FANELE MAQELE
and
ALDRIN NYABANDO
and
TENDAI WARAMBWA
versus
VICE CHANCELLOR, PROFESSOR N.M BHEBHE N.O
and
MIDLANDS STATE UNIVERSITY

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 20 MAY 2016 AND 27 MAY 2016

Urgent Chamber Application

T. Chitere for the applicants
M. Jaravaza for the respondents

MATHONSI J: The concept of administrative justice is one which chimes to a certain degree with the notion that administrative authorities which are charged with the responsibility and power to take administrative action affecting the rights, interests, or legitimate expectations of any person should act lawfully, reasonably and in a fair manner, within a reasonable period. Where it has taken action, it must supply written reasons within a reasonable period. See *Mabuto* v *Women's University in Africa and Others* HH 698/15.

In fact administrative justice is now embedded in our constitution as s68 (1) of the constitution provides that every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair. In addition, s3(1) of the Administrative Justice Act [Chapter 10:28] provides that an administrative authority which has the power and responsibility to take any administrative action affecting the rights, interests or legitimate expectations of others shall act lawfully, reasonably and fairly within a reasonable period.

The three applicants are students at the second respondent university with the first applicant being a final year student of Politics and Public Management while the second and third applicants are second year students majoring in development studies. On 22 April 2016 they were each served with a letter of suspension from the university dated 11 April 2016 and signed by the first respondent.

The suspension letters which are worded the same read:

> "RE: SUSPENSION FROM MIDLANDS STATE UNIVERSITY
> It has come to my attention that you breached Ordinance No. 2 of 2000 in that you are alleged to have posted a message on a Social Medial Platform Whats App calling on other students to go on an illegal demonstration. In terms of section 8(3) (d) of the University Act, I do hereby suspend you from the University pending your appearance before the Student Disciplinary Committee to answer the above stated charges. During the period of your suspension you are not allowed to visit any of our campuses without my permission and a breach of this condition shall constitute another act of misconduct for which you will be duly charged.
>
> Yours sincerely
>
> Professor N. M Bhebhe
> Vice Chancellor."

That way the three applicants were excluded from the University and have not attended any lectures or participated in any activity pertaining to their University education. Significantly, there is no indication in the suspension letters what the duration of the suspension is and when the disciplinary committee will sit to determine their cases. A month has since lapsed since the administrative action was taken and still nothing has happened. The applicants remain on suspension. Meanwhile life on campus goes on with the other students enjoying the benefit of education to the exclusion of the three applicants, who have now filed this urgent application seeking the following relief:

> "TERMS OF THE FINAL ORDER SOUGHT
>
> IT IS HEREBY ORDERED THAT (SIC)
>
> That you show cause to this Honourable Court why a final order should not be made in the following terms;

FINAL ORDER (SIC)

1. That the decision of 1st respondent in his capacity as the Vice Chancellor of the second respondent to suspend all the three applicants be and is hereby declared unlawful and is accordingly set aside.
2. That the letters of suspension be and are hereby declared null and void and of no force or effect and are hereby set aside.

INTERIM RELIEF GRANTED

That pending the confirmation of the Provisional Order the applicants are granted the following relief (sic)

1. That the decision by the 1st respondent to suspend all three applicants dated 11th April 2016 for alleged breach of unspecified sections of Ordinance No 2 of 2000 be and is hereby suspended.
2. That the decision to bar the applicants from visiting any of the respondent's campuses be and is hereby set aside.
3. Pending finalization of this matter 1st and 2nd respondents be and are hereby ordered to allow all three applicants to sit and write their end of semester examination (s)."

The applicants admit having received a WhatsApp message encouraging students to attend a protest in Zvishavane at the beginning of the semester on 17 February 2016 to express displeasure at the University's decision to open a satellite campus in Zvishavane for a number of reasons set out in the message. The message had gone viral on social media and they say all that they did was to pass it on to their friends. This was in February 2016.

When the semester commenced there was no such protest and nothing really came out of that message. Indeed the University authorities also did not act upon it until 22 April 2016, more than two months later, when they served suspension letters on the applicants, which suspensions have not been prosecuted. As it is now, end of semester examinations have commenced having started on 19 May 2016. The suspensions mean that the applicants cannot take those examinations which is prejudicial to them in a big way. Failure to take the examinations would mean that they would have to repeat and would be unable to progress to the next stage of their studies. In the first applicant's case, he will not graduate.

Section 8(3)(d) of the Midlands State University Act [Chapter 25:21] provides:

"Subject to subsections (4) and (5), the Vice Chancellor may expel or suspend, indefinitely or for such period as he may specify, any student or group of students."

Subsection (4) of that section which is of peremptory application makes it clear that the Vice Chancellor shall not expel a student for misconduct unless the student has been found guilty of misconduct by the Student Disciplinary Committee in terms of s27, while subsection (5) requires any decision of the Vice Chancellor made in terms of subsection (3) to be ratified by the University Council. We have not been told if such ratification was done.

Mr Jaravaza, who appeared for the respondents, raised three points *in limine*. The first one is that the matter is not urgent because the applicants have created the urgency. They received the suspension letters on 22 April 2016 and did not do anything about them until doomsday on 18 May 2016, 26 days later, when they filed this application. I do not agree.

This is a matter in which the first respondent exercised his power to suspend the applicants in terms of s 8(3) (d) of the Act, a section which allows him to suspend for an indefinite period. It cannot be said that the need to act arose on 22 April 2016 because the suspension was done pending the convening of a student's disciplinary committee. Up to now that committee has not been convened and on the face of it, one cannot say that the first respondent has acted outside his powers.

In fact it is the failure of the respondents act which is the source of disquiet and has led to a complaint being made against the failure of administrative justice as provided for in s3(1) of the Administrative Justice Act as read with s68 (1) of the constitution. The challenge brought by the applicants centres around the delay in convening a disciplinary hearing until the examinations time arrived.

The respondents are seeking to rely on their own default to deprive the applicants a remedy, suggesting that the applicants have created the urgency. While it is true that the applicants could have come to court earlier in the circumstances, it is a matter in which I am prepared to overlook that delay because the respondents contributed to it. In any event, I have mentioned before that litigants appear to have unduly blown the question of self-created urgency out of proportion and attempted to give it a meaning which authorities have not assigned to it. Courts of law have always appreciate that litigants do not eat, move and have their being in filing court process, if one may be allowed to borrow biblical language. They have other things to attend to and in a case such as the present where the respondents are the ones who have failed to act timeously they cannot use that against the applicants. See *The National Prosecuting*

Authority v *Busangabanye and Another* HH 427/15; *Telecel Zimbabwe (Pvt) Ltd* v *Potraz and others* HH 446/15.

It is for that reason that I decided to exercise my discretion, for a discretion it is to hear a matter as urgent, in favour of the applicants.

But then *Mr Jaravaza* was not finished. He submitted that the applicants' approach to this court was incompetent by reason that they had not exhausted internal or domestic remedies. He relied on the authority of *Sithole* v *Senior Assistant Commissioner and Others* HB 17/10 where this court, per NDOU J, pronounced that a failure by the applicant, without good and sufficient cause, to exhaust domestic remedies available to him is fatal to his application and *Moyo* v *Forestry Commission* 1996 (1) ZLR 173.

Mr Jaravaza located the domestic remedies available to the applicants in the suspension letters written by the first respondent where he states at the end that:

> "During the period of your suspension you are not allowed to visit any of our campuses without my permission and a breach of this condition shall constitute another act of misconduct for which you will be duly charged."

He submitted that the foregoing provision of the suspensions accorded the applicants a domestic remedy before they could approach this court for recourse. I do not agree. Indeed that argument is without merit for two reasons. Firstly there is no remedy at all provided by the cited portion of the suspension letters because it only allowed the applicants to approach the Vice Chancellor if they desired to visit the campuses. It is not a remedy against the suspension from University studies and examinations.

Secondly, while the Vice Chancellor is empowered to suspend a student, his decision is subject to ratification by the University Council in terms of subsection (5) of s 8 of the Act. Once the decision has been ratified by the council it cannot be that of the Vice Chancellor alone and he certainly cannot competently revise it without reference to the council. In any event, domestic remedies envisaged by the law are those which are available to the applicant by virtue of the disciplinary procedure of the institution, not what the respondents have sought to rely upon.

Finally *Mr Jaravaza* submitted that the application must fail because the applicants approached the court late when the examinations had already commenced, when the door had

already been closed. In the first place, the applicants filed this application on 18 May 2016 before commencement of the examinations on 19 May 2016. The delay in hearing the matter was occasioned by the need to give the respondents notice. In the second instance, only a few examinations, those for 19 May 2016, have been missed and there is still room to rectify that by allowing the applicants to write supplementary examinations. There is therefore no merit in the preliminary points taken.

I have already made reference to the provisions of s 3(1) of the Administrative Justice Act [Chapter 10:28] which require administrative authorities to act lawfully, reasonably and fairly at all times and to s68 (1) of the Constitution which makes it a constitutional imperative for every person to receive prompt, efficient, reasonable and impartial decisions in administrative conduct. As started by MAKARAU JP (as she then was) in *U-Tow Trailers (Pvt) Ltd v City of Harare and Another* 2009 (2) ZLR 259 (H) 267 F-G; 268 A –B, it is no longer business as usual for all administrative authorities as there has been a seismic shift in administrative law.

In any event, apart from the right to administrative justice being a fundamental right enshrined in the declaration of rights, Chapter 4 of the Constitution, the right to further education contained in s75 of the constitution is also a fundamental right. What has however occurred in this matter is that those rights have been negated through the conduct of the first respondent.

While the first respondent has power to suspend a student, that power must be exercised within the framework of the law, a law which recognizes the right of the applicants to administrative justice, a concept which is now embedded in our constitution. Its elements are that official decisions must be lawful; rational in that they must comply with the logical framework created by the grant of power under which they are made; consistent, fair in that they should be arrived at impartially in fact and appearance giving the affected persons an opportunity to be heard; and be made in good faith in the sense that the official making the decision must act honestly and with conscientious attention to the task at hand having regard to how the decision affects those involved. See *Telecel Zimbabwe (PVt) Ltd v Potraz and Others* HH 446/15.

It was never the intention of the framers of s8 (3) (d) of the Act that the first respondent would merely suspend students on unproven allegations and then do nothing about the suspension even though the section would seem to allow a suspension “indefinitely” Surely an

indefinite suspension without a hearing cannot be lawful. This is particularly so where the suspension is to facilitate the convening of a disciplinary committee to deal with the student.

In my view the power of suspension should be exercised in accordance with administrative justice. The delay in bringing the applicants before a disciplinary committee offends against the element of administrative justice requiring prompt, efficient and reasonable conduct. This is so because you do not just send a student home indefinitely while others are learning and in the process prevent him or her from taking examinations. There was a failure of administrative justice which has greatly prejudiced the applicants.

The moment his preliminary points failed, *Mr Jaravaza* for the respondents conceded that the applicants are entitled to relief on the merits. He added that, the respondents would like a final order to be made as a provisional order would not serve any useful purpose in the circumstances, a position which *Mr Chitere* for the applicants also embraced. For that reason, the grant of a final order is by consent of the parties.

In my view the concession by *Mr Jaravaza* was properly made. It occurs to me that there is a discernible readiness to unnecessarily pull the trigger and in the process play havoc to the constitutional rights of students. To begin with, the whatsapp message complained of cannot possibly be said to be offensive at all even if it had been generated by the applicants, of which it was not. What the author was doing was to mobilise support among students to protest against what was considered as an unreasonable decision by the University authorities to shift students to Zvishavane a little town with inadequate infrastructure and the scarcity of accommodation.

So what? The decision which was being resisted was not made by God but by humans who had not consulted the affected individuals. Zimbabwe being a democratic country it was therefore the democratic right of those affected to protest and demonstrate their revulsion at such a decision. How then could it be said that the mobilistaion was "illegal."? Section 61 of the constitution guarantees freedom of expression, that is to say, that individuals have the freedom to seek, receive and communicate ideas and other information. Why then should a University be seen to be working to stifle student rights when it was established with progressive objectives including:

> "--- the advancement of knowledge, the diffusion and extension of arts, science and learning, the preservation, dissemination and enhancement of knowledge that is relevant

> for the development of the people of Zimbabwe through teaching and research and, so far as is consistent with those objects, the nurturing of the intellectual, aesthetic, social and moral growth of the students at the University."

The second respondent should not only be a doyen for intellectual interaction but also a wonderful laboratory for freedom of expression and free flow of information. Those values are suppressed if the authorities remain engrossed in a time capsule propagating archaic controls and methods of instruction where students are removed from campus for expressing their views. It is unthinkable that someone can still sleep soundly at night after excluding a student from school and sitting for an examination when that student has not been found guilty but is accused of sending a harmless whatsapp message.

In the result, it is ordered that:

1. The decision of the first respondent to suspend all the three applicants by letters dated 22 April 2016 for alleged breach of sections of Ordinance No 2 of 2000 is hereby suspended.
2. The decision to bar the applicants from visiting any of the respondents' campuses is hereby set aside.
3. The first and second respondents are hereby directed to allow all the three applicants to sit and write their end of semester examinations.
4. The first and second respondents are directed to allow the applicants to take those examinations which they have already missed during the holding of the university supplementary examinations.
5. The first and second respondents may continue with the disciplinary action against the applicants, if any, not before the expiration of a period of 14 days after the completion of the supplementary examinations.
6. Each party shall bear its own costs.

Chitere, Chidawanyika and Partners, applicants' legal practitioners
Dzimba, Jaravaza and Associates, respondent's legal practitioners