in the communal ethos of the School and, furthermore, to abide by whatever its broader curriculum implies. The principle of mutual respect and tolerance requires that they accommodate the institutional rights and interests of the School in pursuing its perceived objectives, so long as those objectives are not pursued unreasonably and, equally importantly, so long as they do not radically undermine the religious beliefs and convictions of any of its pupils. In other words, the School's policy should not transmute into some tyranny of the majority, imposed without due regard for the rights and sensibilities of the minority.

From a purely neutral and secular standpoint, I do not think that attendance in chapel for short stints three times a week would necessarily negate or deracinate the fundamental beliefs of the applicants' daughters. They are not being called upon to engage in prayer or participate in the Anglican rituals conducted in chapel. They are simply required to attend chapel and remain dispassionately respectful during its proceedings, not unlike the participants at an athletic event or diplomatic function where everyone present is expected to stand in silence whenever the national anthem of any

given country is played. Indeed, it is perfectly possible, if they are prepared to open their hearts and minds in the true spirit of religious tolerance, that they might even derive some benefit from quietly observing the rites and rituals of another religion, without having to surrender their own convictions and succumb to the specific beliefs of that religion.

In the event, after considerable vacillation and not without some reservation, I have come to the conclusion, on the particular facts of this case, that the applicants are not entitled to the declaratory and consequential relief that they crave. What this means is that the School is entitled to enforce its policy of compulsory chapel attendance in respect of the applicants' daughters. However, in the event that they refuse to abide by this policy, they should not be removed from or required to leave the School, firstly, unless the School takes the fully considered view that it is entirely necessary to do so and, secondly, until they are afforded a reasonable period of time to select and relocate to another school, having regard to their individual educational needs and circumstances.

As regards costs, I am disinclined to apply the normal rule that costs should follow the event and be awarded to the successful party. Indeed, the usual approach in constitutional matters is not to award costs unless the conduct of a party warrants such an order. The salient questions raised in this matter, although not entirely novel, were particularly complex and difficult to resolve. The unusual facts of the case merited comprehensive constitutional deliberation. I am also alive to the fact that this application was only launched in reaction to the School's policy on chapel attendance

having been altered after the applicants' daughters were admitted to the School. In the circumstances, it is just and equitable that each party should bear its own costs.

In the result, it is ordered as follows:

1. The application be and is hereby dismissed with no order as to costs.
2. In the event that the first and second respondents take the decision to expel the applicants' daughters from the School, they shall be afforded a reasonable period of time to select and relocate to another school.

CHIDYAUSIKU CJ: I agree.

MALABA DCJ: I agree.

ZIYAMBI JCC: I agree.

GWAUNZA JCC: I agree.

GARWE JCC: I agree.

GOWORA JCC: I agree.

HLATSHWAYO JCC: I agree.

GUVAVA JCC:

I agree.

Wintertons, applicants' legal practitioners

Atherstone & Cook, 1st and 2nd respondents' legal practitioners

Civil Division of the Attorney-General's Office, 2nd and 3rd respondents' legal practitioners