Judgment No. HB 165/04
Case No. HC 3365/04
X-Ref HC 1723/03 & 3171/04

JUSTINE MUGOBE AND 15 OTHERS

Versus

PROFESSOR NORMAN MAPHOSA

And

SOLUSI UNIVERSITY

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 17 FEBRUARY 2005

N Mazibuko for applicants
J Tshuma for respondents

Judgment

CHEDA J: This is an urgent chamber application by applicants who sought relief couched as follows:-

"Interim Relief Granted

3. Pending confirmation or discharge of this order the following interim relief is granted to the applicant:-
   (a) 1st and 2nd respondents and any other person deriving power therefrom be and are hereby interdicted from preventing the applicants from graduating at the graduating ceremony set for 5th September 2004.
   (b) The 1st and 2nd respondents, the one acting the other to be absolved, be and are hereby directed to ensure that the applicants names remain on the list of the graduands for the 5th September 2004 and are not removed therefrom, and that if previously removed, they are immediately restored to the list.
   (c) The 1st and 2nd respondents be and are hereby ordered to avail all the rights and privileges due to a graduating student to the applicants herein, including, but not restricted to, the handing over of degree certificates and degree transcripts to the applicants.
   (d) The 1st and 2nd respondents and all those deriving power therefrom be and are hereby ordered to comply with this order immediately upon service on them."

The matter was argued on 3 September 2004 and I dismissed the application with my reasons to follow and these are my reasons.

The historical background of this matter is briefly as follows:-

Applicants are registered students with 2nd respondent whose vice-Chancellor is 1st respondent. On 4 August 2003 the Chronicle Newspaper published an article about a petition that had been signed by students highlighting what they perceived to be the deteriorating living standards, escalation of fees and the use of unqualified lecturers at Solusi University. As a result of the said article, applicants were interviewed by the administration of 2nd respondent and were subsequently notified of a Disciplinary Committee inquiry into the matter. A hearing was held on 18, 19 and 20 August 2003 but was subsequently set aside by this court in case number HC-1723/03 by consent of 1st and 2nd respondents.

The present applicants are part of a group in case number HC-3171/04 which matter is pending before this court. In that case applicants sought a stay of the Preliminary Investigations Committee Hearing which were set for 16 August 2004 and an interim order was granted on 12 August 2004. That matter has therefore not been finalised and is opposed.

The ruling in case 1723/03 was to the effect that respondents were free to commence their disciplinary investigations should they so wish provided that the correct procedure is followed. It was conceded by Mr *Tshuma,* respondents' legal practitioner in that case that the respondents had not properly followed the laid down disciplinary procedure.

Applicants are students at 2nd respondent. They sat for the examinations and passed and were therefore due to graduate on 5 September 2004. They were to be

presented with their degree certificates and transcripts on graduation day or soon thereafter. It is common cause that they have satisfied the academic requirements. Respondents have refused them to attend the graduation ceremony and withheld their degree certificates and transcripts.

Applicants through their legal practitioner Mr *Mazibuko* argue that respondents' refusal for them to graduate and the withholding of their degree certificates and transcripts will result in their inability to secure employment which is prejudicial to them. At the time of writing this judgment the graduation ceremony had already been held. The question which falls for determination is whether or not applicants should have been allowed to graduate and be handed their degree certificates and transcripts while respondents are yet to conduct disciplinary investigations against them. Mr *Mazibuko* for applicants has argued that according to respondents' notice of opposition in case HC 3171/04 they allege that applicant and 42 others are not the subject of the disciplinary charges and that the University was yet to get full details through its investigations and to decide who to charge or whether any of the applicants should be charged or not. It is a fact that, after filing that notice, respondents decided to proceed with the disciplinary measures by refusing applicants' participation in the graduation ceremony which would necessitate the receipt of degree certificates and transcripts by them.

In deciding whether or not applicants should have been allowed to physically graduate and receive degree certificates and transcripts, it is essential to weigh the consequences of doing so before respondents have finalised their investigation. Applicants were all along students at 2nd respondent. They have

finished their final year examinations and were due to leave university after they had been presented with their certificates.

Mr *Mazibuko* argued that they were not under discipline, Mr *Tshuma* on the other hand argued that preliminary disciplinary investigations are being carried out which may result in them being arraigned before a disciplinary tribunal or committee whichever the case may be.

According to Mr *Tshuma*, applicants, together with their legal practitioner have been interfering and preventing respondents from carrying out their disciplinary proceedings to finality. In other words the delay in finalising this matter is shared by both parties in that applicants were employing delaying tactics every time, while respondents also contributed by adopting a wrong procedure.

Discipline is a necessary integral part of any organisation as it is through it that order is maintained. Those in authority need power to command their subordinates to obey them. This power which is legalised by codes of conduct is jealously guarded by managers the world over. The courts, in my view should not without just cause take it away from those in authority. Suffice it to say that the court will no doubt interfere in cases where the said authority is used in such a way that it defies reason, common sense or there is something grossly irregular in its use. It is in the use of that power that rules of natural justice have to be observed at all stages of the proceedings. What comes out of that distinctly is the need for fairness or fair play on both the accuser and the accused. The power of discipline in as far as authority is concerned is their domain, but there are instances where it will no doubt be fettered particularly where it violates the rules of natural justice as failure to do so will be to negate the principles of fair play.

I find that the disciplinary inquiry has not been held and respondents have expressed their intention to proceed with it as evidenced by their notice of opposition referred to above.

Respondents are empowered to take disciplinary measures against those who fall under their jurisdiction and there is therefore a need for the courts to respect that power. The emphasis of discipline was stated in *R* v *Metropolitan Police Commissioner, ex parte* [1953] 2 ALL ER 717 at 712 by LORD GODDARD CJ referring to the exercise of power of the Commissioner said-

> "He was exercising what I may call a disciplinary authority, and where a person, whether he s a military officer, a police officer, or any other person whose duty is to act on matters of discipline is exercising disciplinary powers, it is most undesirable in my opinion, that he should be fettered by threats of orders of certiorari and so forth, because that interferes with the free and proper exercise of the disciplinary powers which he has."

I am fortified by his lordship's approach and totally align myself with it. The powers referred to are necessary for the smooth running of every organisation. In exercising these powers, regard must always be had of the need for a fair hearing by both applicants and respondents. Serious allegations have been levelled against applicants which have been denied. There is therefore a need for respondents to prove them, for, if left as they are, they will remain as a dark cloud hanging on applicants' heads which will prejudice their future. It is in both parties' interests that the said allegations be tested at the hearing.

Respondents' quest to have the matter heard can not and should not be curbed by applicants without any just cause, for to do so will be tantamount to allowing them to fetter the disciplinary powers of respondents whose jurisdiction they fall under.

Both parties have a right to present and contrast evidence.

It is also necessary to look at the possible prejudice each party is likely to suffer in the event that applicants are granted their prayer. It is accepted that applicants have satisfactorily completed their studies and are due to start work immediately after presentation of their degree certificates and transcripts. The delay in getting suitable jobs as per their qualifications will indeed prejudice them. However, in the event that the delay is unreasonable they are at liberty to approach this court for relief and thereby mitigating their prejudice bearing in mind that they are also partly to blame for the delay in finalising this matter.

Once they are presented with their certificates they are free to work anywhere in the world. Once this happens they will have no reason to want to subject themselves to any form of discipline by respondents. They will therefore be out of reach of the respondents.

Respondents' jurisdiction over them is their possession of the said degree certificates and transcripts. It is, therefore, necessary for respondents not to release the said certificates thereby allowing them the use of their unfettered disciplinary powers over applicants as long as such powers are exercised within the four corners of the rules of natural justice. The powers vested in 2nd respondent have very far reaching consequences so much so that, whatever, decision they take will no doubt have a future effect on its administration with regards to present and future students.

Universities occupy a fundamental educational and social role in society. In *Glynn* v *Keele University and Ano*[1971] 2 ALLER 89 at 95 PENNYCUICK V-C remarked-

> "The contexts of educational societies involves a special factor which is not present in other contexts, namely the relation of tutor and principal, i.e. the society is charged with the supervision and upbringing of the pupil under tuition, be the society a university or college or a school. Where this relationship exists it is quite plain that on the one hand in certain circumstances the body or individual acting on behalf of the society must be regarded as acting in a quasi-judicial capacity – expulsion from the society is the obvious example. On the other hand, there exists a wide range of circumstances in which the body or individual is concerned to impose penalties by way of domestic discipline. It is this discipline which should not be unjustifiably removed from respondents."

It is only fair that the respondents be allowed to remove applicants from the list of graduands until a decision as to whether or not they will proceed with disciplinary proceedings is made. In as much as they are not presently under discipline, the fact that respondents intend to institute disciplinary investigations is reason enough to give respondents a chance to accordingly proceed unfettered.

The rules of natural justice should certainly apply to both parties. A body in the form of respondents acting in either a quasi-judicial or administrative position should have a unfettered discretion which should only be interfered with if it is not fairly exercised. See *Breen* v *Amalgamated Engineering Union (now Amalgamated Engineering & Foundry Workers Union & Others*) ALL ER [1971] 1148. Respondents' request that applicants should not receive their degree certificates before a disciplinary hearing is held, is legally correct and should be acceded to.

To allow this application is tantamount to allowing applicants to leave 2nd respondent without clearing their names amid such serious allegations. Applicants need to clear their names while respondents also have a duty to prove their allegations against applicants. Therefore to grant this application will result in serious prejudice to the respondents who will have no other remedy available to them after applicants have collected their degree certificates and transcripts. Most importantly to allow this

to happen is to set a bad precedent for the present and future administration of 2nd respondents.

This application is accordingly dismissed with costs.

Calderwood Bryce Hendrie & Partners applicants' legal practitioners
Messrs Webb,Low & Barry respondents' legal practitioners