Judgment No. HB 140/2002
Case No. HC 2208/2002

NELSON MASUKUME **Applicant**

Versus

S H S MBONA, ACTING PRINCIPAL **First Respondent**

And

UNITED COLLEGE OF EDUCATION **Second Respondent**

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 3 OCTOBER & 28 NOVEMBER 2002

K Ncube for the applicant
C P Moyo for the respondents

Urgent Chamber Application

CHEDA J: On 7 September 2002 applicant filed an urgent chamber application in which he sought the following relief:

> **"Interim Relief Granted**
>
> Pending confirmation of this provisional order the applicant is granted the following relief:
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> i) That applicant be and is hereby allowed to attend school from home.
> ii) That applicant be and is hereby allowed to access the library facilities so as to prepare for his exams.
> iii) That applicant be and is hereby allowed to sit for his first paper on 10 September 2002 and two others in early October.
> iv) That applicant be and is hereby allowed to sit for his Physical Education examination that he missed.
> v) That respondents be and are hereby ordered to set the Physical Education exam for applicant as contemplated in (iv) above.
> vi) That respondents be and are hereby ordered to process all relevant paperwork in contemplation of the recruitment and deployment of applicant next year January 2003.
> vii) That applicant be and is hereby allowed to submit his files for final assessment.
> viii) That respondents be and are hereby ordered to ensure compliance with the above orders.

I granted the provisional order on 7 September 2002. Respondents filed their notice of opposition on 20 September 2002.

Applicant in his founding affidavit stated that he is a registered student at second respondent while 1st respondent is the acting Principal of 2nd respondent. On 9 May 2002 he was charged with an act of indiscipline being that on 6 May 2002 he had written a letter to the *Chronicle* wherein he highlighted a shortage of drugs at 2nd respondent's clinic. A disciplinary hearing was convened and consisted of eight members purportedly in terms of section 9(4) of the Statutory Instrument 81/99 (Manpower Planning & Development (Government teachers Colleges & Technical or Vocational Institutions) Regulations 1999). As a result of the recommendations of the standing committee, applicant was punished as follows:

1. A fine of $60,00 which was to be paid on or before 3 June 2002.
2. Was stripped of his position as Secretary of the Student Representative Council with immediate effect
3. Was warned against any future participation of any related indiscipline.

Applicant appealed and on 21 June 2002 he was advised of an appeal hearing to be held on 25 June 2002 at 0830 hours. On the day of the hearing he was advised by the acting vice-principal that he should go back to his room whereafter he would be called. However, he was not called and the hearing proceeded without him. On 3 July 2002 he was advised by letter that he had failed to attend the hearing and as such his appeal had been dismissed.

On 25 July 2002 he was suspended by 2nd respondent for a full year, the reasons for the suspension were that:

"1. he had written a poster entitled "Huge Constitutional Fraud" which had a potential to incite students.

2. he had refused to collect a letter from the Principal's Secretary.
3. he had lied that he had been stopped from appearing before the Executive Committee of the College's Advisory Council by the acting vice principal.
4. he had followed a member of the Advisory Council Mr A. Moyo to his workplace and had pulled him out of his class and quizzed him about his disciplinary case.
5. he had refused to report to the office of the Principal when the office orderly R. V. Mangena had been asked to call him from the Theory of education mass lecture.
6. The fine had been increased from $60.00 to $120,00."

Applicant denied all the allegations levelled against him in his founding affidavit. Applicant argued that the matter was urgent and as such had to be dealt with for the following reasons:

1. That there were three outstanding final year examinations due on 10 September, 2nd and 3rd October 2002.
2. That 2nd respondent was due to close on 20 October for the final term of the year and since he was the final year student, that was his final year.
3. That having written 10 examinations and the above three were outstanding and as such he would be prejudiced.
4. That he had already failed to write Physical Education paper, which was set by others on 26 July 2002, a day after his suspension.
5. That his recruitment forms for deployment for 2003 had not been processed by 2nd respondent due to the suspension.
6. That he had not submitted his files for 2nd respondent to carry out a final assessment of his performance during training.

I granted the provisional order on 7 September as I was of the view that indeed the matter merited the relief prayed for. Respondents then filed their notice of opposition and subsequently both parties filed their heads of argument. First respondent argued that by suspending applicant he had exercised his powers vested in him in terms of Statutory Instrument 81/99 *supra*. The main reason being that applicant had acted in a manner not expected of a student and also that he had failed to attend an appeal hearing.

It is respondents' further contention that the court should not interfere or disturb the decision reached by them as to do so would be unwarranted usurpation of the powers entrusted to them by the legislature. They further contended that applicant had failed to advance reasons for this court to exercise its judicial discretion to set aside the decision by the respondent to suspend applicant for a year.

They further argued that this matter was not urgent and therefore should have been brought by any other appropriate procedure other than by an urgent chamber application. I would like to deal with the issue as to whether the matter was urgent or not. Applicant is a final year student, he had already lost a sitting in one subject and three more examinations were yet to come. In determining whether the matter is urgent or not I believe the court should weigh the harm respondent has already suffered against harm which would befall applicant if he is suspended from college (2nd respondent). In my view if the harm caused by applicant to respondents is far greater than that which he will suffer by the suspension, then and only then will there be justification for him to bear the consequences of his misdemeanour. In the present case applicant had complained of some maladministration at the clinic, which complaint is legitimate. Respondents have not shown that the harm they suffered is greater than that applicant would suffer in the event that he is suspended for a year from college. If, however, respondents were of the view that he should have acted or presented the said grievances in a particular form, it then becomes a question of procedure. The question then is, should such procedural error result in applicant being suspended for the whole year? Applicant was in the middle of writing his final year examination, to me the issue of the allegations against him where to be dealt with

without further delay as failure to do so would have resulted in greater prejudice than what is perceived to have been suffered by respondents. It is for this reason that I find that the matter indeed deserved urgent attention.

Applicant argued that the provisional order should be confirmed because the Disciplinary Committee was not properly constituted and that 1st respondent should not have suspended applicant of more than 21 days.

I would like to deal with the relevant provisions of Statutory Instrument 81/99 under discussion. *Mr Moyo* for the respondent has argued that 1st respondent has a right to use his discretion in the furtherance of the smooth running of 2nd respondent. Nothing can be further from the truth in my view, than this argument. He further argues that this court is not empowered to interfere with that discretion unless of course if that discretion has been improperly exercised. I can do no more than agree with him on that point. The decision to suspend applicant as argued was in terms of section 7(1) as read with section 9(6). Section 7(1) reads:

> "The principal may permanently or temporarily exclude, remove or expel any student from the premises of a teachers' college or technical or vocational institution if, in the opinion of the purpose:
> (a) he behaves in a manner unbefitting a student of the college or institution or in a manner likely to bring the college or institution into disrepute; or
> (b) …
> (c) …
> (d) …
> (e) …
> (f) …
> (g) …"

Section 9(6) reads,

> "The principal shall give due consideration to, but not be bound by the recommendations of a disciplinary committee."

It is a fact that 1st respondent is empowered to use his discretion in order to instil discipline in the best interest of 2nd respondent. The question, however, is whether or not that discretionary power has been properly exercised. The exercise of a discretion has an element of value judgment largely influenced by certain standards which therefore act as check points against discretionary abuse. If discretion is properly exercised, the courts will not interfere, therefore courts should only interfere with the exercise of discretionary power if it is shown that the said discretionary power was based on either wrong facts or illegality.

Applicant argued that when 1st respondent suspended him, he did so in contravention of section 9(3) which reads:

> "Notwithstanding section 7, in the exercise of his duties in terms of subsection (2), a principal may suspend a student from attendance at a college or institution for a period not exceeding twenty-one days or, where the suspension is connected with any case of discipline that is referred to a disciplinary committee for such period expiring on the day that the disciplinary committee makes its recommendations on the case."
>
> Subsection (4) reads,
>
> "The principal shall appoint a standing committee consisting of 4 members of the staff of the college or institution (of whom the principal shall designate one to be the chairman) and a nominee of the student representative body of the college of institution, which shall make recommendations to the principal on –
>
> (a) disciplinary matters generally;
> (b) any case of indiscipline that may involve the exclusion, removal or expulsion of a student from the college or institution concerned;
> (c) any case of indiscipline other than one mentioned in paragraph (b) that the principal may choose to refer to the committee."

My understanding of section 7 is that it is divided into two parts which stipulate the maximum period of the suspension of a student. Firstly, it stipulates that

1st respondent in exercising his discretion (which is wide) can only suspend a student for a maximum period of twenty-one days. In my view this first part obtains in a situation where the related case is not being referred to the Disciplinary Committee while the second part refers to a suspension where the matter is referred to a disciplinary hearing. The rationale behind the second scenario is to avoid a situation where a student can remain under suspension for an indefinite period.

The power to suspend is vested on the 1st respondent and shall so remain for the proper administration of 2nd respondent, subject of course to the consideration of other factors. First respondent based his reasons for suspending applicant on the recommendations of the standing committee. Applicant challenged these recommendations and he argued that the standing committee was improperly constituted in that it consisted of eight members. Respondents were mum about this allegation. Indeed subsection 4 (*supra*) clearly stipulates that there shall be four members of the standing committee. First respondent however, in his wisdom saw it fit to increase the number to eight. In so doing he obviously acted unlawfully as the section under discussion is mandatory.

The second point is that it is not in doubt that 1st respondent has a discretion in the administration of 2nd respondent which encompasses disciplining applicant. That discretion, however, is not absolute but is subject to the intention of the legislature which in this case is the provisions of Statutory Instrument 81/99, which creates and regulates respondents' conduct. While respondents enjoy certain rights, they are also constrained to carry out certain obligations, amongst which, is compliance with that statute. Acting outside the statute is obviously *ultra vires* the said statute and is

regarded as abuse of power or authority. The courts will no doubt interfere where the said discretion is used to frustrate the objectives of the legislature. See *Padfield* v *Minister of Agriculture, Fisheries & Food* [1968] A C 997. Abuse of some power maybe either be in good faith or bad faith. See *Constitutional and Administrative Law* 7th Ed Hood Phillips page 667 where the learned author stated,

> "Abuse of power may either be in good faith or bad faith. An authority acts in bad faith if it acts dishonestly in order to achieve an object other than that for which it believes the power has been given, or maliciously, if it acts out of personal animosity."

Second respondent was not empowered with a discretionary power to increase the number of members of the committee, therefore to increase the number is nothing other than the re-constituting of the said standing committee which is a non-compliance of the statute. Abuse of power by 1st respondent was therefore in bad faith.

It therefore stands to reason that the recommendations from the eight member committee can not be referred to, let alone used by 1st respondent as they are from an unlawfully constituted committee. They are therefore a nullity. In light of the above observations the provisional order granted by this court on 7 September 2002 is confirmed and the following order is made:

1. That the suspension from 2nd respondent of applicant be set aside.
2. That 1st and 2nd respondents arrange a proper hearing of the applicant's case.
3. That costs of this application be borne by the 2nd respondent.

Cheda & Partners applicant's legal practitioners
Messrs Majoko & Majoko respondents' legal practitioners