

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

PAULA VAN ZYL

1st APPELLANT

WILLIAM KASAILA

2nd APPELLANT

AND

BEANOR CHINGANDU

RESPONDENT

CORAM: Chashi, Sichinga and Ngulube, JJA

ON: 25th March, 8th April and 22nd July 2021

For the Appellants: E. Tembo and V. Kachaka, Messrs ICN Legal Practitioners

For the Respondent: N. C Nalungwe (Ms.) Mesdames Maria Neves Legal Practitioners

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. **Henry Nsama and 1,314 Others v Zambia Telecommunication Company Limited - SCZ Judgment No. 42 of 2014**
2. **Trollope and Colls Limited v North West Metropolitan Regional Hospital Board (1973) 2 All ER, 260**

Rules referred to:

1. **The High Court Rules, Chapter 27 of the Laws of Zambia**

1.0 INTRODUCTION

1.1 This appeal emanates from the Judgment of Honourable Mr. Justice M. Chitabo, SC delivered on 19th July 2019. In the said Judgment, the learned Judge ruled in favour of the Respondent, to the effect that, the school, which was the subject of litigation was a private school and the Respondent should continue running it as such.

1.2 Consequently, the *ex parte* Order of injunction which was granted against the Respondent was discharged, as according to the learned Judge, the Respondent had a legitimate right to be on the premises.

2.0 BACKGROUND

2.1 The Appellants, who were the applicants in the court below took out an originating summons against the Respondent, pursuant to Order 30/11 of **The High Court Rules¹ (HCR)** seeking the following reliefs:

- (i) A declaration that the school known as Aunt Beanor's Pre School, located at No. 2, off Nakatindi Road, in the Mwandi district in the Western Province of Zambia is a community school and not a private school.
- (ii) An Order of interim injunction, to restrain the Respondent either by herself, agents, servants or whomsoever from trespassing, interfering, demarcating, selling, occupying or running Aunt Beanor's Pre School and/or carrying out any steps to change the community school into a private school pending determination of the main matter.

2.2 In the affidavit in support of the originating summons deposed to by the 1st Appellant, it was asserted that, the 1st Appellant and the Respondent entered into an agreement dated 17th August 2015 in respect to the school. According to the 1st Appellant, the property and building donated by the 1st Appellant were to be turned into a community school. That the

land on which the school is built is community land and it was given to the 2nd Appellant and is called Kasaila Community land.

It was further asserted that as the land was community land, the Barotse Royal Establishment (BRE), the traditional authority was informed about the agreement and they accepted and approved it. That the agreement stipulates the role that each of the parties to the agreement was to undertake. According to the 1st Appellant, she donated the existing building and sought other donors interested in helping a community school and ensured that extra buildings were constructed and everything needed in the classrooms was made available. In addition, the 1st Appellant was accountable to the donors.

2.3 The 2nd Appellant was given the responsibility of signage as per the agreement and he painted the name of the school, as “Aunt Beanor’s Community Pre School”. That the Respondent was put in charge of day to day running of the school and was given the task of obtaining the school certificates from the Government to operate a Pre School and comply with all

Government regulations. That however, the Respondent did not register the community school.

2.4 The 1st Appellant asserted that the school upon the Respondents request was given the name “Aunt Beanor’s Community Pre School” in recognition of her being the first to officially run the school. That surprisingly and to the 1st Appellant’s shock, the Respondent changed the community school to a private school. As a result, a lot of children who were going to the community school stopped going there because of the illegal change. That many children who were being sponsored under the community school, could not get sponsorship under the private school. According to the 1st Appellant, she and the donors have spent a lot of money to benefit the community and private individuals. That she has also fully furnished the classrooms and provided all the necessary materials.

2.5 According to the 1st Appellant, the change has brought about heightened tension in the community, leading to some members writing a petition to the Council chairperson in Mwandia. That she has also received threats from the Kuta

(BRE), despite being the ones who officially opened the community school.

2.6 In opposing the application, the Respondent filed an affidavit in which she deposed that in order to raise funds to support the family, she started a school named “Aunt Beanor’s Pre School” in January 2012 at her home in Sipopa Section, Mwandu Royal Village. That the school was registered in that name, and was even known by the Ministry of General Education as a private school.

2.7 According to the Respondent, in October 2017, the 1st Appellant who was running “Home for Aids Orphanage” extended the school the subject of litigation by adding two new rooms and toilets behind the school building. That she then left for the United States of America and returned in November 2017. The Respondent asserted that following an understanding with the 1st Appellant on the separation of the businesses, she had the school painted “Aunt Beanor’s Private Pre School”. That however, upon her return from America, the 1st Appellant informed her that she wanted to change the registration of the school from private to community, as she could not raise funds if the name remained private. That when

she refused, as part of the reconciliation, it was agreed that the Respondent would remain in the original building and the community school, would be the two new rooms the 1st Appellant had built.

2.8 It is further asserted that in November 2017, the 1st Appellant sent out notices for grade one learners as Home for Aids Orphanage for 2018 enrolments to the new community school. That directions to the new community school location were given as being directly behind Aunt Beanor's Pre School.

2.9 That despite the understanding after the reconciliation, the 1st Appellant went on to claim the entire building and repainted the school name from private to community, leading her to seek intervention from the BRE.

2.10 The Respondent further asserted that unknown to her, sometime in 2017, the 1st Appellant went to the Ministry of General Education to register the pre-school as a community school, which led to the standard officers from the Ministry visiting to evaluate the suitability of the school as a private school being upgraded to a community primary school. That the monitoring report dated 1st August 2017 issued by the officers stated that *"the current infrastructure available at this*

site is only suitable for the pre-school; additionally the area is not big enough to allow for the setup of a community school as there is no room for expansion and strongly recommended that a community school led committee identifies a bigger area for the setup of the proposed community school...”

2.11 The BRE informed the 1st Appellant that they had found and allocated a bigger piece of land and that if she was interested in helping the community build a school, she could do so through the community mobilization committee which had been established.

This piece of land was found suitable by the Ministry but the 1st Appellant rejected it, claiming that she had already spent money on the two new classrooms.

3.0 DECISION OF THE COURT BELOW

3.1 After considering the evidence and the submissions by the parties, the learned Judge found that there was an agreement between the two Appellants and the Respondent. That based on the said agreement which was approved by the BRE, the 1st Appellant was to provide funding for a school in the community which was to be run by the Respondent. That at the time of

the agreement, the 2nd Appellant was in charge of the land as it was referred to as Kasaila's community land.

According to the learned Judge, what was left was for the court to establish whether Aunt Beanor's Pre School was a community school or a private school being run legitimately by the Respondent.

3.2 The learned Judge noted that the agreement in issue was freely entered into by all the parties. The agreement stipulated that the Respondent was to be given an existing building on Kasaila's community land, which was to be turned into a pre-school. The learned Judge found that the Respondent was legitimately running a pre-school prior to the agreement. That it was also clear the reason she was incorporated into the agreement was because she was running a private pre-school and she had the necessary expertise in the area. That although the roles of the parties were highlighted in the agreement, it did not state anywhere that the school was a community school.

3.3 According to the learned Judge, the monitoring report from the Ministry dated 20th August 2017 clearly stated that while there was an extension of classrooms, the infrastructure of the school in issue was only suitable for a pre school and was not

big enough to allow for the setting up of a community school. In the learned Judge's view, the report spoke for itself that the school at its current location was not fit to be termed as a community school. The learned Judge was satisfied that despite the intention expressed by the 1st Appellant to have a community school the school in issue cannot be a community school because it does not qualify to be as such, as established by the authorities. Further that, having established that Aunt Beanor's Pre School is an existing school as noted from the annual census for schools and the earlier monitoring report in 2016, the learned Judge found that Aunt Beanor's Pre School was a private school.

3.4 With respect to whether the Respondent can continue to operate at the current premises, the learned Judge reverted to the terms of the agreement and found no reason why the Respondent could not continue to operate in the building that was assigned to her under the agreement, merely because she is not running a community school.

According to the learned Judge, that intention was not expressed in the agreement and the court cannot begin to read into the terms of the agreement.

The learned Judge then ordered that the Respondent continues running her private school in the building that was donated to her and the 1st Appellant was at liberty to use the other rooms constructed for the other uses other than a community school as the infrastructure did not allow for it to be such.

4.0 THE APPEAL

4.1 Dissatisfied with the Judgment, the Appellants have appealed to this Court advancing the following grounds:

- (i) The learned trial Judge erred in law and fact by basing his decision on a monitoring report from the Ministry of Education without considering the 1st Appellants affidavit in reply to the affidavit in opposition to originating summons.
- (ii) The learned trial Judge misdirected himself by making a finding not supported by evidence that the building was donated to the Respondent when the agreement does not say so.
- (iii) The learned trial Judge erred in law and fact by ignoring case authority quoted at page J30 and J31 which clearly states that an unexpressed term can be implied if and

only if the court finds the parties might have intended that term to form part of their conduct; Private school was never an agreed term.

- (iv) The learned Judge erred in law and fact by stating correctly at the end of page J31, that this intention was not expressed, leading to a wrong Order.

5.0 ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 In arguing the appeal, Mr. Tembo, Counsel for the Appellants relied on the Appellant's heads of argument. In arguing the first ground of appeal, Counsel submitted that apart from looking at the monitoring report the court should also have looked at exhibits "PZ33" and "PZ34" in the 1st Appellant's affidavit in reply. That in the reply, the 1st Appellant disagreed with some of the issues in the report, especially on the point that the premises were only suitable for a pre-school. That in the said reply, the 1st Appellant quoted several points from the community school guidelines to support her disagreement. It was Counsel's submission that the learned Judge would have arrived at a different conclusion if he had considered the affidavit in reply, as he would then have understood that the

monitoring report merely contained recommendations and not orders.

5.2 As regards the second ground, Counsel drew the attention of the Court to page J15, line 4 to 7 where it was stated that:

“She conceded to visiting the Respondent with Mathew Burditt but denied proposing to help her private school and denied giving her the building.”

According to Counsel, the court below was correct that the 1st Appellant denied giving the Respondent the building. That, that is why it was shocking that the same court after noting again at page 375 of the record (J31) that the building was assigned to the Respondent continues to run her private school in the building donated to her. It was contended that there was no building donated to the Respondent by the 1st Appellant. That there is nowhere in the agreement where it states that the building was donated to the Respondent.

5.3 It was further submitted that the learned Judge had good case law on matters involving contracts and even quoted from them as shown at pages J30 - J31 of the Judgment. It was contended that there was no implied intention by the 1st

Appellant to donate the building to the Respondent. That the Respondent was only meant to use the building as the one tasked with the running of the school.

That in fact the contract shows that *“Compensation for the use of the property shall be a separate contract between the 2nd Appellant and the Respondent.”*

5.4 In respect to the third ground, Counsel conceded that the agreement mentions a pre-school without stating expressly whether it would be a community or private school. That it is in such instances that a term can be implied in the contract. That however, the case law relied on by the court says only if it was intended by the parties and it must be a term that goes without saying. A term necessary to give business efficacy to the contract.

It was submitted that the school being on community land and having been officially opened by BRE as such, the term community School should be implied and this Court should find that the school was intended to be a community school and declare it as such.

5.5 As regards the fourth ground, it was submitted that the court below was clearly alert as to what the law demands. That the

court cannot begin to read into the terms of the contract that were not expressed, leading to a wrong order of the court.

That, notwithstanding, the court went ahead and read “private” into the terms of the agreement and the term “donated the building to the respondent”, in total disregard of the caution the court earlier gave.

6.0 RESPONDENTS ARGUEMENTS IN OPPOSITION

6.1 In opposing the appeal, Ms. Nalungwe, Counsel for the Respondent relied on the two sets of arguments which were filed into court. Before we proceed with the response, we acknowledge that it was brought to our attention through the arguments by way of objection that the matter in the court below was under cause number 2019/HT/09 and not 2017/HT/09 as indicated on the Judgment. In our view, this was a typographical error which could have been brought to the attention of the court below through the slip rule. This is not an issue which can be raised now as a preliminary issue, through heads of argument.

6.2 In response to the first ground of appeal, Counsel submitted that, the Ministry of Education is obliged to comply with

government regulations on community schools to enable standardisation of community schools throughout the country.

That **The Operational Guidelines for Community Schools of 2007** and **The Education Act 2011** gives clear policy direction on community schools in Zambia and the Government policy to transition of community schools to fully fledged government schools.

6.3 Counsel drew our attention to the monitoring report and the recommendations therein. That despite the monitoring report, the 1st Appellant refused to comply.

6.4 In response to the third ground, Counsel submitted that the evidence in the court below clearly showed that the land is the Respondent's. That the conduct of the parties showed that the 1st Appellant took up some rooms to run as a community school and the other room was left to the Respondent to run as a private school. That the court below was on firm ground following the monitoring report that no community school could be run on the premises, which was donated to the Respondent as she had a legitimate right to be on the premises. According to Counsel, the BRE, being the custodian of the land, granted the land to the Respondent and intervened to have the

Appellants comply, strongly corroborates the Respondent's position.

6.5 In response to the fourth ground, Counsel submitted that the court below was on firm ground when it held that no community school could be run on the premises which was donated to the Respondent and as such she had a legitimate right to be on the premises. That the pre school was being run as a private school from 2015 until 2018 when the 1st Appellant forcibly removed the Respondent from the school in order to change it into a community school.

7.0 ARGUMENTS IN REPLY

7.1 In reply, Counsel for the Appellants in respect to the first ground of appeal submitted that a recommendation in the monitoring report is just a recommendation and nothing more and should not be confused with an order.

7.2 In reply in respect to the second ground, it was Counsel's view that Respondent is confusing the community land and the building.

That the agreement shows that the community land came into the agreement by way of the 2nd Appellant and not the

Respondent. That the agreement did not say anywhere that the land belonged to the Respondent. It was Counsel's contention that the Respondent's argument based on the questionable letter purported to be from BRE stating that the land belongs to the Respondent was not canvassed in the court below in that no one was called from BRE to support the letter.

7.3 In reply as regards the third ground of appeal, Counsel submitted that, it was the Respondent who was given the responsibility to register the school. That the agreement did not state that the school should be registered as a private school. That therefore, the Respondent misrepresented the school as a private school; a move clearly in her favour as against the 1st Appellant who wanted a community project and whose fundraising ventures are community based and not private.

It was further submitted that the evidence in the court below shows that at the official opening of the school in the presence of the main guest from BRE, the name of the school was clearly marked as community school. That it was therefore not clear when and how the intention was changed by the Respondent to private school.

7.4 In reply to the fourth ground, Counsel reiterated his submission that the court below went against its own caution of not reading into the terms of the agreement.

8.0 CONSIDERATION AND DECISION OF THIS COURT

8.1 We have considered the arguments by the parties and the Judgment being assailed. We note from the onset that the originating process in the court below was by way of originating summons pursuant to Order 30/11 **HCR**. Therefore, the matter as correctly conducted by the court below, was to be disposed of in chambers by way of affidavit evidence. In that vein, the learned Judge in the determination of the matter was restricted to the affidavit evidence and the exhibits, thereto, which were before him.

8.2 We also note that, the court below was being called upon to determine a very narrow issue as to whether the pre-school was a community or private school. In determining the question, the learned Judge examined all the documents which were before him. At the centre stage of these documents, which was the genesis of the misunderstanding between the parties, was the contract dated 17th August 2015.

8.3 It is incumbent that we identify the salient points in this contract before we consider the grounds of appeal. This contract was entered into by the 1st and 2nd Appellants and the Respondent. The three parties came together for the purpose of running a project. The project was to be conducted on the 2nd Appellant's land known as Kasaila's community land and it was for the establishment of a pre-school to cater for children aged 3 to 6 years. The 1st Appellant donated to the project a one room building, which the parties agreed to call "Aunt Beanor's Pre School". According to the agreement, the 1st Appellant was obliged to provide certain materials for the pre-school. The Respondent was tasked with the responsibility of obtaining the school certificates from the Government to operate a pre-school and comply with all Government regulations and to be in charge of the pre-school. It was also the Respondent's duty to attend to day to day running of the school, collection of school fees and payment of operational expenses. The agreement concluded by stating that compensation for the use of the property shall be a separate contract between the 2nd Appellant and the Respondent, by way of a separate contract.

8.4 It is evident that the contract neither stated that the pre-school will be a community school nor a private school. What we can easily deduce from the agreement is that the school as per the agreement was to be called "Aunt Beanor's Pre School". Therefore, the issue of whether it should be called a community or private school, is something which was not envisaged by the parties and goes against what was agreed by the parties. The name of the school was agreed as "Aunt Beanor's Pre School".

8.5 We note that the role of each party in the agreement was spelt out. There was no role assigned to the community to play in the project nor was there any mention of what benefit the community will derive from the project. A focused understanding of the contract weighs towards the school being a private school. We take that view because the Respondent in the running of the school was to run it as a business. She was mandated to charge and collect school fees and pay for all operating expenses. The Respondents' running of the school was not to be free of charge as she was to be subjected to payment of compensation to the 2nd Appellant by way of a separate contract between the 2nd Appellant and the Respondent.

8.6 We now revert to the grounds of appeal. The first ground of appeal attacks the learned Judge for basing his decision on a monitoring report from the Ministry of Education, without considering the 1st Appellant's affidavit in reply, in particular exhibits "PZ33" and "PZ34". A perusal of the Judgement of the court below shows in particular at pages 358 to 361, that the learned Judge did consider the Appellant's affidavit in reply, although no specific reference was made to exhibits "PZ33" and PZ34".

8.7 From the Judgment, it is evident that in arriving at his decision; the learned Judge considered all the affidavit evidence on record and in doing so, paid particular attention to the contract between the parties and its terms. The learned Judge also referred to the monitoring reports of 2016 and 2017 from the Ministry of Education to arrive at the conclusion that the pre-school has always been registered as a private school since inception, because it did not meet the requisites as set out by the authorities for a community school. In our view, we see nothing wrong in the learned Judge taking on board the monitoring reports.

8.8 We note that “PZ33” is a letter from the Ministry of Education to the 1st Appellant. The letter is dated 4th November 2017. The subject matter is the advertisement for enrolment of 1st grade students to the new community school. This letter was in response to the advertisement by the 1st Appellant, appearing at page 118 of the record which was calling for enrolment in the new community school, located behind “Aunt Beanor’s Pre School”. The advertisement advised the members of the public not to go to the pre-school and goes on to give further directions as to where to find the new community school. PZ33 lays out Government policy in respect to what is required to establish a community school. As the requirements were not met, the Ministry declined to approve the new school as a community school. PZ34 is a letter of response from the 1st Appellant to the Ministry in which the 1st Appellant sought to clarify certain issues.

8.9 In our view both “PZ33” and PZ34’ have no bearing on the pre-school in issue as they related to a new community school, located behind the pre-school and not the pre-school, subject of litigation. In the view we have taken, even if particular

attention had been given to the two exhibits, the learned Judge would still have arrived at the same decision as he did.

8.10 The second ground attacks the learned Judge's finding of fact that the pre-school building was donated to the Respondent when the contract did not state so. We agree with the Appellants that the finding by the learned Judge was perverse as it was not supported by evidence. As earlier alluded to, the contract categorically stated that the Appellant was donating the building to the project and not the Respondent. We find merit in this ground, although it does not go to the substance of the success of the appeal.

8.11 In respect to the third and fourth grounds of appeal, the Appellants allege that the learned Judge ignored case law, appearing at pages J30 and J31, which clearly states that an implied term can be implied if and only if the court finds that the parties must have intended the term to be part of their contract. Furthermore, that despite the learned Judge correctly stating at page J31, that the intention of the parties was not expressed in the contract, and the court cannot begin to read into the terms of the agreement, the court however, still went

ahead and read terms into the contract that were not expressed.

8.12 Indeed, in looking at the terms of the contract, the learned Judge called into aid the case of **Henry Nsama and Others v Zambia Telecommunications Company Limited**¹ where the Supreme Court cited with approval the case of **Trollope and Colls Limited v North West Metropolitan Regional Hospital Board**², where it was stated as follows:

“... I prefer the views of Donaldson J and Cairns LJ as being more Orthodox and in conformity with the basic principle that the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable, the improvement might be. The court’s function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings; the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpected term can be implied if and only if the court finds that the parties must

have intended that term to form part of their contract; it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them. It must have been a term that went without saying to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves”.

8.13 Premised on the said authorities, the learned Judge opined that in the instant case, the terms of the contract were express and he found difficulty in reading into the contract.

8.14 We do not see anywhere where the learned Judge read into the terms of the contract. The learned Judge based his decision on his understanding of the contract in light of the affidavit evidence and the monitoring reports from the Ministry of Education. As such we find no basis on which to fault the learned Judge.

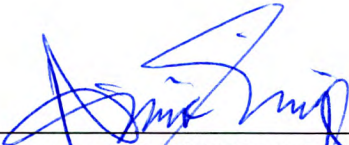
9.0 CONCLUSION

9.1 The appeal having substantially failed, it is accordingly dismissed for lack of merit. The costs of the appeal are to be

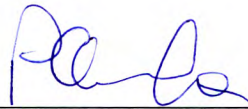
borne by the Appellants. Same are to be paid forthwith and to be taxed in default of agreement.

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J. CHASHI
COURT OF APPEAL JUDGE

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D. Y. L. SICHINGA, SC
COURT OF APPEAL JUDGE

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P. C. M. NGULUBE
COURT OF APPEAL JUDGE