**REPORTABLE** **(7)**

**ZIMBABWE SCHOOL EXAMINATIONS COUNCIL**
**v**
**(1) VICTOR MUKOMEKA (on behalf of a minor Charmaine Mukomeka) (2) CHINGASIYENI GOVHATI (on behalf of a minor Anesu Govhati)**

**SUPREME COURT OF ZIMBABWE**
**PATEL JA, BHUNU JA & BERE JA**
**HARARE, SEPTEMBER 20, 2019 & FEBRUARY 14, 2020**

*T. Mpofu*, for the appellant
*D. Halimani*, for the respondent

**PATEL JA:** This is an appeal against the judgment of the High Court setting aside the decision of the appellant, made on 8 February 2018, ordering the rewrite of an English language examination at Ordinary Level taken by candidates in November 2017. The appeal is mounted against part of the judgment, in particular, paragraph 2 of the operative order of the court *a quo*.

Background

The appellant is the Zimbabwe School Examinations Council (ZIMSEC), a statutory body created in terms of the Zimbabwe School Examinations Council Act [*Chapter 25:18*]. It is responsible for conducting examinations for primary and secondary schools in Zimbabwe. It is also empowered, in terms of s 34 of its enabling Act, to annul

examination results. The respondents are the respective guardians of two schoolchildren who sat to write the Ordinary Level English Paper 1 and Paper 2 examinations conducted by the appellant in November 2017.

It is common cause that there was a leakage of English Paper 2 which led to widespread cheating by candidates who sat for the examination in that paper. On 6 February 2018, the appellant took the decision to nullify the results of that examination. The appellant also directed a resit of that examination which was scheduled for 16 February 2018.

The respondents, being aggrieved by these decisions, filed an urgent chamber application in the High Court for an order setting them aside. They averred that the decisions were arbitrary and would cause undue hardship to their respective daughters as well as other students who had written their examinations in earnest and without cheating. At the time of the application, the first respondent's daughter had travelled to Australia, while the second respondent's daughter was in Bindura but her examination centre was located in Goromonzi.

The court *a quo* identified the issues before it as follows: whether or not the appellant's nullification of the English Paper 2 examination results ought to stand; and whether a rewrite of that examination was the appropriate remedy. The court proceeded to uphold the appellant's decision to nullify the results of the Paper 2 examination. However, it set aside the appellant's decision calling for a rewrite of the examination and substituted

it with an order to the effect that the results of candidates be based on the results in Paper 1 only, as *per* the recommendations of the English Subject Manager, dated 8 January 2018.

In arriving at its decision, the court *a quo* (which comprised two judges) reasoned that it could not uphold the results of the Paper 2 examination as this would amount to the court aiding and abetting cheating in examinations. However, the appellant's decision to order a rewrite of the Paper 2 examination was taken without regard to the recommendations of the Subject Manager and was therefore arbitrary in nature. Additionally, that decision was made without taking into account the interests of those children who did not cheat in the examination. It was also possible that many innocent children did not have access to information pertaining to the scheduled rewrite of the examination, as the notice given by the appellant for the scheduled rewrite was grossly and unreasonably short.

The appellant impugns the judgment *a quo* on the following grounds, as summarised:

- The court granted relief that was not sought or justified on the papers without advance notice or warning to the appellant.
- The court substituted its own substantive decision without being possessed of the tools to make such a technical and far-reaching decision.
- The only relief that was affordable was an extension of time for retaking the examination and the effect of the court's substantive decision was to negate the exercise of the appellant's statutory function.

- The issues in question were not resoluble on the basis of the Subject Manager's recommendations which had already been rejected by the authority vested with the mandate to consider them.
- The court granted final relief on an urgent basis in a matter that was hotly contested and where the parties were not availed sufficient time to advance their contentions.

I should note at the outset that the decision appealed against is an *ex tempore* judgment handed down with full reasons to follow, given the importance of the matter as perceived by the court *a quo*. Although those full reasons have not as yet been availed by the court, I take the view, with the concurrence of my brother judges, that the judgment that was rendered adequately sets out its essential reasons and basis so as to enable this Court to consider and determine the grounds of appeal *in casu*. In any event, both counsel for the appellant and the respondents were willing and prepared to proceed with the appeal on the basis of the available judgment.

Mootness of the Appeal

Apart from the foregoing grounds of appeal, there is a further aspect arising from a point *in limine* taken by Mr *Halimani*, counsel for the respondents, relating to the mootness of the matter in light of developments after the judgment *a quo* was delivered. In particular, it is submitted that all the affected students, including the respondents' daughters, have moved on since the events giving rise to this matter. Therefore, any judgment of this Court would not have any impact on their situation and no practical consequences would flow from granting the relief sought by the appellant. The Court must

deal with a controversy that is live and not one that is moot. The appellant "must not have a mere academic interest in the right or obligation in question but … some tangible and justifiable advantage" in relation to that right or obligation - *per* Chidyausiku CJ in *Ngulube* v *Zimbabwe Electricity Authority & Anor* SC 52–2002. The present matter is clearly academic. Furthermore, so it is argued, the judgment *a quo*, although delivered by two judges of that court, has not set any precedent, as there are two subsequent decisions of the High Court that did not follow the impugned decision.

Mr *Mpofu*, for the appellant, insists that the appeal is not academic. He submits that the judgment *a quo* sets a precedent for the appellant's actions in the future, especially because it is one that was delivered by two judges. The implications of that judgment have practical consequences. If the appellant were to find widespread cheating in its examinations and decides to nullify the results of those examinations, it will be confronted by the judgment *a quo*. In the circumstances, the present appeal is necessary to vindicate the appellant's right to carry out its administrative functions in accordance with the law.

The question of mootness was fairly comprehensively canvassed in a recent judgment of the Constitutional Court in *Khupe & Anor* v *Parliament of Zimbabwe & Ors* CCZ 20/19. As was aptly observed by Malaba CJ, at pp. 7-8:

> "A court may decline to exercise its jurisdiction over a matter because of the occurrence of events outside the record which terminate the controversy. The position of the law is that if the dispute becomes academic by reason of changed circumstances the Court's jurisdiction ceases and the case becomes moot …. The constitutional limits on the exercise of judicial power, combined with notions of the limited nature of judicial power, have evolved into a broad doctrine known as 'justiciability'."

The position on mootness and justiciability is no different in other common law jurisdictions. In the early American case of *Mills* v *Green* 159 US 651 (1895) at 653, the Federal Supreme Court held as follows:

> "The duty of this Court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this Court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal."

With specific reference to justiciability, the same court, in *Flast* v *Cohen* 392 US 83 (1968) at 95, opined that:

> "Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the 'case and controversy' doctrine. Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action."

To similar effect, the Supreme Court of Canada, in *Borowski* v *Canada (Attorney General)* [1989] 1 SCR 342, outlined the two-stage inquiry into the question of mootness:

> "An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercises its discretion to depart from it. The approach with respect to mootness involves a two-step analysis. It is first necessary to determine whether the requisite tangible and concrete dispute has

> disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case."

The same position has been adopted in South Africa. In *National Coalition for Gay and Lesbian Equality & Ors* v *Minister of Home Affairs* 2000 (2) SA 1 (CC), at para 21, the Constitutional Court held that:

> "A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."

Again, in *Koko* v *Eskom Holdings SOC Ltd* [2018] ZALCJHB 76, at para 21, it was emphasised that:

> "Further, the controversy must be a live one. Put differently it must exist between the warring parties. A case would be moot if the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, and the court is without power to grant a decision. It is moot, if it no longer presents an existing or live controversy or the prejudice or threat of prejudice which, to an applicant, no longer exists."

I have already adverted to the two-stage inquiry relating to the question of mootness. As was underscored in *Khupe's* case, *supra*, at p. 13, the mere fact that a matter is moot as between the parties concerned does not *per se* render it unjusticiable. The next step in the analysis is to decide whether or not the court should exercise its discretion to hear the case. In that respect, courts are guided by the rationale and policy considerations underlying the doctrine of mootness – *Borowski's* case, *supra*.

The overriding consideration is whether or not it is in the interests of justice to hear a moot case. The factors to be taken into account in that regard were lucidly enunciated

by the Constitutional Court of South Africa in *Independent Electoral Commission* v *Langeberg Municipality* 2001 (3) SA 925 (CC) at para 11:

> "This Court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced." (My emphasis)

An additional factor that may arise for consideration is whether the effect of declining to authoritatively adjudicate a moot issue would create a situation "capable of repetition, yet evading review". This was highlighted in two separate cases involving the constitutionality of anti-abortion laws in the United States of America and Canada. In the celebrated landmark case of *Roe* v *Wade* 410 US 113 (1973) at 125, the Federal Supreme Court held that:

> "Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of non-mootness. It truly could be 'capable of repetition, yet evading review'."

Again, in *Tremblay* v *Daigle* [1989] 2 SCR 530, at 571, the Supreme Court of Canada proceeded on the same basis:

> "As we have indicated, the Court decided in its discretion to continue the hearing of this appeal although it was moot, in order to resolve the important legal issue raised so that the situation of women in the position in which Ms. Daigle found herself could be clarified."

In the final analysis, as I have already stated, the overriding criterion in exercising the court's discretion to hear and determine a moot question is whether or not it

is in the interests of justice to do so. In the words of Malaba CJ in *Khupe's* case, *supra*, at p. 17:

> "Where a matter is of such a nature that it might keep arising in the Court or where there is need to resolve a serious legal question, the Court may exercise its discretion to hear the moot issue by reason of its significance, as it would in such circumstances be in the interests of justice to make a determination on the issue."

*In casu*, it is common cause that pursuant to the judgment *a quo* all of the students, including the respondents' daughters, who were affected by the appellant's decisions, have in fact moved on to other academic pastures beyond the Ordinary Level stage. Indeed, the only relief that the appellant seeks on appeal is that the challenge to its decision to have the flawed examination retaken be set aside. It is therefore not in dispute that any decision that this Court might render in this appeal will not entail any practical consequence *vis-à-vis* the students in question or their examination results as declared by the court *a quo*. In these circumstances, it cannot be gainsaid that the initial controversy between the parties herein is no longer live and has effectively been extinguished for all practical purposes. That particular controversy has become otiose and substantially moot. Nevertheless, the question that still remains is whether or not this Court should exercise its discretion to entertain and determine the merits of this appeal despite its apparent mootness.

Having regard to the factors articulated in the *Langeberg Municipality* case, *supra*, I am inclined to answer this question in the affirmative for the following reasons. There is no doubt that any decision that this Court makes will inevitably have some practical effect on many other students who will at some stage in the future sit to write examinations conducted by the appellant. The matter is therefore not one that can be

characterised as being entirely academic for all time. In the event that the appellant should for some good reason decide to exercise its administrative will to nullify the results of any given examination and require that it be taken afresh, the students that might be affected thereby as well as the appellant itself will be governed and guided by the decision of this Court. Thus, the extent of its practical effect would undoubtedly be of a long term and all-embracing nature. Moreover, the importance and complexity of the issues raised in this appeal are manifestly self-evident. Additionally, regarded from the different perspective alluded to in *Roe's* case, *supra*, there can be no doubt that the refusal by this Court to decide those issues will inevitably create a situation "capable of repetition, yet evading review". It seems necessary in the present context to definitively demarcate the proper boundary between ostensibly lawful administrative action on the one hand and appropriate judicial intervention on the other. Ultimately, I take the view that the Court should hear and decide the issues herein by virtue of their extensive and long term significance which dictates that those issues be determined in the interests of justice.

Final Relief Granted on Urgent Basis

The first ground of appeal attacks the judgment *a quo* on the basis that the court afforded relief which was neither sought nor justified on the papers before the court, without advance notice or warning to the appellant. Closely related to this ground is the fifth ground which impugns the grant of final relief on an urgent basis, without having availed the parties sufficient time to put forward their respective contentions. I intend to address both grounds together.

It is not disputed that the court *a quo* granted final relief instead of the interim relief that was sought by the respondents. It is also not in dispute that the final order that was granted departed materially from the provisional order that was sought by the respondents. The relief granted was not pleaded or supported by the averments contained in the founding affidavit and no evidence was led to support it.

It is trite that an application either stands or falls on its founding affidavit – *Director of Hospital Services* v *Mistry* 1979 (1) SA 626 (A) at 653 H-636B. It is also trite that a court is ordinarily not at large to grant relief which has not been sought by the applicant. The court cannot exceed its mandate to determine the issues placed before it by the parties through their pleadings and evidence or *mero motu* grant orders not sought by either party without obtaining the parties' views on those orders – *Nzara & Ors* v *Kashumba N.O. & Ors* SC 18-18.

As regards the grant of final substantive relief, it is generally undesirable to afford a final and definitive judgment on an urgent basis because that would ordinarily necessitate the applicant having to prove a clear right on the return date as opposed to a lesser *prima facie* right justifying the grant of interim or provisional relief – *Kuvarega* v *Registrar-General & Anor* 1998 (1) ZLR 188 (H); *Zimbabwe Congress of Trade Unions* v *Officer Commanding, Zimbabwe Republic Police, Harare District & Anor* 2002 (1) ZLR 323 (H) at 328.

*In casu*, Mr *Mpofu* submits that the appellant was not given sufficient time to deal with the matter properly on an urgent basis. Furthermore, the court *a quo* granted final relief that was neither pleaded nor sought, to the extreme prejudice of the appellant.

Mr *Halimani* counters that the parties were afforded the opportunity to address all the issues raised *a quo*. The urgent chamber application mounted by the respondents had effectively become an opposed matter. As regards the order granted by the court, he concedes that it did not grant the provisional order that was sought by the respondents. Nevertheless, so he argues, the case established by the respondents justified the final relief that was granted.

Having regard to the record *a quo*, I am inclined to agree with Mr *Halimani* that the parties were availed sufficient time and ample opportunity to put forward their respective contentions. The respondents filed their application on 9 February 2018, and the appellant responded to file its opposing papers on 12 February 2018. Thereafter, the respondents filed their heads of argument and answering papers on 12 and 13 February 2018 respectively. The appellant reacted immediately with its heads of argument on 13 February 2018 and the respondents' supplementary heads of argument were filed on the same day. The matter was then heard and determined on 14 February 2018. Given this scenario, I am unable to find any merit in the appellant's complaint concerning the time and opportunity afforded to advance its position.

Turning to the order granted by the court *a quo*, there can be no doubt that its terms are materially different from those contained in the draft provisional order sought by the respondents. However, given the perceived urgency of the circumstances *a quo*, I do not think that it can be said that the court took leave of its senses in departing from the original relief sought by the respondents. In my view, the facts of this case are clearly distinguishable from those in *Nzara's* case, *supra*, where the order that was granted by the lower court was simply plucked from the air. This was not the position *in casu* where the constraints of time were evidently paramount. The court *a quo* was obviously alive and sensitive to the interests of those students who would not have been involved in the malpractice of cheating as well as those who might not have had access to information pertaining to the examination that was to be rewritten.

In any event, r 246(2) of the High Court Rules allows the court seized with an urgent application to grant a provisional order in terms of the draft order as may be varied so as to accommodate the respective rights and interests of the parties. As has been observed, albeit in the context of fundamental rights, the courts have a duty to provide effective relief through an appropriate remedy in order to secure the protection and enforcement of important rights, even if it involves having to fashion or forge an innovative remedy – *Fose* v *Minister of Safety and Security* 1997 (3) SA 786 (CC) at paras 19 & 69. I fully endorse these sentiments and subscribe to the view that the courts should not invariably and slavishly be hidebound to the pleadings when framing effective remedies that are appropriate to the given circumstances. All in all, I am satisfied that the court *a*

*quo* did not egregiously misdirect itself in granting final relief in terms that were not originally motivated by the respondents.

In the event, I take the view that the first and fifth grounds of appeal are not meritorious in the particular circumstances of this matter. They are accordingly dismissed.

Judicial Interference with Administrative Action

The second, third and fourth grounds of appeal, taken cumulatively, relate in essence to the court *a quo* having set aside the appellant's administrative decision and having substituted its own decision in its stead. As I have already intimated, they raise the perennial question of the extent to which the courts may justifiably interfere with administrative action.

The fourth ground of appeal takes issue with the reliance placed by the court *a quo* on the recommendations made by the English Subject Manager in ordering that the results of candidates should be based on the results attained in Paper 1 alone. The Subject Manager's recommendations were contained in his/her report dated 8 January 2017. These recommendations were then endorsed on 15 January 2018 by the Examinations Committee in broadly similar terms.

Mr *Halimani* contends that there was no basis for the appellant to reject these recommendations of the Subject Manager and Examinations Committee. The appellant was more obsessed with protecting its image, despite the logistical difficulties and

prejudice to the affected students that would be occasioned by having the Paper 2 examination retaken at very short notice.

The court *a quo* appears to have agreed with this position and proceeded to find that the decision to rewrite Paper 2 was taken without regard to the recommendations of the Subject Manager and was therefore arbitrary in nature. However, as is evident from the minutes of the appellant's Board of Directors meeting held on 22 January 2018, the appellant did in fact consider and deliberate those recommendations. It thereafter took the decision to reject them so as not to jeopardise the integrity of the examination process.

In this respect, I fully agree with Mr *Mpofu*'s submission that the Subject Manager was not the relevant decision maker and that the Board was not bound to accept his recommendations. It was at large to accept or reject those recommendations in order to deal with the examination that had been compromised. The court *a quo* clearly misconstrued the import and purpose of a recommendation, the recipient of which is not legally obligated to accept and implement it in making its final decision. *In casu*, the Subject Manager had no power to bind the appellant's Board. All that he/she could do was to make recommendations for consideration by the Board. The Board duly considered those recommendations and rejected them on grounds falling within its administrative remit and province. The powers that were thereafter exercised by the appellant, *i.e.* to nullify the Paper 2 results and order a rewrite of the examination, were entirely concordant with the provisions of s 34(1) of its enabling Act, as read with s 24(2) of the Interpretation Act [*Chapter 1:01*]. The former empowers the appellant to annul the results of any examination

which is flawed by a specified irregularity, while the latter extends that power to address the consequences and exigencies of any such nullification. In my view, these provisions, taken together, entitled the appellant to exercise all such powers as were reasonably necessary or incidental to the proper and effective discharge of its statutory functions and duties, including the power to order a rewrite of any examination the results of which have been annulled.

The third ground of appeal is premised on the argument that the court *a quo*, having found that the respondents had established their case, could not render a decision that effectively negated the lawful exercise of the appellant's statutory functions. The only appropriate relief that the court could have afforded was an extension of the time period required for the retaking of the Paper 2 examination.

It is not in dispute that the decision made by the appellant to invalidate the results of the flawed examination was properly taken. This position was explicitly affirmed by the court *a quo* in paragraph 1 of its operative order. Nevertheless, the court then proceeded to deprive the appellant of the only logical and practical remedy consequential to the decision to nullify the examination results, to wit, that the examination be rewritten. In my view, a resit of the examination was unavoidable given that the power vested in the appellant to nullify examination results also allows it to rectify the situation by ordering that it be retaken. Any other remedial measure would have hopelessly undermined the integrity of the examination process.

What the court *a quo* could and should have done was to address the procedural aspects of the remedy, by interfering with the timelines that had been stipulated by the appellant and extending those timelines to accommodate the interests of all the affected students. Additionally, the court could have ensured that those students who had travelled outside the country be allowed to resit the examination at Zimbabwean embassies abroad. This was in fact specifically proposed by the appellant itself in its opposing affidavit.

On the other hand, what the court *a quo* could not legitimately do was to interfere with the administrative decision to order the rewrite of the flawed examination. It seems academically inconceivable that an examination, which hitherto has traditionally and globally consisted of an assessment of two separate papers, can suddenly be converted and tested on the basis of an assessment of one paper only. I shall revert to this aspect later in this judgment.

The second and most salient ground of appeal impugns the judgment *a quo* for having set aside and substituted the appellant's substantive decision with the court's own decision, without the court having been possessed of the tools necessary to make such a technical and far reaching decision.

The general principle is that the courts will not interfere with the actions or decisions of an administrative authority unless they are shown to be unlawful, grossly unreasonable or procedurally irregular or unfair. This fundamental canon of the common law, as embodied in the so-called *Wednesbury* principle, is now codified in s 3 (1) of the

Administrative Justice Act [*Chapter 10:28*]. The corollary to this principle is that the courts will generally not substitute their own decisions for those of the administrative authority. As was aptly recognised by McNally JA in *Affretair (Pvt) Ltd & Anor* v *M.K. Airline (Pvt) Ltd* 1996 (2) ZLR 15 (S) at 21:

> "The duty of the courts is not to dismiss the authority and take over its functions, but to ensure, as far as humanly and legally possible, that it carries out its functions fairly and transparently. If we are satisfied that it has done that, we cannot interfere just because we do not approve of its conclusion."

However, this latter principle is not immutable and may be departed from in exceptional circumstances. In particular, the court may substitute its own decision for that of the administrative functionary in the following instances:

- where the end result is a foregone conclusion and it would be a waste of time to remit the matter;
- where further delay would prejudice the applicant;
- where the extent of bias or incompetence displayed is such that it would be unfair to force the applicant to submit to the same jurisdiction;
- where the court is in as good a position as the administrative body or functionary to make the appropriate decision.

See the *Affretair* case, *supra*, at 24–25: *Gurta AG* v *Gwaradzimba N.O.* HH 353-13, at pp. 9–10; *C.J. Petrow & Co (Pvt) Ltd* v *Gwaradzimba N.O.* HH 175–14, at pp. 8–9.

Mr *Halimani* contends that all of the four exceptional criteria were applicable *in casu*. It would have been a waste of time to refer the matter back to the appellant as it

had become clear that it had failed in performing its functions. Further delay would have prejudiced the affected students in their ability to move on to the Advanced Level stage. It would also have been unfair to submit the students to the same hopelessly incompetent officials who had failed to safeguard the integrity of the examination. Lastly, the court *a quo* was in as good a position as the appellant to make the decision as it had been adequately addressed by the parties and had the relevant material on record.

Mr *Mpofu* counters that, once the court *a quo* had accepted that the appellant's decision to nullify the examination was correct, it could not substitute the decision of the appellant to have the examination rewritten. The court did not have the tools to substitute its own decision for that of a professional body. The usurpation of administrative functions by the court was unwarranted.

I fully agree with the appellant's position. Once it was accepted that the appellant was entitled to nullify the examination results, it must follow that it was also entitled to decide what steps should be taken to remedy the situation that had arisen. The court *a quo* was clearly not endowed with the requisite tools or technical expertise to determine the appropriate remedial measure to be applied. It is difficult to understand the basis upon which the entirety of the Ordinary Level English Language examination could be rationally evaluated and determined upon an assessment of Paper 1 alone. The court did not have regard to the different aspects that candidates are tested upon by Paper 1 on the one hand and Paper 2 on the other. The skills and competence involved in the two Papers are obviously and markedly different. In this respect, the court failed to consider that the

candidates would not necessarily perform equally consistently in relation to the two very distinct Papers. The court could not have considered the foregoing factors for the simple reason that it was not equipped to do so. In my view, the impugned part of the judgment *a quo* renders the credibility of the entire examination system administered by the appellant highly questionable.

In the final analysis, it is abundantly clear that the court *a quo* was not in as good a position as the appellant to make the drastic and far reaching decision that it made. In so doing, it usurped a function that only the appellant could have efficiently and effectively performed in accordance with its statutory mandate. By interfering with that mandate, the court unwittingly entered into a domain completely beyond its ken and thereby transgressed the proper boundary between lawful administrative action and appropriate judicial intervention.

Disposition

In the result, the appeal succeeds on the three substantive and principal grounds of appeal. As regards costs, there appears to be no reason to depart from the usual norm that costs should follow the cause.

It is accordingly ordered that:

1. The appeal be and is hereby allowed with costs.
2. Paragraph 2 of the judgment of the court *a quo* is set aside and substituted with the following:

"The application to set aside the first respondent's decision to have the Ordinary Level English Paper 2 examination retaken be and is hereby dismissed."

**BHUNU JA :** I agree.

**BERE JA :** I agree.

*Dube, Manikai & Hwacha*, appellant's legal practitioners

*Wintertons*, respondents' legal practitioners