THE ASSOCIATION OF TRUST SCHOOLS
and
ARUNDEL SCHOOL TRUST
and
ARIEL SCHOOL TRUST
and
CHISIPITE JUNIOR SCHOOL TRUST
versus
THE MINISTER OF EDUCATION, SPORT AND CULTURE
and
THE PERMANENT SECRETARY IN THE MINISTRY
OF EDUCATION, SPORT AND CULTURE

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 15 and 21 March 2007

OPPOSED MATTER

Mrs *SFJ Jarvis*, for the applicants
Mr *Muchenga* with him Mrs *V. Mabiza*, for the respondents

KUDYA J: On 26 January 2007, in case No. HC 342/07, Hlatshwayo J *inter alia* ordered, by consent, the consolidation of Case No. 5883/06 and 7624/06.

THE PROVISIONAL ORDERS

CASE NO. 5883/06

On 15 September 2006, the applicants filed an urgent chamber application in which they sought certain relief. A provisional order was granted on 19 September 2006 by Hungwe J. It is couched in the following terms:

A. FINAL ORDER SOUGHT

The Respondents shall show any cause why a final order should not be granted in the following terms:-

A1. That the interim relief granted herein is confirmed

A2. [If the application is opposed] That those respondents who have opposed this application shall, jointly and severally, pay the applicants' costs herein.

B **INTERIM RELIEF GRANTED**

B1. That the respondents shall not request, instigate or effect the closure of any non-government school that is being maintained by any Applicant or by any member of First Applicant.

B2. That Respondents shall not request, instigate or effect an arrest on a charge under section 21(7) of the *Education Act[Chapter 25:04]* as amended before any August

2006 Consumer Price Index [CPI] has been published by the Central Statistical Office and is known to Second Respondent, the relevant pending application under section 21(1) made by an Applicant or other member of First Applicant has been duly considered by the Second Respondent, and any consequential procedures thereafter in accordance with the law have been duly dealt with and determined in terms of the law.

B3. That upon the issue of the aforesaid CPI, the Second Respondent shall forthwith consider each and every such pending application, and notify the responsible authority of his approval or other decision in accordance with the law without delay.
It is specified that, unless there is some supervening impossibility, he shall send his approval or other reply to the responsible authority
(a) in respect of any school that offers day only or boarding only and thus cannot be affected by subparagraphs (b) and (c) of subsection (2) of section 21 of the said Act within five working days of receiving the CPI as aforesaid; and
(b) In respect of any school that offers both day and boarding options and may thus be affected by subparagraphs (b) and (c) of subsection (2) of section 21, within 5 working days of receiving the CPI as aforesaid.
Any responsible authority may in addition make arrangement to collect a copy of it's approval or other reply from the Second Respondent's office.

B4. That should Second Respondent decide not to approve of any application, he will provide his written reasons for such refusal to the appropriate responsible authority either with his reply advising it of that or within 48 hours thereafter.

B5. That this order shall remain binding pending any appeal, and will not be suspended merely by the noting of an appeal.

CASE NO. 7624/06

On 14 December 2006 Bhunu J issued the following provisional order:

A. **FINAL ORDER SOUGHT**

The Respondents shall show any cause why a final order should not be granted in the following terms:

A1. The interim relief granted herein is hereby confirmed

A2. First Respondent's announcement that he had set fees for ATS schools for Term One 2007 is declared to be *ultra vires* and of no force or effect.

A3. It is declared that any fee or money collected in excess of any fees or levies that may be lawfully determined in accordance with the *Education Act [Chapter 24:05]* as amended will only be reclaimable by or to be credited to the parent or other person who paid it.

A4. Accordingly the Respondents shall not seek to forfeit any of these for the benefit of the State.

A5. Upon publication of the December's Consumer Price Index and receipt of any applications for approval of fee increases for a school and any calculations referred to hereafter, Second Respondent shall forthwith consider every such application and

notify the responsible authority of his approval or other decision in accordance with the law without delay, and at most within 10 working days of such receipt.

Any responsible authority may also make arrangements to collect a copy of its approval or other reply from the Second Respondent's office.

A6. Should Second Respondent decide not to approve any application, he will provide written reasons for his refusal to the appropriate responsible authority with his reply advising it of this, or within 48 hours thereafter.

A7. [If the application is opposed] That those Respondents who oppose this application shall, jointly and severally, pay the applicants' costs herein.

B. **INTERM RELIEF GRANTED**

It is hereby ordered by consent that

B1. The directive by the First Respondent setting fees for ATS schools for Term One be and is hereby set aside.

B2. Second to Third Applicants and other members of First Applicant shall submit any application for approval of increases in fees for Term One of 2007 to the Second Respondent in accordance with section 21 of the *Education Act* with the available information before December 31 2006, and the responsible authority shall then notify him of its own final calculation of its fees within 2 working days of the publication of the Consumer Price Index [CPI] for December 2006 by the Central Statistics Office.

B3. First Respondent is hereby restrained from unlawfully interfering with the functions and responsibilities of the Second Respondent by issuing directives, publicly purporting to set or prescribe fees, or otherwise interfering with or encouraging or permitting interference with the Second Respondent in the discharge of his duties under section 21, save unless and until the relevant responsible authority lodges an appeal with the First Respondent in accordance with section 22 of the Education Act.

B4. Respondent shall not request, instigate or effect any arrest on a charge under section 21(7) of the *Education Act* before publication of the CPI for November and December 2006, consideration by Second Respondent of any application made by an applicant or other member of First Applicant under section 21(1) thereof, and the final determination of any consequential procedures thereafter in accordance with the law.

B5. First Respondent is interdicted from seizing or purporting to confiscate to the State any fee or other money that may be paid by or for parents to any member of First Applicant for fees or levies for Term One 2007.

B5. This order shall remain binding pending any appeal and until set aside by a competent court and will not be suspended merely by noting an appeal.

THE FACTS

The facts in both these cases are common cause.

The dispute between the parties can be traced to the confirmation on 17 January 2005 of the provisional order granted by Chiweshe J in the matter between *Christian Brothers College and 12 others v The Minister of Education, Sport and Culture and Another* Case No.3286/2004 at the Bulawayo High Court. It was therein declared firstly, that there was not in existence a prescribed amount of fees as provided in section 21 of the Education Act *[Chapter 25:04]* (hereinafter called the Act) relating to any increase in fees and levies and secondly that section 4 of the Education (Control of Fees and Levies) (Government and Non-Governmental Schools) Regulations 2003, Statutory Instrument 28A of 2003 was null and void and of no force or effect or alternatively remained of force and effect until the end of the 3rd school term in 2003.

Matters came to a heard between the present parties in *Association of Trust Schools and 14 OTHERS v The Permanent Secretary for Education, Sport and Culture* Case No. 12682/2004.The provisional order that was granted therein by Makarau J, as she then was, was confirmed by Karwi J on 23 February 2005. Karwi J declared firstly that the Permanent Secretary acted *ultra vires* section 21 of the Education Act *[Chapter 25:04]* when he reset the fees that had been applied for by the applicants instead of approving or rejecting them for these and other responsible authorities for non-government schools in terms of subsection (2) of section 21, secondly that the Minister did not act lawfully, reasonably and in a fair manner as required by sections 3 (1) and 3 (2) of the Administrative of Justice Act 12/2004 in resetting the fees without affording the affected parties an opportunity to be heard and thirdly allowed all the appeals that had been lodged in terms of section 22 of the Education Act.

He in addition restrained the closure of schools ran by the applicants, confirmed the interim relief that had been granted by MAKARAU J and set aside section 4 of the Education (Control of Fees and Levies) (Government and Non-Governmental Schools) Regulations 2004 SI 194A OF 2004 as being of no force or effect in regard to any fees payable to any applicant during 2005.

The effect of the order by Karwi J, which in my view was permissible under the then existing subsection (2) of section 22 of the Education Act before its repeal and substitution by the present section 22 effective from 12 May 2006, was simply that this Court approved the fees and levies that the applicants submitted to the Permanent Secretary for 2005.

In September 2005, negotiations commenced between the present parties for a new format for charging fees and levies by non-government schools. These were successfully concluded in November 2005. The concept of adopting the CPI, which had been proposed

by the Applicants in Case No. 12682/2004, was accepted as the new formula for charging fees and levies by non- government schools.

The Minister, as indicated in the minutes of the inter-ministerial meeting which was chaired by the Minister of Justice, Legal and Parliamentary Affairs, produced by him as Annexure D to his opposing papers, understood the meaning of the use of the CPI in this new format. He was to repeat this same appreciation in the House of Assembly on 6 September 2006, when he stated thus: "Lastly, that Ministry approval of school fees proposals within the C.P.I. is automatic. But applications must be submitted to enable the Ministry to keep its finger on every school pulse".

The November 2005 agreement drove the Permanent Secretary to issue, in his Circular Minute No. 1 of 2006 dated 4 January 2006, interim arrangement guidelines on the charging of school fees and levies for Term One 2006 pending the promulgation of legislation incorporating the terms of the agreement. This circular was reproduced in a press release of 6 January 2006. It encouraged the use of the CPI in the calculation of fees and levies and set out the mathematical formula for doing so. Term One 2006 fees and levies were to be calculated using the CPI for Term Three 2005[which in turn would be based on the CPI for Term Two 2005.] The Minister did not prescribe any fees or levies for 2006 as he was mandated to do by the then existing Education Act.

The Applicants on the other hand understood the import of the November 2005 application of the CPI differently. They applied the year on year percentage rate of 585% to the figures approved by this Court in February 2005 in the confirmation proceedings in case no.12682/2004 to arrive at the Term One 2006 fees and levies. Fees for Term Two 2006 were set by the Applicants without the approval of the Permanent Secretary using the rate of increase in the CPI during Term One of 142.65 %.

On 12 May 2006, the Education Amendment Act, 2006 (No. 2 of 2006) came into force. It gave specific legislative recognition of the use of CPI in the setting of fees and levies. The parties were agreed that its provisions could only be utilized in the calculation of Term Three 2006 fees and levies.

On 26 June 2006, the Permanent Secretary issued out Circular No. 7 of 2006 entitled 'Policy on charging of school fees and levies in Government and Non-Government schools using the Consumer Price Index (CPI).' It set out the preamble, legal framework, mathematical formula and baseline period for which it would start from, documentation required and a remainder.

The applicants in their respective submissions for approval, purportedly based on the agreed CPI, disagreed on the calculation of the baseline period and baseline figures and in the interpretation of subsection (2) of section 21 of the Act with the Permanent Secretary.

On 6 September 2006 they were galvanized into action by the ministerial statement issued by the Minister in the National Assembly, which they deigned to be inimical to their interests. They had the sad events of May 2004 to reflect on, hence the launch of the first of the present applications.

The second application was again a reaction to the Minister's attempt to usurp a function, from which he was disempowered by the Education Amendment Act of 2006, of prescribing fees and levies for non-government schools.

It dawned on the parties that the Permanent Secretary could not deal with the applications for Term 1 of 2007 promptly " in accordance with the law" without the resolution of the legal disputes over the applicable baseline figure and the interpretation of section 21 of the Act.

THE AMENDMENT TO THE FINAL ORDER SOUGHT

The applicants seek a final order, in the terms of a draft final order which Mrs. *Jarvis* handed from the bar, which incorporates in the first paragraph the confirmation of the two provisional orders and introduces two 'new' paragraphs as paragraph 6 and 7. The justification advanced for introducing the new paragraphs, which I must say is correct, is that the issues they cover were raised in the second application in the Permanent Secretary's opposing affidavit. It is noteworthy that it was only the Minister who filed an opposing affidavit in the first matter. A notice of opposition was filed for both of them. While it would have been desirable for the Secretary to have filed an opposing affidavit, I do not consider his failure to do so fatal to his interest. As was properly noted by Mrs. *Jarvis*, for the applicants, there is a convergence of ideas between the Minister and the Secretary whom, in any event the Minister decided to represent.

The respondents did not counter-claim against the applicants. It is therefore legally impracticable for me to make an order in the terms as prayed in the Secretary's opposing affidavit. It may be that if I do not find favour with the applicants submissions on the points which are in contradistinction, then the implication will be that had the respondents properly counterclaimed I may have made the orders they seek.

THE ISSUES

These are common cause. They revolve around the baseline figures and the interpretation of section 21 of the Education Act, both before and after the amendment of 12 May 2006. The resolution of these issues will determine whether all or some of the provisions of the provisional orders should be confirmed. Sub-paragraphs (l) and (m) of paragraph 7 of the draft final order raise the issue of how the Secretary should deal with the applications of those of First Applicant's members who offer both day schooling and boarding services whose applications for an increase that are before him are in excess of the percentage rates set out in sub-paragraphs (b) and (c) of section (2) of section 21 of the Act, as amended.

THE NATURE OF THE PROVISIONAL ORDERS

It is agreed that they are interdicts. Those provisions which seek to bar certain conduct on the part of the Minister are prohibitory interdicts, while those which seek specific deliverables from the Secretary are mandatory interdicts.

In *Tribac (Pvt) Ltd v Tobacco Marketing Board* 1996 (2) ZLR 52 (S) at 56B-D, GUBBAY CJ, as he then was, stated as follows:

> "An application for a mandamus or "mandatory interdict", as it is often termed, can only be granted if all the requisites of a prohibitory interdict are established. See *Lipschitz v Wattrus NO 1980* (1) SA 662 (T) at 673C-D; *Kaputuaza& Anor v Executive Committee of the Administration for the Hereros & Ors* 1984 (4) SA 295 (SWA) at 317E.These are:
>
> 1. A clear or definite right—this is a matter of substantive law.
> 2. An injury actually committed or reasonably apprehended—an infringement of the right established and resultant prejudice.
> 3. The absence of a similar protection by an ordinary remedy. The alternative remedy must (a) be adequate in the circumstances; (b) be ordinary and reasonable; (c) be a legal remedy; and (d) grant similar protection.
>
> The *locus classicus* of the cases which sets out these criteria is, of course, *Setlogelo* v *Setlogelo* 1914 AD221 AT 227. See also *PTC Pension Fund v Standard Chartered Merchant Bank, Zimbabwe Ltd & Anor 1993*(1) ZLR 55 (H) at 63A-C."

It is not necessary for me to apply these three criteria to the prohibitory interdicts sought against the Minister, as these are conceded by Mr. *Muchenga*, for the Respondents, both in his written and oral submissions. Suffice it to say that it is a matter of clear law, as demonstrated by the Act, that the Minister is not seized with the power or authority to set fees for the Association of Trust Schools as he purported to do for Term One 2007. The same Act sets out the fate of any excess fees and levies. These can only be credited to the payee thereof and cannot be forfeited to the State.

The Secretary consents to the confirmation of paragraphs 8, 9 and 10 of the amended final order which deal with the collection of his decision by any applicant, the provision of his reasons in writing within 48 hours in the event that he turns down any application, and together with the Minister that the order that I shall make will remain binding until set aside on appeal and will not be suspended by the noting of an appeal.

The respondents challenge the confirmation of the two orders in certain respects. The onus to justify confirmation on a balance of probabilities, of course, rests on the applicants.

THE FIRST APPLICATION

The interim relief granted under B1 and B2 seeks to prohibit the closure of any non-government school that is maintained by any applicant or any member of the First Applicant and any arrest of any of these for purportedly violating the Act. The arrest prohibition is predicated on two conditions. The first of these is dependant on the release of the CPI for August 2006 and its receipt by the Secretary. This was published on 18 September 2006 and on the date on which the interim relief was granted, that is, 19 September 2006, the Secretary was aware of it. This first condition must therefore fall away. The second condition relates to the consideration and determination of the fee and levy application by the Secretary in accordance with the law. This will be resolved together with B3 and B4 by a determination of the legal issues, already highlighted above.

THE SECOND APPLICATION

At the hearing the parties agreed that the provisions for determination were paragraphs 5, 6 and 7 as set out by the applicants in the draft document entitled FINAL ORDER, which fall into the same category as B2, B3 and B4 of the first application.

THE SUBMISSIONS MADE AT THE HEARING

Mrs. *Jarvis*, for the Applicants, and Mr. *Muchenga*, for the Respondents, were agreed that the key issue for determination revolved on the interpretation of section 21 of the Act.

Before its amendment on 12 May 2006 it read as follows:

21 Fees payable at non-Government schools

(1) No responsible authority shall—

(a) charge any fee or levy; or

(b) increase any fee or levy by more than the prescribed amount or percentage in any

period of twelve months;

in respect of any pupil attending a non-Government school, unless the fee or levy or increase therein, as the case may be, has been approved by the Secretary.

(2) Any responsible authority who wishes to obtain approval for any fee or levy or increase therein in terms of subsection (1) shall make application to the Secretary in writing, setting out the details of the proposed fee or levy increase therein, and the basis of calculation thereof.

After the amendment, it now reads:

21 Fees and levies payable at non- Government schools

(1) Subject to this subsection, no responsible authority shall—

(a) charge any fee or levy; or

(b) increase any fee or levy;

In respect of any pupil attending a non- Government school, unless it makes prior application therefor to the Secretary in writing, setting out the full details of the fee or levy or increase thereof, and the Secretary has approved the fee or levy or the increase thereof, as the case may be.

(2) The Secretary shall approve any increase of fees or levies if the increase is sought in respect is sought in respect of the next term of the non-Government school concerned and the fees and levies—

(a) do not exceed the percentage increase in the cost of living from the beginning to the end of the preceding term as indicated by the Consumer Price Index published by the Central Statistics Office; and

(b) for day school students who are provided with meals are not more than forty *per centum* of the fees or levies paid by boarding students; and

(c) for day school students who are not provided with meals at the school are not more than thirty *per centum* of the fees or levies paid by boarding students.

Mrs. *Jarvis*, for the Applicants, submitted that the applicants were not obliged to seek approval for the fees and levies that they imposed in Term One and Term Two of 2006.She contended that they were not charging any new fees or levies but were merely increasing the old fees and levies. They had, so she maintained, charged the fees and levies on registration only and any payments sought and made thereafter were increases. They therefore did not fall foul of the old section 21(1)(a).Rather their conduct was governed by the old section 21 (1)(b). It was common cause that during the twelve month period of 2006 there was no prescribed amount or percentage that was set by the Minister. She therefore

contended that the applicants could and did lawfully increase the fees and levies as they saw fit.

Mr. *Muchenga,* for the Respondents, on the other hand, submitted that the old section 21(1)(a) and (b) are framed in clear and unambiguous language, which obliged the Secretary to approve any fee or levy or any increase thereof. He contended that in the absence of a prescribed amount or percentage by the Minister, there would be no increase that would take place because there would be no threshold to compare it with and any fee or levy that was imposed was therefore a charge. It was his further contention that the Applicants did not therefore fall under the provisions of the old section 21(1)(b) but under the old section 21(1)(a) as they were charging 'a fee or levy'. They were thus, so he argued, obliged in terms of the old section 21(2) to seek the Secretary's approval in writing. He maintained the view that the fee or levy charged was not governed by the date of registration of the non –Government school or by the introduction of a new fee or levy. He therefore contended that the fees and levies for Term One and Term Two of 2006 that were charged by the applicants were unlawful for want of the Secretary's approval.

There is need to explore in detail the argument made by Mr. *Muchenga* as to the meaning and effect of the old section 21(1)(a). The words "charge any fee or levy", at first blush, carry a wide meaning. In support of his contention that the word "any" carries a wide meaning he referred to the case of *Hayne and Company v Kaffrarian Steam Mill Company Ltd* 1914 AD 363 at 371 where Innes JA held that the word "any"

> "In its natural and ordinary sense "any"—unless restricted by the context—is an indefinite term which includes all of the things to which it relates. A qualification applied "any" of a certain class must necessarily affect each and all of the class."

Hayne's case was premised on the construction of a broker's note which formed the basis of the contract of the delivery of maize between the parties. The full remarks of INNES JA, which are instructive on how a court should construe the interpretation of written contracts as well as statutes, at pages 370-371, are couched in the following terms:

> "No doubt the first expression is the more general one, but it is by no means uncommon to find in contracts or in statutes, a general statement cut down by a proviso, in certain eventualities, to vanishing point. And we have to consider what in the present instance the operation of the qualifying clause is. That depends mainly upon the effect to be given to the word "any." In its natural and ordinary sense "any"—unless restricted by the context—is an indefinite term which includes all of the things to which it relates. A qualification applied "any" of a certain class must necessarily affect each and all of the class…….It is a question of the plain and ordinary meaning of language, and the expression "any of the maize…..in the 200 tons," are here used, necessarily comprehends each and every ton in that quantity, and, therefore, includes in its scope the whole cargo."

And at page 372 the learned Judge of Appeal proceeded thus:

> "To speak of the word "any" as being restricted by the earlier provision is incorrect; because the second clause qualifies the first, not the first the second. Any cutting down of the meaning of that word must be looked for not in the sentence which it qualifies but in the sentence where it occurs, and none has been inserted."

It is thus correct that the word any bears a wide meaning. It means all and can be substituted by such words as "whole", "entire" and "every". The full remarks of Innes JA are instructive in that they encourage a contextual and purposive approach to interpretation of contracts as well as statutes. The context may whittle down the meaning of an originally wide word. Indeed, the words or phrases or clauses which cut down the wide meaning often come after it, and not before it. These could be in the form of other subsequent clauses or provisos in the same section. The purposive approach calls upon the judge to give the meaning which is in tune with the reason behind the promulgation of the statute under consideration. It is this reason that assists in unraveling the mind of the lawmaker.

In the present matter the word "any" relates to the nouns "fee and levy". On the other hand the word "charge" is not a noun but a verb which may be substituted by such words as 'demand', 'request', 'ask', or 'debit' The argument on behalf of the respondents is that because the applicants were requesting for fees or levies during these two terms, they needed the Secretary's approval before they could effect the request. One has to relate this argument to the context of the present matter to assess its validity. The context was one that was characterized by the absence of a prescribed amount or percentage in Term One and Two of 2006. The last prescribed amount had been the one sanctioned by this Court for the 2005 calendar year, which can legally be deemed to be the Minister's by virtue of the confirmation of Makarau J's order wherein in clause 1.3 thereof " all appeals against any such decision in terms of section 22 of the Education Act [*Chapter 25:04*] must be allowed". The 2005 fees and levies were the last prescribed amounts. Now, the logical conclusion of Mr. *Muchenga's* argument is that any fee or levy that was sought by the applicants, for these two terms of 2006, required approval even if the Applicants had, for one reason or another, demanded the same amount of, or reduced, the fees or levies that were court sanctioned. In the context thus postulated, to submit that the applicants required approval would do violence to the intention of the lawmaker in promulgating the old section 21(1)(a). After all, the purpose of promulgating that section was to prevent the responsible authorities from imposing exorbitant fees or levies. Those already approved would not require a second approval at the commencement of a new calendar year simply because the parents or guardians of the students were being asked to pay fees or levies for that fresh year. It must follow that what sought to be approved were not the old fees or levies but any

increase from the old approved fees or levies. Thus, in my view, section 21(1)(b) qualified the seemingly wide meaning of section 21(1)(a) of the Act.

I find merit in the contention by the applicants that the old section 21(1)(a) in question was promulgated to cater for, firstly, the very first application made by a non-government school on its registration for its initial fee or levy or, secondly, the introduction of a new class of fee or levy by an already registered non-government school. Such a finding, in my view, is the only one which would give meaning to both the old section 21(1)(a) and 21(1)(b) of the Act. It would have been unnecessary for the lawmaker to promulgate the old section 21(1)(b) as an increase of any fee or levy above the prescribed amount or percentage in any period of twelve months would still be a demand of any fee or levy. For the two sub-paragraphs to co-exist, the legislature must have intended that they bear different meanings. This view is further buttressed by the fact that an increase would only be an incremental or additional amount or percentage of an already existing, known and approved fee or levy. In any event the respondents were unable to counter the averment that since the inception the old section 21(1)(a) in our law through the Education Act No. 5 of 1987 on 8 June 1986 as amended by the Education Amendment Act No. 26 of 1991, no approval of an existing fee or levy was ever sought by any non-government school or demanded by the Secretary. This is a further pointer to the fact that the respondents did not ascribe the meaning that they now advance in argument to this paragraph.

I therefore hold that there was no legal obligation, in terms of paragraph (a) of subsection (1) of section 21 of the Education Act then in force, on the part of the applicants to seek approval from the Secretary for the increase of the already existing fees and levies that they charged during Term One and Term Two of 2006.

The applicants further contended that the provisions of paragraph (b) of subsection (1) of section 21 of the Act, before its amendment on 12 May 2006, did not apply to them when they increased the fees and levies during these two terms in question. This contention was based on the absence of any prescribed fee or levy in any period of twelve months, by the Minister. They therefore did not have any reference point which would trigger the application for approval. The correctness of this submission cannot be gainsaid. The whole purpose for prescription was to notify the non government school of the limit beyond which they could not increase fees or levies without seeking authority. It is noteworthy that one of the major differences between the old and new section 21(1) of the Act lies in the requirement for approval for any level of increase in the new, while in the old approval could only be sought if the level of the increase exceeded the prescribed amount or percentage. There was therefore no need for the applicants to seek approval for an increase

in the fees or levies from the Secretary, in the absence of prescription by the Minister. The applicants, faced with this situation, increased their fees by utilizing the CPI concept that had been agreed upon with the Minister in November 2005, for the first and second terms of 2006. That there was nothing illegal in using this formula, is clear from the attempt by the respondents to decree its use in the Secretary's circular No.1 of 2006.I therefore hold that the increases that the applicants imposed during these two terms of 2006 were lawful.

THE BASELINE FIGURE FOR TERM THREE OF 2006 AND TERM ONE OF 2007

The baseline figure against which the relevant percentage increase in the consumer price index should be applied is the next bone of contention between the parties. The parties are agreed on the applicable CPI increases of 142.65% and 159.55% for Term Three 2006 and Term One 2007. The formula for applying these percentages is found in the present section 21(2) of the Act which prescribes the new limit to the percentage increase in the cost of living from the beginning to the end of the preceding term as indicated by the CPI published by the Central Statistics Office. As long as the increase sought does not exceed the CPI, the Secretary is mandated to give his approval. He has no power, in these circumstances; to reject or amend the fee or levy, save, of course, to correct arithmetic errors.

The respondents seek to use the baseline figure of the fees and levies set by this Court in February 2005. They wrongly, in my view, contend that these are the last lawful amounts that were increased by the applicants. I have already held that the increases of fees and levies by the applicants in 2006 were lawful. It must follow that the correct baseline figure for increasing the fees and levies for Term Three of 2006 is the application of the CPI in terms of section 21(2) of the Act. The appropriate figures would be those that are based on the Term Two calculations that were done by the Applicants, provided the arithmetic is accurate. *A fortiori*, the baseline figure for Term One of 2007 is based on the accurate amounts calculated from the Applicants' Term Three 2006 figures.

It is noteworthy that the respondents' papers reveal their failure to comprehend the meaning of paragraphs (a), (b) and (c) of subsection (2) of section 21 of the Act with reference to single mode day schools. They suggested that day schools should increase fees and levies at the rate of 40% of the fees and levies of boarding schools. This was a fallacious suggestion which was sensibly abandoned in argument. For day only schools, paragraph (a) of subsection (2) of section 21 of the Act would apply. The cost centers of day schools are clearly different from those of boarding schools in certain significant respects but the incidence of our runaway inflation would hit them both equally. There would be no rational reason for basing the calculation of the fees and levies of day schools on those of

boarding schools. The words "the non-Government school concerned" and "at the school" clearly show that these three paragraphs are meant to apply to the same school which offers boarding facilities, meals to day school students and no meals to day school students.

In the event that the calculations for those non government schools which offer boarding facilities, and day schooling (with or without meals) exceed the 40% and 30% as mandated in paragraphs (b) and (c) of subsection (2) of section 21 of the Act, respectively, the applicants seek that the Secretary considers and approves them in terms of section 21(5) of the Act. Further that even though he may reserve his decision, he should not reject the applications until the validity of the ratios set out in the two paragraphs of section 21(2) in question have been definitively determined by the courts. I see no basis for granting such wide relief in confirmation proceedings.

Section 21(4) of the Act directs those schools in applicants' shoes to make a prior application in writing to the Secretary setting out the full details of the increase and proof that it has been approved by the majority of not less than twenty *per centum* of all the parents and guardians of the affected students at a meeting of the Schools Parents Assembly. The applicants have not shown on a balance of probabilities that they have made such a written application. Such an application must be consciously and deliberately made and cannot be left to the Secretary to presume that because the application for an increase in terms of subsection (1)(b) as read with subsection (2)(b) and/or (c) of section 21 of the Act has failed, then he should automatically and of his own accord invoke the provisions of subsection (4) and (5) of section 21 of the Act.

Again, section 21(5) permits the Secretary to consider and grant the application in excess of the ratios set out in section 21(2)(b) and (c). He must apply his mind to the four criteria there set in, always bearing in mind the need to give the affected schools the right to be heard, in accordance with section 3(1)(c) of the Administrative Justice Act *[Chapter 10:28],* before he makes any adverse decision. He can approve the increase, amend the figures to fall to the level of the ratio set in section 21(2) of the Act or reject the application. In the event that he gives an adverse decision, he is obliged to give his reasons for so doing.

It seems to me that the schools which did not comply with the provisions of section 21 (4) of the Act cannot receive this Court's protection for such a conscious and deliberate failure to follow the clear precepts of the law. If, however, section 21(4) was complied with then all I can direct the Secretary to do is to exercise his powers in terms of section 21 (5) of the Act. The applicants' papers do not show that the provisions of subsection (4) and (5) of the Act were complied with. Accordingly, I will decline to make an order which

incorporates paragraphs (l) and (m) of the draft final order, as it appears that no such application was lodged with the Secretary.

CONCLUSION

The three requirements for a final interdict as set out in the *Tribac (Pvt) Ltd*, case, *supra,* favour the Applicants. In terms of the substantive law, the Secretary is obliged to approve their increases as they are in line with the appropriate rates of inflation for the preceding terms, respectively. They have established that they have been injured by his failure to implement the letter and spirit of the law. It is not suggested that there is any suitable remedy outside the prohibitory and mandatory interdicts sought. I will therefore confirm the two provisional orders in terms of the draft final order, as amended.

COSTS

These must follow the event.

DISPOSITION

IT IS HEREBY ORDERED THAT

1. The interim relief granted in HC 5883/06 and in HC 7624 be and is hereby confirmed.

2. First Respondent's announcement that he had set fees for ATS schools for Term One of 2007 is declared to be ultra vires and of no force and effect.

3. It is declared that any fee or money collected in excess of any fees or levies that may be lawfully determined in accordance with the Education Act [Chapter 25:05] as amended will only be reclaimable by or can only be credited to the parent or other person who paid it.

4. Accordingly the Respondents shall not seek to forfeit any of these for the benefit of the State.

5. Upon publication of December's Consumer Price Index and receipt of any applications for approval of fee increases for a school and any calculations referred to hereafter, Second Respondent shall forthwith consider every such application and notify the responsible authority of his approval or other decision in accordance with the law without delay, and at most within 10 working days of such receipt or of this Order, whichever is later.

6. The order sought by the Respondents in paragraph 2.20 of their opposing affidavit is not justified by the law and is hereby refused.

7. In deciding what is in accordance with the law, the Second Respondent shall ensure that he is guided by the following:

   (a) Increases in fees by responsible authorities without the approval of the Second Respondent before the amendment of the Education Act [*Chapter 25:04*] by Act 2 of 2006 were not unlawful, as there was no prescribed maximum amount or percentage for such increases under section 21 as it stood at the time.

   (b) The responsible authorities did not act unlawfully in voluntarily applying the increases in the Consumer Price Index to their fees to calculate their fee increases before the Education Amendment Act came into effect.

   (c) The Second Respondent shall not use the figures he gave in Appendix H to his opposing affidavit as his baseline for applying cost of living increases in line with the in the Consumer Price Index since the Education Amendment Act came into effect.

   (d) The Second Respondent shall use the fees that were charged for a school when the Education Amendment Act was brought into effect, that is, the fees charged in Term 2 of 2006, as his proper baseline.

   (e) The Second Respondent shall first deal with each application for his approval of a fee increase for Term 3 OF 2006, and then with the corresponding application for his approval of fee increases for Term 1 of 2007, dealing with each in turn in accordance with the law

   (f) The Second Respondent will first establish whether each school offered parents and pupils a choice between day schooling and boarding schooling, or whether that particular school offered only one type of schooling and accordingly only had a fee for day scholars, or only had a fee for boarding scholars.

   (g) If the particular school only had a fee for day scholars, or only had a fee for boarding scholars, Second Respondent shall approve:

      I. any increase sought for its fee for Term 3 of 2006 that did not

exceed 142.65% of its baseline fee specified above; and then

II. any increase from that fee that is sought for Term 1 of 2007 and does not exceed 159.55% the increase in the cost of living shown by the percentage increase in the CPI from 1 September to 31 December 2006.

(h) Second Respondent shall not limit any increase for day schools to a percentage of CPI's increase.

(i) Second Respondent shall issue such approvals within the aforesaid period of ten days or within any extension thereof accepted in writing by Applicants or failing agreement, sought as a variation of this Order and granted by a judge of this Court.

(j) If he has established that a school offered its parents and pupils a choice between boarding and day schooling, in considering its application Second Respondent may first determine whether the ratio between the fees charged at that particular school for day scholars and boarders was in line with the relevant ratio stipulated in section 21 (2) (b) or (c) of the Education Act [*Chapter 25:04]* as amended.

(k) If they were in accordance with the relevant ratio, the Second Respondent shall deal with them in accordance with paragraph (f) above.

8. Any responsible authority may make arrangements to collect a copy of its approval/s or other replies from the Second Respondent's office.

9. Should the Second Respondent decide not to approve any application, he shall provide written reasons for his refusal to the appropriate responsible authority with his reply advising of this, within 48 hours thereafter.

10. This Order shall remain binding pending any appeal and until set aside by a competent court, and will not be suspended merely by noting an appeal.

11. The Applicants shall deliver to the Commissioner of Police a copy of this Order, for information purposes only.

12. Respondents shall jointly and severally, the one paying the other to be absolved, pay the Applicants' costs including the costs occasioned in HC 342/07.

Messrs Atherstone and Cook, plaintiff's legal practitioners.
Civil Division of the Attorney-General's Office, Respondents' legal practitioners.