JOB GONDORA
and
PETER MATONGO
versus
ZIMBABWE SCHOOL EXAMINATIONS COUNCIL

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 26 June 2018, 18, 19 June 2019

Opposed Application

T. Maanda, for the applicants
T.Z Zvobgo, for the respondent

CHIRAWU-MUGOMBA J: On the 28th of June 2018, I gave an interlocutory order in this matter in case number HH 371/18. The respondent sought leave to appeal which I granted. On the 27th of May 2019, the Supreme Court granted the appeal and ordered that the matter be remitted to this court for a determination of the issues raised by the parties. I sought audience with *T Maanda* and *T.Z Zvobgo* who both indicated that they did not wish to make any further submissions on the matter and would abide by the submissions made on the 26th of June 2018.

Pages 1- 4 of HH- 371-18 sets out the relief sought and the background to this matter. I shall not repeat them save to state that this matter revolves around the cancellation and withholding of all November 2017 ordinary level results of the applicant's children. The applicants based their case on the following, that:-

a. The decision to cancel the results is illegal in that apart from cancelling the mathematics results, the respondent proceeded to cancel all other results for subjects sat for.

b. The cancellation of all results is not proportional with the offence as envisaged by section 68 of the Constitution.

c. The decision to cancel the results is substantively unfair especially in view of the fact that there was no investigation conducted on the alleged unlawful accessing of the examination.

d. The applicants daughters were not given an opportunity to be heard thus breaching the rules of natural justice.

e. The respondent did not afford the applicants daughters' reasons for the decision within a reasonable time.

f. The right of the applicants' daughter to education was infringed upon.

Annexure A attached to the application is a report by X; annexure B is a report by Y and annexure C is the decision taken by the respondent.

In its opposing affidavit, the respondent made the following averments: - that the relief sought by the applicants is not commensurate with the allegations made in the founding affidavit. The applicants were not clear as to whether they sought a review of the respondent's decision or merely the provision of reasons for the decisions taken. Further that there are material disputes of facts in the matter as the first issue to be resolved was whether or not the applicants' daughters had engaged in examination malpractice. The respondent also averred that the issue of whether or not there were material disputes of fact is now *res judicata* by virtue of the doctrine of estoppel in view of the fact that ZHOU J had found in another matter based on the same cheating allegations that there were material disputes of fact. The applicants were not party to that matter. Further that the relief sought by the applicants is unsustainable on the factual averments established in their founding affidavit. With regards to the main relief sought, the court cannot set aside the decision of the respondent of the 3rd of November 2017 and replace it with its own. The respondent also averred that the alternative relief sought by the applicants cannot be secured on the basis of section 4 of the Administrative Justice Act [*Chapter 10:28*]. Public policy would demand that the decision of the respondent be upheld as it is reasonably justifiable in a democratic society.

In *casu,* the respondent took action in its capacity as an administrative authority. Section 68 of the constitution which is contained in the Declaration of Rights [*Chapter 4*] provides:

"(1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.

(2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.

(3) -------------"

The Administrative Justice Act has brought in the concept of, "business unusual". In that regard I can do no better than borrow a leaf from the words of MAKARAU J (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 as follows:-

> "That the promulgation of the Act brings in an era in administrative law in this jurisdiction cannot be disputed. It can no longer be business as usual for all administrative authorities, as there has been a seismic shift in this branch of the law. The shift that has occurred is, in my view, profound as it brings under the judicial microscope all decisions of administrative authorities save where the provisions of s 3 (3) of the Act, apply. On the basis of the foregoing, I find that the decision by the first respondent summarily to terminate the lease agreement between itself and the applicant was an administrative action carried out by an administrative authority, empowered to do so by the lease agreement between the parties. The Act applies to that decision. The Act provides that an administrative authority which has the responsibility or power to take any administrative action which may adversely affect a right, interest or legitimate expectation of any person shall, *inter alia*, act reasonably and in a fair manner. The Act proceeds to define what a fair manner, for the purposes of the Act, entails and this includes adequate notice of the nature and purpose of the proposed action and a reasonable opportunity to make adequate representations, in my view, an embodiment of the *audi alteram partem* rule."

In cancelling the examination results, the respondent relied on s 34 (2) of the Zimbabwe School Examinations Council Act [*Chapter 25:18*] which reads as follows:-

"34 Cancellation of examinations and annulment of results

(2) If the Board is satisfied that any candidate for an examination—

(*a*) obtained unauthorized access to any examination material prior to the examination; or
(*b*) was impersonated by any other person at the sitting of the examination; or
(*c*) engaged in any form of fraud or dishonest conduct in regard to the examination; or
(*d*) contravened any rule or regulation governing the examination;
the Board may prohibit him from sitting the examination or may annul his results or withdraw any certificate, diploma or award given to him in respect of the examination, as may be appropriate.

(3) It shall not be necessary for the Board to consult or invite representations from any person before cancelling or postponing an examination or annulling the results of an examination in terms of subsection (1)."

In *casu*, annexure C being the letter of cancellation makes reference to the ZIMSEC regulations particularly paragraph C. The applicants also seek as part of their relief the

invalidation of the Zimbabwe School Examination description of malpractice and schedule of penalties to the extent that they are ultra vires s 34(2) of ZIMSEC Act and s 68 of the Constitution. It is pertinent to note that these regulations were not placed before the court by both parties and not enough evidence and submissions were made on the issue.

Although section 34(3) of the ZMISEC Act states that this body shall not consult or invite representations from any person before cancelling or postponing any examination or annulling any results or withdrawing any certificate, this seems to fly in the face of the constitution particularly section 68. It seems that the respondent is given the authority to act arbitrarily without considering the right to be heard. Any decision to withhold, cancel or annul examination results has drastic consequences on those affected and should not be exercised arbitrarily.

Having said that, I do concur with ZHOU J when he stated in the case of *Velah and ors* v *The Minister of Primary and Secondary Education and anor,* HH-124-18 that, " *The nature of examinations and their bearing on the credibility and integrity of a system of education are matters of national importance*". Section 34 (2) (a) addresses, "unauthorized access to any examination material prior to the examination". It does not state the manner of the unauthorised access. In my view, it is sufficient to just merely establish that there was unauthorised access. I note that the applicants' daughters were given an opportunity to present their side of the story regarding the allegations of having pre-accessed the mathematics examination paper. Both these reports confirm that the same questions that the two students had seen prior to the mathematics examination appeared in the paper in question. It cannot therefore be said that the issue of unauthorised access has not been established. In X's report she states that, *"Was even surprised to see the same questions Kim had asked me except of the circle geometry"*. That statement unequivocally establishes unauthorised access and it does not matter that the writer places blame on someone else. In Y's report she states as follows, *"I was shocked to see some of the problems I helped in the morning in the paper"*. This again is an unequivocal admission of unauthorised access despite the shifting of blame to someone else. It would have been a different matter had the two students not admitted the similarities in the questions that they saw prior to sitting for the examination and those that appeared in the examination paper. In my view, the issues of material disputes of fact and estoppel fall away. The decision by the respondent to cancel the mathematics results in respect of the two students cannot be faulted.

The next issue for consideration falls on the decision to cancel results for all other examinations in addition to the mathematics results. The applicants' daughters were never afforded an opportunity to make representations regarding the cancellation of results for all the other examinations. Annexure C specifically states that the students concerned accessed a mathematics 4030/01 paper which they received via social media. The same cannot be said about the other papers that they sat for. I did not read the respondent's notice of opposition to allege that there was evidence of "unauthorised access" to any other examination prior to them sitting or that there was some fraud or dishonest conduct on the part of the students. It seems to me that the students were punished for their conduct in relation to the mathematics paper and nothing more. To that end, the decision to cancel all other results falls foul of the Administrative Justice Act and the standard set in the *U-Tow Trailers (Pvt) Ltd* v *City of Harare and Another* matter. *T. Maanda* for the applicants likened the decision to crushing a lice with a hammer.

The respondent in its papers filed of record and at the hearing through submissions made by *T. Z Zvobgo,* contended that the court assuming that it sets aside the decision of the respondent should not substitute the decision with its own and grant the alternative relief sought by the applicants. It went on to state that the court will only assume the role of an administrative authority in limited circumstances as follows: - 1. Where the end result is a foregone conclusion and it would be a waste of time to refer the matter back. 2. Where further delay could prejudice the applicant. 3. Where the extent of the bias or incompetence is such that it would be unfair to the applicant to force it to submit to the same jurisdiction and 4. Where the court is in as good a position as the administrative body to make the decision – see *Affretair (pvt) Ltd and anor* v *MK Airlines (pvt) Ltd,* 1996(2) ZLR 15 @21 (based on comments in *Baxters Administrative law); Mhanyami Fishing and Transport Co-operative Society Limited and 2 ors* v *The Director General Parks and Wildlife Management Authority n.o-* HH 92-11; *Juve Simba* v *The Mining Commissioner and 2 others* HH-10-16. The applicants in their heads of argument also made similar submissions. I must hasten to add that the quality of the heads filed by both parties was very good and helpful to the court.

In my view, this matter is on all fours with the four considerations enunciated above. It will be an exercise in futility to remit the matter back to the respondent a body that has already cancelled the results. The examinations in questions were conducted in September/ November 2017 and already time has gone by. In Zimbabwe, one's ordinary level results

determines whether they will (a) proceed to advanced level and (b) the subjects that they will study at advanced level and (c) whether a student will repeat particular subject (s). Given the fact that the ZIMSEC Act (wrongly in my view) does not require consultation with the affected student before cancelling the results of an examination, it would be unfair to send the two students back to the respondent for a further determination of their matter. This court is also in a very good position as the respondent to make a decision.

The applicants' sought costs on a legal practitioner to client scale. Although this is a matter of national importance as it touches on the integrity of examinations, I do not see anything warranting an order of costs on a higher scale.

Disposition

It is ordered as follows:-

1. Respondent's decision to cancel and withhold the September/ November 2017 Ordinary Level results of the applicants' minor children namely, X (Candidate no. 3039, and Y (Candidate no. 3086) of subjects in examinations other than that of mathematics in unlawful.
2. Accordingly respondent shall provide the applicants' minor children with the ordinary level results in respect of all other subjects they wrote in the September/ November 2017 examinations except mathematics which shall not be referred to on the certificate of the ordinary level results.
3. The respondent shall pay the costs.

Maunga Maanda and Associates, Applicants' legal practitioners
Dube, Manikai and Hwacha, Respondent's legal practitioners