

JOHN TAFARA MPOFU
TREVOR JEKESÉ
ADMIRE JEKESÉ
KEITH MAHACHI
SIMBARASHE ELVIS CHAKATA
OBERT MUGUTI
PROUD NGIZA
EMMANUEL MASHAKADA

And

HAPAZARI CHIPUTSO

Versus

THE PRINCIPAL, MINISTRY OF HIGHER & TERTIARY EDUCATION, SCIENCE &
TECHNOLOGY DEVELOPMENT MASVINGO POLYTECHNIC (NO)

And

THE MASVINGO HEXCO REGIONAL CHAIRPERSON FOR HEXCO BOARD (NO)

HIGH COURT OF ZIMBABWE
WAMAMBO J
MASVINGO 25 July 2019, 21 & 27 August 2019 & 9 June 2021

Opposed Application

J. Mpoeri for 1st applicant
A. Timothy for 2nd to 9th applicants
T. Undenge for the respondents

WAMAMBO J: The applicants were electrical power engineering students at the Masvingo Polytechnic College (*hereinafter called the College*). The 1st respondent is the Principal of the said College. The second respondent is the Masvingo HEXCO Regional

Chairperson for HEXCO Board. 1st respondent is cited as the responsible authority for student affairs of the College. 2nd respondent manages the examinations of first respondent.

On 13 November 2018 the applicants sat for examinations in electronics for the final year. The results for the electronics module were deferred for all students. On 14 January 2019, text messages were sent to all students who wrote the electronics subject inviting them for a resit of the same subject on 18 January 2019. Thereafter matters escalated and the long and short of it is that a petition was delivered to the respondents. Legal practitioners became involved. The result thereof was that some students resat for the examinations on 31 January 2019.

Applicants aver that the deferment of their results was a breach of their constitutional rights. They aver that they have rights to lawful conduct by the administrative bodies of the 1st and second respondents. It is alleged among other things that if applicants had breached the rules and regulations of the College they should have been tried after being granted adequate notice. Further that they have a right to education and that by deferring their results "arbitrarily and unilaterally without any reasonable or just cause interferes with their constitutional right to education". Also that they have a legitimate expectation to their examination results which should be disclosed to them.

The applicants thus apply for declaratory order that the deferment of their results of 13 November 2018 be declared unlawful and that respondent be ordered to release the said results and that respondents should pay costs on an attorney client scale.

During the first hearing of this application I ordered that the record of proceedings and regulations be placed before the court and the parties to make submissions on the said record. There had been reference to the said record without it forming part of the papers before the record. The HEXCO General Guidelines 2016 (Higher Examinations Council General Guidelines 2018) and the report and investigations report on the conduct of the October – November 2018 HEXCO examinations in Masvingo Region 27-30 December 2018 (*hereinafter called the report*). The said record clarifies a number of relevant issues.

The applicants placed heavy reliance on the said report and also cited section 68 of the Constitution of Zimbabwe Amendment No. 20 (Act 2013) (*hereinafter referred to as the Constitution*).

The respondents' argument is that if the order sought by applicants is granted this will open floodgates. They also argued that the reasons for deferment of the results were given and that the applicants were heard. It was further argued that invigilators picked up malpractices. It was argued that the applicants were given two chances to rewrite the examination.

After the report was availed to the court counsel for the applicants and respondent made their submissions based on the report.

Respondents argue that the applicants cheated and that respondent's position is to protect the integrity of examinations.

The report which spans about 55 pages reflects the following:

The allegations were that candidates brought rulers inscribed with formulae and notes in violation of HEXCO Examination Rules and Regulations.

The investigation committee's terms of reference were as follows:

- (i) Investigate the administration and management of the October – November 2018 HEXCO Examinations in Masvingo Region.
- (ii) Establish the extent to which personnel in the HEXCO and National examination structures are familiar with HEXCO Rules and Regulations.
- (iii) Establish whether the Region complied with Rules and Regulations.
- (iv) Establish the extent of cheating in the Region during the October – November 2018 Examinations session and
- (v) Make recommendations to the HEXCO Chairperson.

Interviews were held with various stakeholders the summary of the some the interviews are as follows:

The Principal of Masvingo Polytechnic established that there are structures set up as for HEXCO Regulations. However it becomes clear that when the examinations of 13 November 2018 were undertaken he was off duty and the Vice Principal was responsible. He was not advised of any mishap. Effectively his evidence was not of much assistance. Besides outlining the procedures to be followed in theory he was not present during the writing of the examinations in question.

The Vice Principal gave evidence that he checked the commencement of the examination. He like the Principal is not aware of what transpired during the writing of the

examinations. Around 1600 hours he was advised that there was an anomaly in the conduct of the examinations. On 14 November he received a call from Head Office advising that invigilators were refusing to write reports on the conduct of the examinations. The long and short of his evidence is that the invigilators were emotional and that emotions overtook the observation of the regulations.

Mr Chikondere, the examinations co-ordinator testified that he was not at the venue of the examinations and was only speaking on behalf of his assistant Mr Mauta.

He was of the view that the inspectors mixed up matters in writing their reports.

Mr Dube the Chief Invigilator testified that rulers were returned to the candidates but it was not identified where the rulers had been collected individually. He conceded that the cheating case form was not utilised.

Mr Mapuranga the Chief Invigilator Engineering testified that within an hour of the commencement of the examinations he met an inspection team from HEXCO who already had 7 to 8 rulers with formulae inscribed. When it was requested to provide the names of the candidates who had cheated the inspectors said it was not necessary.

Mr Hurumidza the Chief Invigilator Commerce, Mr Mauta Exams Office Assistant Mrs F. Chinyati, Exam Administration Officer and others were also interviewed. I have read all their testimonies in detail. What emerges is that the correct procedures were not followed according to the Guidelines and Regulations. The cheating form was also not employed as per procedure. The supposed rulers were also not satisfactorily identified and linked to particular candidates. The details inscribed on the rulers and the effect the inscription had on the examinations results were not satisfactorily explained. It appears there was confusion and generally non-adherence to the procedures set out in the conduct of the invigilators and the inspectors.

For some reason there was a clash between the inspectors and the invigilators.

Section 68 of the Constitution provides in part as follows:

(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 prompt and in writing the reason for the conduct."

The report clearly reflects that the invigilators were not clearly aware of the HEXCO Regulations and did not follow the same.

Although the report recommends deferment of the results of the examinations of the candidates involved it is not based on any substantiated evidence of cheating on the part of the candidates.

The applicants had a legitimate expectation to their results by the responsible authorities. In this case no prompt reason for the deferment of the examination result was given.

Some firefighting was attempted through an invitation to rewrite the examinations. However, before this effort there had been no reasons given for the for the said deferment in the first place.

The report clearly paints a rather chaotic situation where the inspectors and the invigilators were not acting in tandem in the best interests of the advancement of examinations conduct.

I find that the withholding of the examinations fell foul of the Administrative Justice Act [Chapter 10:28] Section 3 thereof provides as follows:

- (1) *"An administrative authority which has the responsibility or power to take any administration action which may affect the rights interests or legitimate expectations of any person shall*
 - (a) *act lawfully, reasonably and in a fair manner and*
 - (b) *act within the relevant period specified by law or if there is no specified period within a reasonable period after being requested to take the action by the person concerned and*
 - (c) *where it has taken the action, supply written reasons therefore within the relevant period specified by law or if there is no such period specified period within a reasonable period after being requested to supply reasons by the persons concerned.*
- (2) *In order for an administrative action to be taken in a fair manner as required by paragraph (a) of subsection (1) an administrative authority shall give a person referred to in subsection (1)*
 - (a) *adequate notice of the nature and purpose of the proposed action and*
 - (b) *a reasonable opportunity to make adequate representation and*
 - (c) *adequate notice of any right of review or appeal were applicable.*

- (3) *An administrative authority may depart from any of the requirements referred to in subsection (1) or (2) if*
- (a) *the enactment under which the decision is made expressly provides for any of the matters referred to in those subsections so as to vary or exclude any of their requirements or*
 - (b) *the departure is under the circumstances reasonable and justifiable in which case the administrative authority shall take into account all relevant matters including-*
 - (i) *the objects of the applicable enactment or rule of common law*
 - (ii) *the likely effect of its action*
 - (iii) *the urgency of the matter or the urgency of acting thereon*
 - (iv) *the need to promote the efficient administration and good governance*
 - (v) *the need to promote public interest"*

The Masvingo Polytechnic clearly falls within the definition of an administrative authority.

Having found that the applicants were not directly or substantially linked to the offensive rulers and that the inscriptions on the rulers were not shown to be cheating and that the cheating form and other procedures as provided for in the Regulations were not followed. I conclude that the deferment of examination results for the appellants was clearly unlawful.

In *Douglas Nyati & Others v Lupane State University HB 104/18 MATHOWSI J (as he then was)* at page 5 said: -

"Now in terms of section 68 (1) of the Constitution every person has a right to administrative conduct that is lawful prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair. It has been stated that ever since the advent of the Administrative Justice Act [Chapter 10:28] which embodies the constitutional rights contained in section 68 of the Constitution in section 3, that it is no longer business as usual for administrative authorities. They have to make decisions which, when they affect the rights interests or legitimate expectations of others are lawful, reasonable and fair. See U-Tow Trailers (Pvt) Ltd v City of Harare & Another 2009 (2) ZLR 259 (H) at 267 F-G. Mabuto v Womens University in Africa & Others 2015 (2) ZLR 355 (H) at 356 A-C."

I find that when the applicants were invited and allowed to write examinations a legitimate expectation was created as protected by the law that they would receive the results of the said examinations.

The deferment of the results was clearly not proper at law in the circumstances. Procedures and processes were clearly bungled by the relevant authorities as is clear from the report as alluded to earlier.

I find in the circumstances that the appellants were not promptly advised of the decision to defer their examinations results and also not given an advised platform to voice their objections if any. The authorities clearly acted in an arbitrary manner.

To that end I find that the applicants have established the relief they seek and I make an order as follows:

1. The deferment of applicants' results for the 13th of November 2018 examinations by the respondents be and is hereby declared unlawful.
2. The respondents are hereby ordered to release the results for the applicants within 5 days of this order.
3. The respondents to pay costs.

*Saratoga Makaan Law Chambers; 1st Applicant's Legal Practitioners
Legal Resources Foundation; 2nd to 9th Applicants Legal Practitioners
Civil Division of the Attorney General's Office; Respondents Legal Practitioners*