Appeal Case 1
MUBEENA EBRAHIM PRIMARY SCHOOL
versus
PORTIFA MWENDERA CIV 'A' 144/21
Appeal Case 2
MUBEENA EBRAHIM PRIMARY SCHOOL
versus
KELVIN NYAKAPANZE & LINSET CHEDEMBO CIV 'A'145/21

Appeal Case 3
MUBEENA EBRAHIM PRIMARY SCHOOL
versus
ABDUL RAKAK EBRAHIM TALAT CIV 'A'146/21

Appeal Case 4
MUBEENA EBRAHIM PRIMARY SCHOOL
versus
OZIAS GOREDEMA CIV 'A' 183/21

HIGH COURT OF ZIMBABWE
TSANGA & MAXWELL JJ
HARARE 10 February & 11 May 2022

Civil Appeal

I Madongwe, for all appellants
BR Daringo, for respondent in Appeal case 1
VC Maramba, for the respondent in Appeal case 3
Respondents barred in cases 2 & 4

TSANGA J:

Background

1. The above four appeals were heard on the same day and involved the same appellant, namely, Mubeena Ebrahim Primary School. The respondents were different parents with children at that school. There were certain common cause factual circumstances to all four

appeals. Fees were payable to the school in advance of each term. A term's notice was required for withdrawal of a child from the school. Failure of the parent to do so would make the parent liable to a term's fees. In the event of legal proceedings being instituted by the school, the defendant would be liable for costs on the higher scale as well as collection commission.

2. All four appeals though brought individually, essentially centred on whether the parents were obliged to pay school fees for the second term of 2020 when the school resorted to learning through online lessons due to the closure of schools by government as a result of Covid 19. The parents in question did not pay the second term's fees wholly or in part as they argued that they had not consented to online lessons and neither had they enrolled their children for these. In addition to this failure, the parents had also withdrawn their children completely from the school without paying the requisite term's fees in lieu of failure to give notice for withdrawal of their children. However in the fourth appeal, the appellant had omitted in the court below to claim for fees in lieu of notice of withdrawal. In all four cases in so far as the appellant's claim was for outstanding fees for online lessons during the corona virus disease (Covid 19) lockdown in 2020, the claims were dismissed on account that the children had not in fact participated in those online lessons. Three of the four cases, being the first to the third appeal had been heard by the same magistrate with a substantial overlap in the court's findings and in consequence equal similarity in the grounds of appeal. The fourth appeal had been before a different magistrate who had equally arrived at the same conclusion as the one in the first three cases. Due to the overlap in the grounds of appeal by the appellant in all four cases, they have been therefore been combined under one appeal judgment.

BRIEF FACTS

3. In *Mubeena Ebrahim Primary School* v *Portifa Mwendera* CIV 'A' 144 / 21, the respondent Portifa Mwendera applied and enrolled two children at the school in grades 4 and 1 in 2017. In breach of agreement in 2020, he was issued summons in the court below for having failed to pay school fees to the tune of US$2 200.00, for the second and third terms of

2020. This was during the Covid 19 disease lockdown at a time when the school had introduced online learning as a measure for the continued provision of education. In further breach of the contract he had with the school, he was also said to have withdrawn the two children without notice and was therefore said to owe US$1 400.00 or its equivalent.

4. The findings in the court below were in favour of the respondent to the effect that due to the Covid 19 lockdown, the school calendar for the second and third terms had ceased to exist. As a result there was a need for consent of each parent for online lessons because they were conducted during the extended holiday given by the relevant authorities due to Covid 19. The court observed that the school appeared to have regarded the online lessons as mandatory and yet there was need for mutual consent by the parties as the lessons were conducted during an extended holiday as opposed to an official school term. As such in the absence of consent the lessons could not be deemed compulsory.

5. Furthermore, the court found that the respondent's children did not participate in online lessons during the second term and that the appellant could not sue for services it had not rendered. Additionally the court found that from the form of the communication between the parties, the respondent had clearly not accepted the online lessons and could not be held accountable to pay.

6. The court also found that the respondent gave notice of the withdrawal of his child /children on the 12th of November 2020 when a full term's notice was required. It concluded, however, that the withdrawal was necessitated by the failure to reach consensus over the online lessons which the court deemed not to have been compulsory. It also relied on a letter to parents, written by the Board Chairman on 6 March 2020 regarding fees and other matters, which it found to have made it clear that those who wanted to withdraw their children could do so which the defendant did. The respondent was thus found not liable to pay the terms fees in lieu of notice of withdrawal. The court also remarked that in any event, the term's fees in this case would have been the fees that had been legally charged and not the fees that had

been claimed by the school due to increased costs for online learning. As a result the school's claim was dismissed with costs on an ordinary scale.

7. In *Mubeena Ebrahim Primary School* v *Kelvin Nyapanze & Anor* CIV 'A' 145/21 the respondents were said to have applied for a grade 6 place for their daughter Celina Mazvita Nyakapanze and entered into a contract with the school in Jan 2020. They did not pay fees for the second and third terms of 2020 which was the sum of US$1100.00. They were also said to have withdrawn their daughter without requisite notice and the school had thus additionally claimed US$700.00, plus interest from 6 November 2020 to date of payment in full and costs of suit. The respondents in this instance had cross appealed and claimed indebtedness for smaller sum said to be US$300.00 being the existing fees then, which amount had been rejected by the school. They denied breach and argued that it was the school that had refused to accept fees fairly and reasonably due to it and used this as an excuse to withhold learning material from the child. They also argued that due to Covid 19, it became impossible for each to perform their respective parts of the contract.

8. In this case the magistrate's finding was that schools closed on March 2020 and that the school communicated its decision to conduct online lessons in April 2020. The court also found that pupils who had not paid had been barred by the school from accessing online facility. Further the school had written a letter in October 2020 seeking confirmation that the child would return in 2021. That letter had a portion that failure to append one's signature on the form provided would result in the child being taken off from the register and that the respondent would be liable for the conditions of the contract relating to fees and notice. The respondent did not respond to this letter. The court found that the responsible authorities for education that is the relevant Ministry did not permit the opening of the second and third terms of 2020 due to Covid 19 pandemic and that it was impossible for the appellant to have provided education physically during that period. The court therefore held that "For one to conclude that the enrolment contract was open to any method of providing education services other than formal learning would be tantamount to stretching the parties' intention to the contract too far in the circumstances of the case".

9. It also found that the provision of online service was a new arrangement which called for mutual consent of the interested parties and that it was improper to make use of the existing contract during the period the school term was closed or more specifically when the children were deemed to be on holiday. Further, it found that it would be improper to claim a term's fees when there was no term and that technically what should be claimed was a term's fees for the withdrawal. The school was also found not to have stated in clear terms the consequences of not participating in those lessons with a view to creating a common understanding between the parties. In essence the court therefore found that online lessons could not have been possibly based on the enrolment contracts and they were not specifically compulsory. The respondents could not be held liable for online lessons which their child also did not access. The court was alive to the fact that the appellant incurred costs in setting up the online facility but found that this could not be a justification for claiming fees for services it did not render to the respondent's child.

10. However, on the notice seeking confirmation of the child's return, the court found that the respondents were still bound by the provision of the enrolment contracts. As such it found that the respondents were bound to pay the claimed amount in lieu of notice. On costs, the court also found that the parties had agreed on how these were to be paid and there was no basis not to grant these. In the result, the respondent was ordered to pay US$700.00 being one term's fees in lieu of notice of withdrawal from school or the Zimbabwean dollar equivalent plus interest at the prescribed rate and costs of suit on a legal practitioner and client scale.

11. At the hearing of this appeal the respondents were barred for filing heads out of time and not bothering to make an application for condonation prior to the hearing. The appellant's matter was heard on its merits.

12. In the third appeal case, *Mubeena Ebrahim Primary School* v *Abdul Rajah Ebrahim Talati* Civ 'A' 146/21, the appellant had been issued summons claiming US$1100.00 for outstanding school fees for his daughter. The school also claimed US$700.00 being one's term's fees in lieu of notice. Interest at 5% and legal costs on the higher scale as well as

collection commission were also sought. The respondent disputed that there was any agreement requiring a term's notice to be given. With regards to the school fees for the second and third term he pleaded that his daughter did not attend school nor did she do the online lessons. He thus denied liability for the US$1100.00 school fees claimed. He also said that his daughter was barred from attending school due to arrear school fees contrary to the Minister's guidelines. He also pleaded that the school having unilaterally cancelled the contract by refusing to provide educational services to the child, the issue of one term's fees was not relevant.

13. As with Civ "A" 145/21 and Civ 'A' 144/21 involving the same appellant, the court found that the online lessons could not have been possibly based on the enrolment contracts and were not specifically compulsory. The court also found that the respondent's child had not accessed the online lessons. When schools finally opened in November 2020 he had not paid that term's fees as per the contract he had signed when he initially enrolled the child at the school. The court therefore concluded that if his child was not going to be attending school that term, then he ought to have given the requisite one month's notice. On costs the court found that the parties had agreed to these being paid on a higher scale plus commission in the event of the school having to institute legal proceedings which it had had to. In the result the respondent was ordered to pay US$700.00 being one term's fees, interest at the prescribed rate plus costs on the higher scale including collecting commission. With regards to the notice for withdrawal, the court found that a letter had been sent to the respondent on the 8th of October 2020 asking the parent to confirm if child was returning in 2021 and pointing out the consequences of not endorsing his signature and liability for fees and notice. The respondent did not respond to this letter. So of the three cases before the same magistrate, the court had found the parents liable for withdrawal fees in lieu of notice in two cases whilst in the other one the same court had found the parent not liable. The common denominator in all three cases was the finding that the parents were not liable for fees in the online lessons in the second term.

14. Finally, in *Mubeena Ebrahim Primary School* v *Ozias Goredema* Civ 'A' 183/21 the respondent, the parent had applied to the school for early child development and grade 2 places. He did not pay US800.00 school fees for second term 2020 and $1350.00 for third term and was thus said to owe $2 150.00 for outstanding fees for term 2 and 3. The school had also sought interest at 5% per annum plus costs of suit on a legal practitioner and client scale. The claim was dismissed by a different magistrate from the other three cases. Also unlike the other three cases the school had inadvertently not sued for the amount in lieu of notice so that was not an issue in this case.

15. This case was before a different magistrate from the other three. The court noted that due to the detrimental effect Covid 19 would have had on children's education, many schools adopted to take a robust approach and introduced online lessons. However, similarly to the other cases, it found that online lessons were only offered to children whose parents had paid fees and that the respondent was not one such parent and therefore had no access to online lessons for his children. It also found that this method of learning required active participation from parents, which was previously not essential, and, that the approach was only possible with compatible devices and a sturdy internet connection. The court in this instance found that new terms and obligations were created on both parties and that only some parents accepted the offer. The court's conclusion regarding the online lessons was that this was an entirely new arrangement with the parents for the subsistence of the lockdown period. The introduction of online lessons was not an extension of the original arrangement but was a new arrangement during the subsistence of the lockdown period which the defendant did not accept.

16. The school's claim was said to be unjustified because the respondent's two children had no access to the online learning platform and did not benefit from it. The finding was equally that the school had confirmed that the children had not benefitted due to their exclusion. Thus the court also emphasised that from a public policy perspective, it would set a greatly unfair precedent to allow a claim for fees when educational services had not been benefitted from during the uncontrollable Covid 19 lockdown. Furthermore, it found that a

term's fees is inclusive but not exhaustive to education as it would also include sporting activities, medical facilities, levies and so forth. In final it found that the school had failed to prove its case on a balance of probabilities and found the defendant not liable to pay. In this instance, whilst the respondent had indeed proceeded to remove his children from the school without communicating, the court found that it could not grant what was not claimed in the summons.

THE GROUNDS OF APPEAL

17. From the findings of the courts *a quo*, collectively examined there are two grounds of appeal that pervade all four of the cases, namely that in each case:

1. The magistrate misdirected herself by finding that the contract between the parties did not cover online lessons when such contracts did not stipulate that lessons were only to be delivered physically.
2. The magistrate misdirected herself by finding that the respondent did not consent to online lessons yet there was ample evidence that the respondents' children participated in online lessons.

18. However, *Mubeena Ebrahim Primary School* v *Portifa Mwendera* CIV 'A' 144/21 had two other distinct grounds of appeal which were that:

3. The Magistrate misdirected herself by finding that the fees charged by the appellant for online lessons were illegal, yet the appellant substantially complied with the relevant legal provisions in charging the said fees.
4. The Magistrate misdirected herself by finding that the Respondent is not liable to pay one term's full fees in lieu of notice of withdrawal yet there was ample evidence that the respondent did not give the stipulated full term's notice of withdrawal.

THE LEGAL SUBMISSIONS

The Appellant's submissions

19. The appellant's arguments in *Mubeena Ebrahim Primary School* v *Portifa Mwendera* CIV 'A'144/21 provided the foundational arguments in all four appeal cases. With respect to the first ground of appeal, the gist of the appellant's arguments was that the contract did not specifically state the mode of delivering lessons and those lessons were not necessarily to be physical. Thus the lower court that heard these cases was said to have erred in finding that the contract did not provide for online lessons when it was not open for the court to rewrite the contract for the parties. In further submission, the delivery of online lessons was not a material variation of a contract as provision of online lessons was consistent with provision of education. Performance of the contract according to the appellant was said to have been tendered per *aequipollens* meaning in this instance "by an equivalent" mode for learning, being online rather than physical learning. Rather than being condemned the appellant therefore argued that it should have been commended.

20. Regarding the second ground of appeal, the appellant argued that there was ample evidence that the respondents consented to online lessons and that the respondents' children also consented to online lessons that were rolled out. Given that consent can be express or implied, silence in this instance was deemed to have evinced implied consent. The case of *Moses Mawire* v *Rio Zim Limited (Private) Limited* SC 13/21 was cited for an example of where consent was deemed to have been implied.

21. Further, as to no liability to pay fees because children did not access online lessons, the lower court in each case was said to have failed to pay attention and give effect to the principle of reciprocity under contract law. The argument was that the Respondents were obliged to pay school fees in advance before term started, meaning obligations were reciprocal in a consecutive manner; pay first and lessons second. Additionally, the court was said to have failed to give consideration to the fact that the appellant was ready, able, and willing to avail online lessons to the respondents' children at all material times.

22. With respect to the third ground of appeal that formed part of the first case, being that fees were illegally hiked, the appellant's position was that it had substantially complied with the applicable law with respect to requirements for raising fees. The appellant drew on the case of *Sterling Products International Ltd v Zulu 1988 (2) ZLR 293* for the principle that in looking at substantial compliance the focus should be on the intention of the legislature, the relevant legislation, what actually happened, whether the provision of legislation was substantially complied with, and, whether there was any prejudice as a result of non-compliance The emphasis here was that despite being served with the application for online learning fees, the Ministry did not respond at all. Moreover, the appellant argued that the majority of the parents had paid at the time the application was sought and hence the approval was said to have been a mere fulfilment of compliance with the formalities. In essence, the appellant was said to have done everything it was statutorily required to do but for the response of the Ministry. In this first case it was also argued that the parent had not even paid the old fees.

23. As to the fourth ground of appeal on failure to give the stipulated full term's notice of withdrawal, the argument was that there was an error on the part of the court as the requisite notice had simply and factually not been given in this first appeal case.

Respondent's submissions

24. Mr *Daringo* who was the lawyer for the respondent in the first appeal submitted that the online lessons would have been introducing a new term since the only mode of learning applicable at the time was physical lessons. With regards to the children's access to online lessons in the second ground of appeal, he argued that the respondent's children had only done so as a trial version. The respondent's children had also not benefited from photocopied materials. The trial had been on 24 July 2020 whilst the lessons had started on 28 July 2020. In response, the appellant maintained that the exclusion of the respondent's children was justified because the respondent was already in breach.

25. As to the legality of the fees hike, Mr *Daringo* argued that the procedure laid out in s 21(2) of the Education Act *[Chapter 25:04]* had not been followed as the application is made through the Secretary of the Ministry and yet in this case the letter, which was said to have not been responded to, had gone to the Schools District Inspector. Most importantly, Mr *DO* emphasised that the issue of the fee hike had nothing to do with online lessons since it had in fact been discussed by the Board in November 2019 and a letter subsequently written to parents in March 2020 regarding the fee hike. Thus the hike was not as a result of Covid but had been contemplated long before that. The quest for authority to raise fees was thus argued to have been an afterthought.

26. Ms *Maramba* who appeared for the respondent in the third appeal, *Mubeena Ebrahim Primary School* v *Abdul Rajah Ebrahim Talati* Civ 'A' 146/21, also argued that clearly a new contract was offered by the reply slip and the disclaimer which was sent to parents regarding consent to the online classes. They highlighted that if the slip was not signed, then no new contract came into being. Further, the equipment that parents were expected to have which included computers and tablets was clearly spelt out. She emphasised that nothing could point more clearly to a significant shift in thrust contractually than this communication that was sent to parents. Ms *Maramba* further highlighted that the school had not provided any proof that the respondent's child had participated in WhatsApp lessons. The issue of school fees was thus said to fall away as the child, as in the other cases, had not benefitted whatsoever from the online lessons. She further motivated that the school could not demand payment for services that were offered but not taken up in the new contract as no loss had been occasioned.

27. In response to these arguments Mr Mandongwe submitted that the form sent applied to pupils in Grade 6 and the respondent's child was only in Grade 3 where WhatsApp was being used for lessons. He also drew attention to a form filled by the respondent on page 63 of the record in which the conditions upon which the child had been offered a place were spelt out and signed for by the respondent. In particular, clause 5 of those conditions permitted the school to withhold services in the event of fees not being paid. Mr Mandongwe

also drew attention to *Ndabezinhle Mazibuko* v *The Board Of Governors, Christian Brothers College* & Ors SC 54/17 where barring of students was deemed to be a legitimate part of the contract.

28. Regarding notice for withdrawal, he stressed that clause 4 stated that one full term's notice of withdrawal was to be given in writing. In the event of no notice being given, a full term's fees were to be paid. The conditions also stated that a child would be deemed to have withdrawn if due fees remained unpaid within ten days of due date and the school could allocate the place to another child. Clause 5 also stated that the fees and levies would be determined by the Board of Trustees from time to time. He therefore emphasised the issue of reciprocity to the extent that the respondent herein had also breached the contract by failing to pay fees in advance thereby entitling the appellant to withhold its services.

LEGAL AND FACTUAL ANALYSIS OF THE GROUNDS OF APPEAL

29. **Whether the contract covered on line lessons**

This issue is analysed with respect to all four appeal cases. The terms and conditions in the contract signed by parents analysed by the court below read in the material part as follows:

TERMS OF PAYMENT

1. School fees will be paid in advance before the first day of the term failing that will result in the place being given to another candidate.
2. One full term's notice of withdrawal is given in writing in the event that a child is to be withdrawn from the school failing that will result in the parent / guardian being liable to pay one term's fees in lieu of notice.
3. No results or clearance certificate will be issued in the event of any outstanding fees; no notice of withdrawal of pupil, or lost school property such as books etc.

In the event of any action being taken against you for the recovery of outstanding debts, you will be responsible for all legal costs incurred including commission, tracing fees, and any other costs.
The debtor consents to the jurisdiction of the Magistrates court sitting at Harare. It is agreed that the Mubeena Ebrahim Primary School may at its discretion institute proceedings at the High Court of Zimbabwe should it wish.

30. From the contract, the payment of school fees was therefore a condition precedent to the counter obligation to provide education to the children by the school. In other words, in terms of sequence of performance it was the parents who were supposed to pay first, followed by the provision of education to the children. It is also apparent that indeed the contract did not stipulate or touch in any way on the mode of learning that the school was to provide. It is however common cause that up until the Covid 19 epidemic brought on dramatic changes to life as we all knew it by accelerating technological interactions, lessons were through physical attendance.

31. To recapitulate the lower court's finding was that there was a need for parental consent for online lessons which were a result of Covid 19. The finding by the lower court that the online classes ushered in separate contractual arrangements is indeed borne out by the records. On the 20th of April 2020, the school communicated with parents that due to uncertainty on when schools would reopen as the country was under lockdown, it had considered other ways of providing education and had settled on online lessons albeit reluctantly because of costs involved. The move was said to be coming at a hefty cost to the school. It was also a learning curve. Wi-Fi was said to be a necessity in homes. In addition, parental supervision to ensure that daily assignments were done was also said to be necessary. Materially the phase was described in that letter as a new dynamic phase. The disclaimer form later sent to parents later in July indeed further confirms that parents were expected to indicate their consent to the online lessons.

32. The school itself as indicated by attachments on record regarded online lessons as charting new territory. This was a new arrangement ushering in education in critical ways that had clearly not been envisaged. It included additional costs for parents such as ensuring that the household had reliable Wi-Fi and additional funds for purchase of data as well as for the hardware itself. In addition to these changes, parents would also be expected to provide some critical backup and monitoring to their children. Further the school itself claimed its fee rise was due to the provision of online learning. Given that the school was charging US$300 per term and this had gone up to US$700 a term as a result of online learning, some parents

would have found these terms indeed constituent of new conditions in the provision of education in ways that were very different to those at the time of signing the enrolment contracts. The lower court in all four cases therefore did not err in finding that the online lessons were not part of the enrolment but a new contractual arrangement which some parents consented to and others did not. The first ground of appeal is therefore dismissed.

Whether the respondents' children consented to online lessons

33 There was no concrete evidence in the court below in any of the four cases that the respondents' children had indeed systematically participated in the online lessons. To the contrary the pervasive evidence was that the school had precluded access for all those who had not paid fees for the term during the lockdown period. The school attributed the exclusion on account of parental breach of the contract to pay fees upfront. The school relied on the principle of reciprocity. In the Supreme Court of *Beitbridge-Bulawayo/Railway Private Limited* v *Commercial Union Insurance Company of Zimbabwe Limited* SC 57/07 this principle was articulated thus:

> "The principle of reciprocity recognizes the fact that in many contracts the common intention of the parties, expressed or unexpressed, is that there should be an exchange of performances, and the exception gives effect to the recognition of this fact by serving as a defence for the defendant who is sued on the contract by a plaintiff who has not yet performed or tendered to perform - *The Law of Contract in South Africa supra* at p 467.
>
> In order to decide whether a defendant can raise such a defence in any given case, it is necessary to decide whether the contract is one to which the principle of reciprocity would apply. This is a question of interpretation. The presumption is that in any bilateral contract the common intention is that neither should be entitled to enforce the contract unless he has performed or is ready to perform his own obligations."

In Morgen Mufowo v *Naboth Munyengera & Anor* HH 266/17 the court cited *Van der Merwe, Van Huyssteen, Reinecke and Lubbe's* Contract: *General Principles* 4th ed p 334 where the principle is explained thus:

> "A contract that creates reciprocal obligations, the one in exchange for the other, is called a reciprocal contract and such a contract is governed by the principle of reciprocity.
> The principle of reciprocity entails that performance or a tender of performance by a plaintiff is a requirement for the enforceability of his claim for counter performance conversely, a

> party to a reciprocal contract may withhold his own performance until the other contractant performs."

34. The enrolment contract that the parents initially entered into was indeed reciprocal in the sense that fees had to be paid in advance of each term and in return the children would receive education. But then there was no dispute as to the manner of delivery of that education then since the lessons to be provided were clearly through physical attendance at school.

35. But even if it is assumed that this finding is wrong and that the initial enrolment contract was broad enough to include the online lessons, the reciprocity argument would still be problematic for the appellant since the context of withholding performance is not devoid of analysis in an argument on reciprocity. Indeed the right to withhold counter performance where the other party has not fulfilled its bargain is core to reciprocity. However, drawing on the case of *BK Tooling (Edms) Bpk* v *Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A) 418C-E, in explaining the historical as well as contemporary aspects of reciprocity in contract law, Hutchinson explains that:

> "Once a right to withhold performance is recognised, an immediate inquiry must take place as to whether that retention is justified and whether the principle of reciprocity is served or undermined by upholding the refusal to perform. Ultimately many of these questions involve issues of what is fair *inter partes*….."[1]

36. The *BK Tooling* case clarified that this self-help mechanism of withholding performance could lead to injustice if regard is not had to the context. In this instance therefore the lower court was correct to engage with the context within which the parents failed to pay. The point is the school introduced materially new terms which were not part of the existing contract. It could not be assumed that all parents were ready, able and willing to pay these additional costs. Furthermore, the school justified its fees hike to the Ministry solely on the basis of the new online endeavour.

37. Materially, the finding having been that the online lessons introduced a new arrangement, it is significant to emphasize that these parents in fact did not seek to force the

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[1] Hutchison, Andrew . "Reciprocity in Contract Law ." Stellenbosch Law Review , vol. 24, No. 1, 2013, p. 3-30. HeinOnline.

school to open up online learning for their excluded children. The withholding of online lessons was to try and force the parents to meet their obligation of paying fees. They did not pay and did not enrol their children for the online lessons. It was the school which withheld online lessons as a way to try and force the parents to meet their obligation of paying fees for lessons which were online at the time when schools were officially closed due to Covid 19. Besides not paying fees, none had signed any acceptance documentation relating to online learning. The school sought to introduce new terms as a result of adopting online learning, which terms the parents in this case simply did not agree to cost wise, especially during lockdown. The school therefore excluded those children.

38. If the finding is that the school introduced new terms for the provision of education, can the parents be said to have repudiated the contract thereby justifying the school for withholding performance in service provisions as long as the parents refused to pay? It would be improper to acknowledge in one breath that the new terms were introduced and then to say the parents repudiated an existing contract. What the parents in question refused were the new terms resultant from online learning, particularly the cost aspects in the form of enhanced fees, data expenses and the need for reliable internet connectivity for parents at home that came with using this technology. The second appeal ground therefore fails in all the four cases.

Whether the fees were illegal despite the substantial compliance

39. Turning now to the ground of appeal raised in the first appeal case only as to whether the fee increase was illegal despite substantial compliance The court below found in the case involving *Mwendera* that the increase in fees which the school had levied had been without the approval of the Secretary and that this is a criminalised act in terms of s 21 (1) of the Education Act *[Chapter 25: 04]*. The court rejected the substantial compliance argument on the basis that s 21 (5) of the Education Act makes it clear that the fees have to be approved first before they can be applied.

40. Materially, notification of the increase in fees had been given on the 23rd of March 2020. It had nothing to do with the online classes. It was a general fee increase that the school said was necessitated by operational costs and had been initially mooted in 2019. The school's Board Chairman had also discussed the fees issue with parents prior to the 23rd of March 2020 in a letter / circular dated 5th March 2020. Parents were therefore aware of this fee increase in terms of the existing contract, which is why even by the school's own admission in their letter to the District School's Inspector, by April 2020, most parents had already paid. The school, however, in its letter to the District Inspector, linked the increase to online lessons. This was not entirely truthful. Since a letter was written seeking permission to increase the fees to US$700.00 for online lessons and the reasons are unknown why it was not responded to, it would be presumptuous to conclude without knowing why, that the increase was legal or illegal. Silence, generally means consent. Moreover, it is also a fact that only those children whose parents who had already paid fees for the second term essentially accessed the services. In other words the appeal ground in itself does not alter much and is dismissed.

Fees *in lieu* of notice of withdrawal

41. Turning now to the fourth ground of appeal again in the Mwendera case instance, where the lower court found no obligation to pay fees in lieu of notice of withdrawal, the contract which the parents had entered into with the school was crystal clear in terms of the conditions precedent for withdrawing a child from the school. Therefore even if a parent withdrew the children as a result of the failure to agree on fees for online lessons due to the Covid epidemic, the school had already accrued the right to fees for withdrawal at the time that the parents signed the contract on withdrawal terms. Whether due to Covid or not there was nothing that prevented the parent from giving the requisite notice. In this instance, it was only in December that the parent advised the school of the children's withdrawal. The fees at that time of withdrawal were pegged at US$700.00 which the parent had been advised of in March 2020. As stated, it had nothing to do with online lessons.

42. The respondent was clearly in breach and cannot hide behind Covid 19 for not giving notice. By the second term the parent had already made up his mind that his children would not be continuing since in reality all parents were already aware of the increase in fees even before the schools were closed due to Covid 19.

In the result the orders are granted per each case as follows:

Civ 'A' 144/21

It is hereby ordered that:

1. The appeal in case number 144/21 succeeds in part with each party paying their own costs.
2. The judgment of the Magistrate Court sitting at Harare in Case Number Com1213/20 is set aside in part and substituted with the following order
   a) The defendant be and is hereby ordered to pay US$ 1400.00 or the Zimbabwean dollar equivalent thereof being one term's total fees in lieu of notice of withdrawal of his two children from the school.
   b) The Defendant shall pay interest at the prescribed rate calculated from 06 November 2020 to the date of full payment.
   c) The Defendant shall pay costs of suit on a higher scale.

Civ 'A' 145/212

It is hereby ordered that:

1 The appeal in CIV 145/21 is dismissed with no order as to costs.
2 The respondent's cross in Civ "A" 145 /21 is dismissed with no order as to costs.

Civil 'A' 146/21

The appeal in Civ Appeal No Com 146/21is dismissed with each party paying their own costs.

Civ 'A' 183/21

The appeal is dismissed with no order as to costs.

MAXWELL J…….AGREES

Chitewe Law Practice, appellants' legal practitioners
Dodo & Partners, respondent's legal practitioners in Civ "A"145//21
Nyakutombwa Legal Counsel, respondents legal practitioners in Civ "A"144//21
Muchirevesi & Zvenyika, respondent's legal practitioners in Civ "A" 146/21
Madzima & Company Law Chambers, respondent's legal practitioners in Civ "A" 183/21