

SM (A Minor Child)
and
A H (A Minor Child)
and
CARE AT THE CORE OF HUMANITY
(CATCH) (PV O35/12)
versus
THE MINISTER OF PRIMARY AND SECONDARY EDUCATION
and
MINISTER OF HEALTH AND CHILD CARE
and
MINISTER OF PUBLIC SERVICE AND SOCIAL WELFARE
and
MINISTER OF FINANCE
and
ZIMBABWE HUMAN RIGHTS COMMISSION

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 16 January & 29 March 2023

Opposed Matter

C Damiso, for the applicant
Mr Chitekuteku, for the respondent

MANGOTA J: Two minor children both of whom were/are in primary school and a non-governmental organization which describes itself as Care At The Core of Humanity (“CATCH”) sued the first, second, third and fourth respondents all of whom are government functionaries whom they accused of having discriminated against them when they, as government, introduced radio lessons for primary school children during the Covid 19 pandemic. The minor children and CATCH filed their application under s 85 (1) of the constitution of Zimbabwe. The section allows them to sue in their own right as well as members of a group or class of persons

who fall into their category because of their economic and/or social status. They couched their draft order in the following terms:

“IT IS ORDERED THAT:

1. The 1st respondent’s failure to put in place measures to ensure that the poorest and most marginalized children in Zimbabwe have access to radios to enable them to access the lessons that it has availed on national radio stations be and is hereby declared to be an affront to the applicants (sic) rights to education and to equality and non-discrimination protected under s 76, 81(1)(f) and 56 of the Constitution respectively
2. AND consequently:
 - a) The respondents shall forthwith work together to conduct a rapid assessment of children in the most vulnerable and marginalized situations in the rural areas of Zimbabwe who are not able to access the radio lessons;
 - b) The respondents shall thereafter avail radios, fit for purpose, to the families of the applicants and other affected children identified in the rapid assessment;
 - c) The 1st and 3rd respondents shall deploy their officers to monitor the effective utilization of the radios for school lessons at community and household level;
 - d) The 4th respondent shall avail adequate resources to implement the terms of this order;
 - e) The 1st to 4th respondents shall, within 30 working days of this order, submit a report to the 5th respondent stating the steps it has taken to comply with the order of the court;
 - f) The 5th respondent shall submit the report to Parliament within 3 days”.

All the respondents, but the fifth respondent which owes its existence to s 242 of the Constitution of Zimbabwe, oppose the application which, they contend, has been overtaken by events. They, in the main, deny that they violated the education right of the minor applicants when they rolled out radio lessons to primary school children a number of whom fell into the social or economic class of the applicants who were/are of minority status. They place reliance on section 75(4) of the Constitution of Zimbabwe which exhorts the State to take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization of the right to:

- i) a basic State-funded education, including adult basic education; and
- ii) further education which the State, through reasonable legislative and other measures must make progressively available and accessible.

They move me to dismiss the application with costs.

The application cannot succeed. It cannot succeed for a variety of reasons. Chief amongst those reasons is whether or not an application which has been overtaken by events, such as the present one, is ever worth of the attention of anyone let alone that of the court. The applicants should desist from the habit of engaging the court in matters which are of an academic nature such as the one which they invited me to deal with *in casu*. They know as much as I do that the Covid

19 pandemic came at the time that they filed this application. They also know that the pandemic went away and it left the application still filed at court. They know further that the consequential relief which they are moving me to grant to them serves little, if any, purpose when the pandemic for which it was meant to address is no longer amidst us. The consequential relief would, in some way or other, have remained applicable during the time of the pandemic but not now.

Indeed, the applicants were quick to realize the futility of their intention to persist with the consequential relief in the absence of the pandemic. It is for the mentioned reason, if for no other, that they made up their minds to abandon, through counsel, the consequential relief during submissions. They, however, persisted with clause 1 of their draft order.

Whether or not clause 1 of the applicants' draft order is sustainable depends, in a large measure, on the context of the application. The context is that Covid 19 was a reality. It was a reality not only in Zimbabwe but also throughout the entire globe. Its coming into existence brought planet earth onto a stand-still position. Nothing was able to move in the face of the pandemic. There was total breakdown of communication let alone movement of persons from one point to the other. The menacing effects of the disease brought governments, parliaments, courts, commerce and industry to a complete halt. People described the disease as a pandemic which, indeed, it was. It threatened life, limb and soul of all and sundry. All people stood in awe at the thought of it. No one dared to venture into the unknowns without good advice from medical personnel. Such was the virus's menacing effect.

It is in the context of the above-described set of circumstances that the respondents remained cognizant of their obligation to continue to deliver education to the country's primary school going children through radio lessons. They teamed up with such children's interest groups as the United Nations Children's Fund and rolled out radio lesson programmes to pupils who could access such lessons over the radio.

How the applicants and CATCH remained of the view that the respondents could have implemented consequential relief which is spelt out in clause 2 (a) – (f) of their draft order in the middle of the pandemic which did not allow the respondents or their officers to move from one point to another remains a matter for anyone's guess. The applicants themselves do not tell how the respondents would have been able to:

- i) conduct a rapid assessment of children who fell into their social status because of their economic condition;
- ii) avail radios to families of the applicants and/or those who are in their category;
- iii) deploy officers to monitor the effective utilization of the radios and/or
- iv) submit reports to the 5th respondent who would submit the same to a non-sitting Parliament.

The above-observed supervening impossibilities do not point to any intention on the part of the respondents to discriminate anyone let alone the applicants. The situation which then obtained made it physically and mentally impossible for the respondents to cover every situation which was then on the ground. They did what they humanly could possibly do and, in the process, they left out those who fell into the category of the applicants not out of any ill- will or malice on their part but out of circumstances which were beyond their control. They cannot, under the stated set of circumstances, be said to have acted in a discriminatory manner. They did not. They ameliorated the plight of the Zimbabwean child in very abnormal circumstances.

The Constitution of Zimbabwe Amendment (No.2) Act of 2013 (“the constitution”) confers, in Section 75, an obligation on the first respondent to provide State-funded education to citizens and permanent residents of Zimbabwe as of right. The right of citizens and permanent residents to provision of education is, however, not absolute. It is subject to availability of resources which Zimbabwe may enjoy at any given point in time. Sub-section (4) of the section is relevant in the mentioned regard. It qualifies the provision of this basic right to the applicants as well as to others who are in their category. The respondent is, therefore, enjoined to provide State-funded education to the applicants within the limits of the resources which are available to it.

It stands to logic and reason that, where such resources are available and the situation which is obtaining within the length and breadth of Zimbabwe is normal, provision of radio lessons by Government to some pupils to the exclusion of other pupils warrants that the Government be accused of discriminating like persons without justification. Where, however, resources are, for some reason or other, unavailable and the situation is as abnormal as it was during the period of the pandemic, criticizing Government for the effort which it made to ameliorate the plight of the Zimbabwean child by rolling out radio lesson programmes to some primary school children remains not only unfair but also uncalled for.

In casu, however, all the respondents sing in complete unison. They state, correctly in my view, that the situation which was about them was abnormal and the resources which were available to them, as government, were over-stretched because of the need on their part to purchase the necessary vaccines for the cure of citizens and residents who were adversely affected by the pandemic as well as for the purchase of necessary equipment for medical personnel who were at the forefront of combating the menacing virus. The stated matters were/are not fanciful. They were real.

The respondents should be commended for having rolled out radio lesson programmes in the face of difficulties which the pandemic presented. Criticizing them for the good work which they put into the Zimbabwean child shows clear lack of appreciation on the part of the applicants, their parents and the non-governmental organization which, going by what it professes, should have done something positive to ameliorate the difficult circumstances of the minor children who brought this application.

One is sometimes left to wonder when CATCH states as its objective, as a private voluntary organization, that it promotes the rights and welfare of children in Zimbabwe. It certainly is not making me believe that it promotes the rights of children who are in Zimbabwe by criticizing, and not appreciating, the good work which the respondents performed. CATCH is no doubt acting contrary to the objectives which it sets down for itself as it states them in paragraph 4 of its affidavit.

The applicants failed to prove their case on a preponderance of probabilities. The application is dismissed with costs.

Legal Resources Foundation, applicant's legal practitioners
Civil Division Attorney General's Office, respondent's legal practitioners