



**JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY**



**CIVIL CAUSE NO. 96 OF 2017**

**BETWEEN**

**CAROLYN BEHAN ..... PLAINTIFF**

**AND**

**THE BOARD OF GOVERNORS OF SAINT**

**ANDREWS INTERNATIONAL PRIMARY SCHOOL ..... DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**

Mrs. Jumbe, of Counsel, for the Plaintiff

Mr. Jangale, of Counsel, for the Defendant

Mr. O. Chitatu, Court Clerk

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**ORDER**

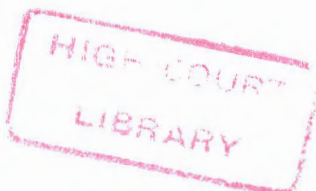
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*Kenyatta Nyirenda, J.*

This is an application brought under Order 29 of the Rules of the Supreme Court (RSC) whereby the Plaintiff seeks an order of injunction restraining the Defendant from proceeding with the disciplinary hearing against her before the decision of the Head Teacher is reviewed on the grounds that the decision is unjust, unlawful and against the principles of natural justice and fair labour practice, until trial or determination of the main action herein or a further court order.

The application came before me on 29<sup>th</sup> March 2017, by way of an ex-parte summons, and there was filed along with the ex-parte summons an affidavit, sworn by the Plaintiff [Hereinafter referred to as the "Plaintiff's Affidavit"]. I granted an interlocutory injunction subject to the Plaintiff filing an inter-partes summons for continuation of the injunction within 10 days from 2<sup>9th</sup> March 2017.

The Plaintiff's Affidavit is couched as follows:



- “3. **THAT** *I have been a close family with Nicola Everett (Nee Desmond) since 2012.*
4. **THAT** *in or about 2015, I heard that Nicola Everett and her husband, Dean Everett were having family problems, and because of the proximity or closeness that we were as two families. I sent Nicola Everett a strong message of concern. Now produced and shown to me is copy of the whatsapp message that I sent to her marked ‘CB’*
5. **THAT** *Nicola Desmond did not take action against me and we were still in good terms despite the problems that she eventually had to separate from her husband.*
6. **THAT** *On or about the 10<sup>th</sup> Day of February 2017, I (as Sophie’s god mother) and the Defendant’s Head Teacher had a discussion over Nicola Everett in relation to her child’s welfare (Sophie) considering that the student’s parents had an impending child custody matter in which the Defendant’s Head Teacher, Assistant Head Teacher, and the Chairperson of the Board of Governors had given good character references in favour of Nicola Everett. Now produced shown to me are the said character reference exhibited herein and marked “CB1”*
7. **THAT** *the defendant’s Head Teacher felt that I had breached the school’s Child Protection Policy and hence the Head Teacher referred the matter to the Protection Officer for action.*
8. **THAT** *on 16<sup>th</sup> February , I was called by the Child Protection Officer to her office where I was verbally warned on the discussion I had the Head Teacher, to which I was verbally apologized although I was not given any chance to either explain my side or refute any allegations that were made against me by the Head teacher. Now produced and shown to me is a copy of one email from the Child Protection Officer acknowledging my verbal apology marked “CB2”*
9. **THAT** *in a surprising move. on or about 13<sup>th</sup> February 2017, an official complaint was lodged against me by Nicola Everett in relation to the whatsapp message which I had to sent as my friend a year ago (February 2016) and after the Head teacher had told her the discussion had between, him and me on the 10<sup>th</sup> February 2017. Now produced and shown to me is a copy of the complaint lodged at my school marked “CB3” and an acknowledgement by the Head teacher of this involvement in an email “CB4”.*
10. **THAT** *I was never told of the complaint until the February 18<sup>th</sup>, eight days later which is against the schools complaints policy.*
11. **THAT** *I was then called to a ‘meeting’ to explain my side of the story relating to the whatsapp message which was the content of the complaint itself, however, I was not feeling well and had to request for an extension of the date.*
12. **THAT** *was surprised to be called for this meeting as I had not breached any school rules by talking to a friend and expressing my disappointment in her behaviour.*

13. **THAT** I requested for copies of the letter of evidence that the Defendant's Management were to use against me with a view to preparing my defence but the Defendant's Management did not provide the said evidence. Now produced and shown to me are several emails requesting for the evidence marked "CB5"
14. **THAT** on or about 25<sup>th</sup> February 2017, for the second time I requested further information and clarification from the Defendant's Child Protection Officer and Head Teacher to send me evidence and basis why I was being sent through the disciplinary process but the Defendant did not adhere to the request. All this time I had not given my side of the story or presented my statement. Now produced and shown to me are several emails requesting for the said evidence marked "CB6"
15. **THAT** on several occasions I requested for the said evidence, and further clarification on the school's policies to which the Defendant's Management have blatantly refused to give or deliberately ignored.
16. **THAT** on or about the 10<sup>th</sup> March 2017, in the absence of any supporting evidence against the Defendant, and despite several request and documents relating to the disciplinary process, I submitted a letter to the Defendant denying all allegations against me. Now produced and shown to me is a copy of the letter as my response marked "BC7"
17. **THAT** I was not comfortable to be heard by the Head Teacher as he is the one who instigated the whole issue but the Defendant's Management proceeded to conduct the meeting.
18. **THAT** on or about the 17<sup>th</sup> March 2017 the Defendant communicated to me that I had been found guilty of the allegations. Now produced and shown to me is copy of the letter marked "CB8"
19. **THAT** the Defendant's Management proceeded to hear the case despite not providing me with the necessary information to defend my case which was an unfair practice and unjust.
20. **THAT** further, the Defendant's Management were clearly biased throughout the process as they could not give me a chance to explain myself making it worse, they have personally given character evidence in support of Nicola Everett, and have disregarded the school's Complaints Policy in deciding before referring the matter to the Board Chairperson. Now produced and shown to me is a copy of the Complaints policy marked "CB9".
21. **THAT** despite the many requests, the Head Teacher ignored my requests, and kept responding to my requests rudely. Now produced and shown to me are several letters as respond from the Head Teacher marked 'Cb10'.
22. **THAT** I verily that the head teacher's responses and conduct in the hearing was totally biased, unjust unfair and against my constitutional rights as enshrined under Sections 19, 41 and 43.



23. ***THAT** furthermore the Defendant's proceed to hear a complaint which undated no witness/complaint came to testify against me, which was evidence enough that the hearing was arranged meeting/ and or a kangaroo court.*
24. ***THAT** further, the fact that the Complaint was not heard within a reasonable time casts doubt as the authenticity of the complaint and only shows that this is not a genuine complaint.*
25. ***THAT** furthermore all involves as Chairperson for the hearing are witness in a child custody case between Nicola Everett and her husband, makes it worse because they were obviously biased having known that I had given character reference on behalf of Dean Everett.*
26. ***THAT** I feel my rights for this disciplinary hearing are further being violated as I have note breached any of the Defendant's rules and I was already warned for the offence and it is against fair labour practice to be punished for the same offence twice.*
27. ***THAT** I have been called for a disciplinary hearing n 28<sup>th</sup> February 2017, and if not restrained, the Board Chairperson will proceed to hear the matter and if any proceed to dismiss me from the Defendant's school. Now produced and shown to me is a copy of the letter marked "CB11 which clearly shows the Defendant's intention to dismiss me on flimsy grounds.*
28. ***THAT** the letter clearly shows that the Board Chairperson has already made up his mind to dismiss me as stated in the letter.*
29. ***THAT** the decision of the Management was made in breach of the rules of natural justice as no particulars of the breach were afforded to the Application such that the Application's right to a fair trial was unjustly breached.*
30. ***THAT** further, the said decision and recommendations were also unreasonable in the Wednesday sense in that they were arrived at after considering irrelevant factors such that the decision has been in bad faith.*
31. ***THAT** I have been a teacher with the Defendant's school for a period of 6 years and that I have not breached any school rules the one I was verbally warned.*
32. ***THAT** I have had better character references from several people that I know and have known me at school and even on the outside. Now produced and shown to me are copies of such character references from the various people exhibited and marked 'CB13' 'CB14' and 'CB15'.*
33. ***THAT** the implementation of the unfair decision and the unfair recommendations of the Management would foreseeably violate my right to an economic activity provided in section 19 of the Constitution of the Republic of Malawi and would greatly lower my dignity and reputation in the reasonable estimation of right minded Malawians.*

34. **THAT** I am informed by my legal practitioners and verily believe that it is unlawful and procedurally unfair for the Defendant's Management to recommend to the Chairperson of the Board of Governors that the Applicant be paraded through a disciplinary hearing without following stages 3 and 4 of the Complaints Policy and leveling new accusations insubordination when I have not been given the particulars and evidence of such allegations thereof and been afforded the opportunity to be heard or be granted a fair hearing.
35. **THAT** I am of the view that the Head Teacher has not only flouted the processes but also been the complaint, judge jury and executioner, as he is the one who instigated the complaint, heard as the jury and judged on the matter, and will implement the Board Chairperson's decision.
36. **THAT** all these people involved in my hearing deliberately not disclosed that they have been close with Nicola Everett, and that they have given character reference abusing the Defendant's letter head, and it is my firm belief that the disciplinary hearing earlier conducted was done in bad faith and if not stopped the whole process is a sham with the final intention of dismissing me from employment.
37. **THAT** I have to this effect instituted an action to challenge the entire process under Originating Summons. Now and shown to me is a copy of the said Originating Summons which has been filed with the Court and is waiting for a date of hearing exhibited and marked 'CBI6'.
38. **THAT** it is these reasons that I believe it is in the interest of justice that the decision to discipline me be pended until the hearing of the orders or declarations sought in the Originating Summons.
39. **THAT** due to the Defendant's conduct, I have suffered extreme stress and have eventually been advised by my psychiatrist to go on a medical leave. Now produced and shown to me is a copy of the psychiatrist's report exhibited and marked 'CBI7'.
40. **THAT** I am informed and I verily believe that it is the Defendant's conduct to willingly and wantonly disregard labour laws and fair employment practices as several members of staff have been unjustly and unfairly dismissed including the Board of Governors without justifiable reasons.
41. **THAT** the defendant's Head Teacher does not separate personal and professional matters such that the Defendant abuses his position against employees.
42. **THAT** I undertake to comply with any orders as to damages that the court may take in the event that it is found that the order of injunction was wrongfully granted and has accused the Defendant to suffer loss."

The Defendant is opposed to the application for the interlocutory injunction and it, accordingly, filed an affidavit in opposition, sworn by David Marriott, the Headmaster of Saint Andrews International Secondary School [Hereinafter



referred to as the "Defendant's Affidavit"]. For purposes of parity of treatment, I will also set out in full the material part of the Defendant's Affidavit. It reads:

- "3. The school is and international primary school proving primary education to pupils who comprise children from different races, cultures, ethnicity and backgrounds.*
- 4. The School, its management and staff are therefore required to conform to high codes of the conduct that can be expected of any primary school in Malawi teaching children.*
- 5. The School is a member of Council of British Schools (COBIS), which a membership association of over 400 international schools of global and developed markedly since its foundation, changing to meet the needs and aspirations of its growing global school membership base.*
- 6. The school, its management and staff are also required to conform high codes of conduct as promulgated by COBIS from time to time.*
- 7. The Schools has Complaints Policy whose purpose is to establish procedures for dealing with all complaints relating to the School. The Complaints Policy is exhibited in the affidavit of Mrs. Carolyn Behan marked "CB9".*
- 8. The Complaints Policy, is not a disciplinary procedure, only relates to handling of disciplinary hearing of members hearing of members of staff.*
- 9. Disciplinary procedures relating to members of staff are dealt with according to contract of employment of a particular member of staff and in terms of the labour laws of Malawi.*
- 10. In relation to the present matter, Mrs. Behan has been subjected to complaints procedures only and not yet any disciplinary procedures.*
- 11. The complaint, which was lodged by a parent at the School, Ms. Nicola Desmond, against Mrs. Behan in February 2017, was handled according to the Complaints Policy. Mrs. Desmond's complaint is exhibited in the affidavit of Mrs. Behan marked "CB3".*
- 12. Ms. Desmond's complaint related to being subjected to intimidated by Mrs. Behan since January 2016 which included being receiving some 'poisonous' email text and whatsapp messages from Mrs. Behan and shouting out to Mrs. Desmond offensive words, such as "I 'm going to fuck you out here".*
- 13. Mrs. Desmond's complaint was attached with a whatsapp message, which contained very offensive language and was aggressively written. Now produced and shown to me is copy of whatsapp message that Mrs. Behan marked "DMI".*
- 14. The nature of the complaint was that Mrs. Desmond had been a victim of continuing intimidation. The whatsapp message, which is equally exhibited in the*

*affidavit of Mrs. Behan marked "CB" was used as an example of such acts of intimidation.*

15. *The School conducted the complaints procedure and came up with its finding, which was the outcome of the complaints procedure which effectively got the complaint resolved at stage 2 of the Complaints Policy.*
16. *The outcome of the complaints procedure, which marked the conclusion of the procedure for complaints handling, communicated to Mrs. Behan and Mrs. Desmond. The outcome is exhibited in the affidavit of Mrs. Behan marked "CB8".*
17. *The complaints being resolved at Stage 2 of the Complaints Policy and Mrs Desmond being satisfied with the outcome of the complaints procedure, there was no need to take the complaint further up to Stage 3 of the Complaints Policy.*
18. *Based outcome of the procedure as Stage 2 of the Complaints Policy, the School management recommended to the School Board of Governors that Mrs. Behan put forward for a disciplinary hearing on the grounds of serious misconduct.*
19. *Mrs. Behan has neither been given a warning by the school nor undergone through any disciplinary procedure in relation to this matter. This is a fact which Mrs. Behan is fully aware of as she corrected the school management that her hearing related to complaints procedure and a disciplinary hearing. Now produced and shown to me is copy of an email related to a complaints hearing marked "DM2"*
20. *Further, as evidenced by exhibit "DM2", Mrs. Behan participated in the adjustment of the minutes of her complaints hearing, which were entitled "Minutes of the Complaints Procedure Meeting Hearing held on 17<sup>th</sup> March 2017". Now produced and shown to me is copy of Minutes of the Complaints Procedure Meeting Hearing dated 17<sup>th</sup> March 2017 marked "DM3".*
21. *By the time of hearing of the complaints procedure, all evidence that the school had at that point had been presented to Mrs. Behan. This included the contents contained I Ms. Desmond's formal complaint and the whatsapp message which Mrs. Behan has exhibited marked "CB" and I have marked "DM1".*
22. *The School management considers Mrs. Behan's actions in this matter as a mere attempt to divert attention away from the substantive issues of pending disciplinary hearing by focusing issues relating to procedure, which have not been flouted by the School.*
23. *The School Manager has made every effort to point Mrs. Behan in the direction of relevant policies. This does not constitute ignoring her requests.*
24. *I have no personal interest in this case as I am not aligned to one party or other. I am only following School protocol as closely as possible so that the situation is dealt with as fairly and professionally as possible.*

25. *I do not hold any personal grudge towards Mrs. Behan. On fighting many occasions, I have applauded her work at the School.*
26. *The Matter beforehand relates to an occasion, which has come to knowledge of the School in which Mrs. Behan has willfully acted unprofessionally and willfully degraded a parent of a child at the School."*

I have set out both affidavits *in extenso* so as to see clearly the issues that are involved in this matter.

As already mentioned hereinbefore, the present application was filed with the Court on 28<sup>th</sup> March 2017. The Plaintiff has not explained why she did not disclose to the Court her e-mail message dated 24 March 2017, that is, **DM2** (referred to in the Defendant's Affidavit). I deem it necessary to quote therefrom the following relevant parts:

*"Subject: End of stage 2 Complaints process*

....

*The minutes provided for me from our meeting on Friday 17<sup>th</sup>, March are erroneous as follows:*

1. *The title states disciplinary hearing, I believe that it was close of stage 2 of the complaints process*

...

*I require the following clarifications regarding the complaints policy:*

1. ...

*Am I not allowed the right to appeal with the board chairperson as part of stage 3 of the complaints procedure and further appeal to a panel of 3 governors at stage 4 of the complaints procedure*

...

*Why is there a stage 3 and stage 4 in the complaints process if the Headteacher has the authority to decide if complaints are valid or not and without providing staff members or parents a right of appeal at the board level?*

*Please explain clearly how the process moved from a stage 2 complaints process to a stage 4 disciplinary process*



*Please explain clearly where I have a chance to appeal your recommendations to Mrs Yusuf for gross misconduct at the end of the stage 2 complaints process*

*Please explain clearly how I was quickly moved to stage 4 of the disciplinary process yet I have not been interviewed by any members of the board of governors regarding my version of events in terms of Nicola Everett's complaints*

2. *I have looked on the website and on the school server and I am unable to find a copy of the saips disciplinary procedure. Please provide me a copy to allow me the information I need to defend myself in this process.*
3. *Am I allowed to the communication between Mrs Nicola Everett and Saips regarding the complaint. It would be helpful if we all had the same understanding of what was discussed and agreed."* – Emphasis by underlining supplied

It is not difficult to fathom why the Plaintiff does not want the Court to know about "DM2". This is a damning e-mail in which the Plaintiff does not only acknowledge that she has no knowledge of the regime that governs disciplinary procedure at Saint Andrews International Primary School but also confirms the Defendant's position that the matter was still at complaint procedure process: see CB5 (dated 17<sup>th</sup> March 2017) which concludes as follows:

"3) *The way forward*

*Based on the result of the investigation, it is being recommended to the Board of Governors that you be put forward for a disciplinary hearing on the grounds of serious misconduct on the back of this complaint."*

It is trite that as far as an *ex parte* application is concerned, all the facts must be laid before the Court and nothing may be suppressed. The court requires *uberrima fides* on the part of the applicant: see the judgment of Lord Cozens-Hardy, M.R. in **R v. The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington, ex parte Princess Edmond de Polignac** [1917] 1 KB 486,.

The *ratio decidendi* of **R v. The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington, ex parte Princess Edmond de Polignac**, supra, is that if an *ex parte* injunction has been granted upon an affidavit which was not candid and did not fairly state the facts, but state them in such a way as to mislead and deceive the court, there is power inherent in the court, in order to protect itself and prevent an abuse of process, to discharge the injunction and even

to refuse to proceed further with the examination of the merits: see also **Somanje v. Somanje, Chilamwa and Stumbles (Trading as Sacranie, Gow and Company)** [1987-89] 12 MLR 326, **Vitsitsi v Vitsitsi** [2002-2003] MLR 419 (SCA) and **Koreia v. Designated School Board** [1995] 2 MLR 649(HC).

In **Vitsitsi v. Vitsitsi**, supra, the Supreme Court of Appeal stated, at p.422, that:


*“it is a perfectly and long settled principle of law that a person who makes an ex-parte application to the court is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not do so he will not be allowed any advantage gained by means of an order which will have been so obtained”*

It has to be borne in mind that material facts are facts which if known to the court would have led the court to arrive at a conclusion or order different from the one it arrived at. Therefore, for the conclusion to be reached that the plaintiff suppressed or misrepresented facts, the alleged suppressed facts must be facts which if it were laid before the court the ex-parte injunction could not have been granted: see **Gloria Mchungula Amani v. Stanbic Bank Limited and Another, HC/PR Civil Cause No. 558 of 2007(unreported)**. I have carefully analysed the affidavit evidence before the Court and I am satisfied that the Plaintiff suppressed material facts at *ex parte* stage and there is just no way in which the interlocutory injunction would have been granted if the Plaintiff had not suppressed **DM2**. It is significant to note that the Plaintiff filed with the Court an Affidavit in Response dated 27<sup>th</sup> April 2017 but made no attempt to explain therein why she had not disclosed to the Court **DM2** in her earlier affidavit.

In the circumstances and in view of the conclusion that I have reached on the issue of suppression of material facts, I do not see the consideration of the other grounds argued before me as being in anyway necessary any longer. I, accordingly, rest my decision on the sole ground that the Applicants suppressed material facts.

All in all, the continuation of the injunction cannot be sustained. The injunction has, accordingly, to be discharged with costs. I so order.

Pronounced in Chambers this 19<sup>th</sup> day of June 2017 at Blantyre in the Republic of Malawi.

  
**Kenyatta Nyirenda**  
**JUDGE**