

MUGUMBATE KENNETH
and
GOHODZI GOHODZI
and
MASINIRE RICHARD
and
MATEKU FUNGISAI
and
MLAMBO TINASHE
and
NYAMUZIWA RINASHE
versus
UNIVERSITY OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 20 February 2014 & 17 April 2014

Court application

R Masinire, for the applicant
R Nemaramba, for the respondent

MAFUSIRE J: It must be few decisions that will surpass the irrationality of the respondent's conduct in this matter. The sole point for determination was whether the course of study that the respondent had offered the applicants and others, and for which the applicants had studied for a year, was a postgraduate diploma or a mere diploma. The applicants said it was a postgraduate diploma. The respondent said it was a mere diploma. There was a deadlock. The parties came to court. I read the papers. I heard argument. At the end of the hearing I granted the applicants the relief they sought. I considered that the respondent's decision to switch, in midstream, and in the manner it did, the designation of the course from postgraduate diploma to a mere diploma, was grossly unreasonable in the *Wednesbury* sense, that is to say, a decision so grossly unreasonable as to be irrational and outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the issue to be decided would have arrived at it.¹

Here are the facts.

¹See *CCSU v Minister for the Civil Service* [1984] 3 All ER 939 (HL) at p 950 – 951 which was quoted with approval by DUMBUTSHENA CJ in *Patriotic Front – ZAPU v Minister of Justice, Legal and Parliamentary Affairs* 1986 (1) SA 532 (ZS) at p 548 (also reported in 1999 (2) ZLR 305).

The respondent is a university. The course in question was offered by its Faculty of Law. It was called Diploma in Law (Conciliation and Arbitration). The applicants had not been the pioneers of that course. I was not told for how long it had been running. But graduates in the stream ahead of that of the applicants had been awarded certificates with the designation “**Post-Graduate Diploma in Law (Conciliation and Arbitration)**”. The respondent said that was immaterial.

The respondent had invited interested persons to apply for the course. It had flighted an advert. The heading on that advert had read: “**UNIVERSITY OF ZIMBABWE FEBRUARY 2011 POST GRADUATE AND DIPLOMA PROGRAMMES**”. There had been several other courses offered by several other faculties such as Agriculture, Arts, Engineering, Science, Social Studies and Veterinary Sciences. Most of these were Masters’ degrees. Under the Faculty of Law the advert said: “**Diploma in Law (Conciliation and Arbitration) (1 yr f/t)**”.

The respondent said the advert did not say “post graduate diploma in law”. Therefore, so the argument ran, the applicants could not have been under any illusion as to the exact designation of the course that they had enrolled for.

That was the bulwark of the respondent’s case. However, it seems the respondent had conveniently ignored, or inadvertently overlooked, the rest of the advert and the other documents relevant to that course. Starting with the advert itself, under “**Entry Requirements**” and against “**Diploma in Law ...**” was the following: “**A good first degree in Law. Applicants with other professional qualifications and experience in Labour Law and Labour Relations may be required to sit a qualifying examination.**” Now is a university course that requires as an entry qualification a first degree not a post graduate course?

But this is just the beginning. There is more to come. It was a charade.

The applicants had responded to the advert. They had applied. They had been accepted. The acceptance letter had read in part:

“**ADMISSION IN THE YEAR 2011 TO THE POST GRADUATE DIPLOMA IN LAW – CONCILIATION AND ARBITRATION**”

I am pleased to inform you that your application for admission to the above mentioned degree programme has been accepted.

.....
.....

I would like you to note that this offer is made without prejudice to the rights which the University may have to withdraw or cancel in the event of you or the University being unable to meet the conditions of the offer.

Kindly note that admittance to the University is made subject to your accepting the conditions set out in this letter and your registering for the programme. Failure to do so may result in the University withdrawing your name from its list of successful applicants for the 2011 admission year.

(Underlining and emphasis by the author)

It was part of the respondent's argument that the prerogative to offer any course of study, to regulate it, and even to withdraw it, lies not with the applicants, not with the court, not with anyone else, but solely with the respondent's Senate. Therefore, so the argument ran, where the respondent had decided to withdraw the academic transcripts and diploma certificates that said "*post-graduate diploma in law*" and replace them with those simply inscribed "*diploma in law*" it was not up to the applicants or the courts to question that decision. This was in spite of the acceptance letter saying the respondent could withdraw or cancel the offer only in the event of an applicant or the respondent failing to meet the conditions of the offer. The conditions of the offer as stipulated in the letter related to the registration times, the starting times for lectures, the payment of the various fees for tuition, for registration, for examinations and for the library, and the need for an identity photograph. Evidently, none of these was the reason for the respondent's incredible decision.

The next document was the student enrolment form. For the post-graduate diploma in law the denotation was "*PDL*". The code for each of the subjects in that course started with the letters "*LLD*". The respondent's instruction under Section B of the student enrolment form, said, among other things, that the next section, i.e. Sections C and D, would form the basis of an applicant's record. The instruction required an applicant, among other things, to denote the correct code for his or her course of study. The instruction then went on like this:

“ENSURE THAT YOU GET DEPARTMENT AND FACULTY APPROVAL IN THE COLUMNS PROVIDED. THE DEPARTMENT/FACULTY SHOULD CIRCLE THE COURSE/UNIT CODE FOR WHICH YOU ARE ACCEPTED AND THEN INITIAL”

In s D, the applicants had filled in the subject codes, all starting with LLD. The faculty had signed. In s E the faculty had placed its seal. Thus the applicants had obtained the requisite departmental and faculty approval for the course of study of their choice.

That was not all.

The diploma was done over two semesters. The result slips for the first semester had the following heading: “***EXAMINATION RESULTS FOR 2011 SEMESTER 1 PDL POST GRAD DIPLOMA IN LAW (CONCILIATION & ARBITRATION)***”.

It was the same for the second and last semester. But the respondent still maintained it was a mere diploma, not a post-graduate diploma.

That was not all. There was still much more.

Apart from the student enrolment form, there was another application form titled “***POSTGRADUATE ADMISSION APPLICATION FORM***”. In s 4, under the heading “***CHOICE OF DEGREE OR DIPLOMA PROGRAMME***” an applicant would fill in the name of the programme of study and the relevant code. On all the forms laid before me the applicants had filled in “***Diploma in Law (Conciliation and Arbitration)***”. And except for one which had “***PDL***” filled in under “***Code***”, the rest of the forms had been blank on the box for “***Code***”.

The respondent went to town. It was argued that the applicants had filled in “***diploma***” and not “***postgraduate diploma***” and that therefore they had known exactly that they had been enrolling for a diploma, not a postgraduate diploma. However, that argument missed a little detail. Subsection 1 of s 4 on p 3 of that admission application form had required the applicant to refer to an APPENDIX before he or she could fill in his or her choice of degree or diploma programme. That APPENDIX had directed an applicant first to choose his or her programme and then to enter the code in the box in s 4.1 on p 3. On the APPENDIX there had been all the other faculties offering the postgraduate programmes. They had listed their own programmes of study as well as the individual subjects for each particular programme. But there had been nothing for the Law Faculty. The applicants said all the application forms handed to them had “***PDL***” inscribed on them on the top right hand corner. This had been done in long hand by none other than the respondent itself. This was not contested. The inscription was evident on the annexures produced in court. Thus, for the law diploma the APPENDIX was the “***PDL***” inscription by the respondent. Therefore, there could have been no question by either party as to what type of diploma course the applicants had enrolled for.

Even the student identity documents issued for those studying for the law diploma had “***PDL***” inscribed on them.

The next document was one containing the regulations governing that law diploma course. It was titled “***REGULATIONS GOVERNING THE POST GRADUATE DIPLOMA***”.

IN LAW (CONCILIATION AND ARBITRATION)”. Under “*ADMISSION CRITERIA*” the regulations read:

“A person may be considered for admission as a candidate for the *Postgraduate Diploma in Law* if the person has obtained a first degree in Law of an appropriate standard from this or another university.”

The regulations went on to state that the Senate could in advance approve an individual course or courses offered by another university, as a course which would allow credit for, or exemption from, a course prescribed for “*the Postgraduate Diploma in Law*.”

The regulations ended by providing that the classification of the Diploma “... *shall be done in accordance with University of Zimbabwe regulations*.” Thus, it was not said the classification would be at the whim of the University Senate as was the essence of the argument placed before me.

That was not all.

The lecturers in the various departments for the various subjects to be taught for that diploma course had presented the applicants with the course outlines and the course objectives. All of them had “*POST-GRADUATE DIPLOMA IN LAW*” as part of the headings.

The applicants had gone on to sit examinations in the subjects that they had studied, including submitting dissertations. All the examination question papers had been marked “*POST GRADUATE DIPLOMA IN LAW (CONCILIATION AND ARBITRATION)*”

The next development must rank as bizarre.

On graduation day all the applicants had been capped by the respondent’s Chancellor. The deans in the various faculties had presented the Chancellor with their respective citations and the lists of the graduands. In the Faculty of Law the citation had run: “*The Dean of Law, Mr E. Magade, will present to the Chancellor those Graduands who are present. POST-GRADUATE DIPLOMA IN LAW (CONCILIATION & ARBITRATION)*”.

It does not end there.

After graduation some of the applicants had collected their academic transcripts with the list of subjects that they had passed and the grades that they had attained. The transcripts had been marked: “*POST GRAD DIPLOMA IN LAW (CONCILIATION & ARBITRATION)*”. Not only that, but three graduates in the applicants’ class had collected their diploma certificates. The designation on those certificates, as in the preceding year, had been “*Post-Graduate Diploma in Law (Conciliation and Arbitration)*”. Only when some of the applicants had gone to collect their academic transcripts, and the others, the actual

diploma certificates, was it then that the respondent, according to its Vice-Chancellor, the deponent to the opposing affidavit, had noticed that there had been-

“... an apparent mistake when the admission letter... was written because clearly the reference to Post Graduate Diploma in Law (Conciliation and Arbitration) is not in sync with the programme which was in the contemplation of the parties at the time of the offer and acceptance.”

As to how such a mistake had possibly arisen and how it could have run for so long and on so many documents without detection, the respondent had this to say:

“... [I]t is my contention that the caption [on the rest of the documents] was wrong and irregular as the University was not offering that Programme but a mere Diploma in Law (Conciliation and Arbitration). The error was a result of same (sic) stereotyped (sic) minds in the University Administration System who, unfortunately, did not care to verify the correctness of the Diploma title as aptly described in the advert.”

In my view, and in the light of what I have highlighted above, there was everything irrational in the respondent's conduct. That course had run for at least a year before the applicants had embarked on it. The applicants' predecessors in the year before had been issued with certificates designated “*postgraduate*”. Virtually all the paper work, from the application forms, the student enrolment forms, the regulations governing the course, the course outlines and the examination and academic transcripts, had all been inscribed with “*postgraduate diploma*”. Some lucky students in the applicant's class had actually been issued with diploma certificates designated “*Post-Graduate Diploma ... Certificate*”. With all that, the decision to withdraw the “*postgraduate*” designation from the diploma for only a section of the students in the applicants' class could not possibly be blamed on an error by “*stereotyped minds*” lurking in the respondent's administration.

There was simply no error. The respondent had carefully considered and had carefully designated the course that it had intended to offer. It was to be a *postgraduate* diploma in law (conciliation and arbitration). The applicants had accepted it as such. They had paid the tuition and other fees on that basis. They had studied and had been examined on the course as a *postgraduate* diploma. They had graduated and had been capped by the respondent's Chancellor with a *postgraduate* diploma. Yet for reasons not really disclosed, the respondent had purported to downgrade the course to a mere diploma, thereby purporting to rob it of its prestige and its allure. In my view, such conduct was irrational in the *Wednesbury* sense.

At the hearing the respondent took a point *in limine*. Before me were six applicants. The founding affidavit had been deposed to by one of them. It had told the full story. It had

made out the whole case. All the annexures had been attached to it. But it had made no mention of the rest of the applicants. For that reason the respondent argued that this applicant had no authority to speak on behalf of the rest of them. It was argued that the rest of the applicants had been improperly before the court.

I dismissed the point *in limine*. It had no merit. The rest of the applicants had filed a separate affidavit deposed to by all of them. They said they had read and had understood the first applicant's founding affidavit. They said they confirmed giving their authority to the first applicant to depose as he had done. They verified and associated themselves with the contents thereof. I was satisfied that the rest of the applicants had properly been brought before me.

The respondent's decision to downgrade the diploma course from being a postgraduate diploma to a mere diploma, whatever its real reasons had been, could not apply retroactively. If it had been an error, which I reject it was, then it was not a *justus* error, namely a reasonable mistake that reasonably might have been induced by the applicants themselves². For the applicants, they knew they were enrolling for a postgraduate diploma in law. Others had done it before them. The respondent was also demonstrably of the same mind. The acceptance letter which the respondent blamed for the alleged error was simply not the sole document to signify the acceptance or admission of the applicants into the programme. The acceptance process had been a lengthy one. Among other things, the advert, the admission application forms, the student enrolment forms and the acceptance letter, had all been part of the offer and acceptance process.

The applicants explained that there had been no change in the content or curriculum of that programme from those that had studied it before them. Among other things, the fees had remained the same. This was not contested. So I took it as fact.

From the course outlines and the course objectives the programme seemed to have been carefully designed to cater for a certain niche in the field of industrial relations and conciliation. Most of the applicants, from the information given on their student enrolment forms, appeared to have been senior employees in their various fields of endeavour. Some of them had actually been sponsored by their employers. For them it seems the attraction of the course was its designation as a postgraduate diploma programme. That had prestige. For the respondent to then arbitrarily downgrade it, not even in midstream, but well after graduation, was manifestly wrongful. It was blatantly a breach of contract.

² See *Maresky v Morkel* 1994 (1) SA 249 (C)

The applicants argued that they had a legitimate expectation to be conferred with diploma certificates that were properly designated for the type of course that they had studied. They argued that the respondent had breached the *audi alteram partem* rule of natural justice when they had not been afforded the chance to make representations. Inevitably, reference was made to the cases of *Administrator, Transvaal and Ors v Traub and Ors* 1989 (4) SA 731 (A); *Metsola v Chairman, Public Service Commission & Anor* 1989 (3) ZLR 147 (S); *Health Professions Council v McGown* 1994 (2) ZLR 329 (S); *Taylor v Minister of Education & Anor* 1996 (2) ZLR 772 (S); *Mawenga v PTC* 1997 (2) ZLR 483 (S) and *Minister of Information v PTC Managerial Employees Workers' Committee* 1999 (1) ZLR 128 (S).

However, in this matter I feel I should not concern myself with the doctrine of legitimate expectation or the *audi alteram partem* principle. The respondent's conduct was patently a breach of contract. Furthermore, its decision, however it was made, whenever it was made and by whomever it was made, was so grossly unreasonable as to be liable to be set aside.

The respondent referred to s 16 of the University of Zimbabwe Act, *Cap 25: 16* and argued that only its Senate had the exclusive power to confer degrees and diplomas and even to withdraw them. It was argued that the process of arriving at such decisions was an administrative action. It was said such a decision is arrived at after taking into account academic considerations which this court is not placed to undertake.

The portions of s 16 of the University of Zimbabwe Act cited by the respondent read as follows:

- “The Senate as the academic authority of the University shall have the following powers and duties –
- (a)
 - (b) to be responsible for academic policy, the regulation of courses of study and the examinations held by the University,
 - (c) to regulate the admission of students to the University and to the courses of instruction held by the University,
 - (d) to recommend to the Chancellor, through the Council, the conferment of degrees, including honorary degrees, diplomas and other awards and distinctions of the University and the withdrawal and restoration of any such award ...”

The respondent's argument was illusory. The University of Zimbabwe Act is irrelevant. The respondent is an administrative authority. Like all administrative authorities its decisions are subject to review. It must not act wrongfully or unlawfully or irrationally or whimsically or capriciously. If it does its decisions will be set aside.

Although not well developed, it was the essence of the respondent's argument that as a rule of administrative law the court will refrain from usurping the functions of an administrative functionary. It will avoid substituting its own decisions for that of the administrative functionary. Reference was made to the case of *Mhanyami Fishing and Transport Co-operative Limited & Ors v Director General Parks & Wildlife Authority NO & Ors* HH 92-13.

In that case MAKONI J declined to grant certain fishing licences that the applicants had been denied by the respondents. Such licences had been continuously and routinely issued to them for the previous ten years. In turning down the application the learned judge had felt that to grant the order sought would have been tantamount to substituting the decision of the court for that of the administrative functionary.

As noted by MAKONI J in the *Mhanyami Fisheries* case; by MATHONSI J in the case of *Gurta AG v AfarasMtausi Gwaradzimba NO* HH 353-13 and by myself in the case of *CJ Petrow & Company Limited v AfarasMtausi Gwaradzimba NO* HH175/14, the approach in such matters was as set out by McNALLY JA in the case of *Affretair (Pvt) Ltd & Anor v M K Airlines (Pvt) Ltd* 1996 (2) 15 (S). Quoting from BAXTER *Administrative Law*, at p 681, the learned judge of appeal said³:

“The function of judicial review is to scrutinize the legality of administrative action, not to secure a decision by a judge in place of an administrator. As a general principle, the courts will not attempt to substitute their own decision for that of the public authority; if an administrative decision is found to be *ultra vires* the court will usually set it aside and refer the matter back to the authority for a fresh decision. To do otherwise ‘would constitute an unwarranted usurpation of the powers entrusted [to the public authority] by the Legislator’. Thus it is said that: ‘[t]he ordinary course is to refer back because the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary. **In exceptional circumstances this principle will be departed from.** The overriding principle is that of fairness.”

(my emphasis)

Thus in exceptional circumstances a court will substitute its own decision for that of the administrative functionary. There are four criteria:

- 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 At p 25D - F

- 3 where the extent of bias or incompetence is such that it would be unfair to the applicant to force it to submit to the same jurisdiction;
- 4 where the court is in as good a position as the administrative body to make the decision.

(See *Affretair's* case at pp 24 – 25)

Mhanyami Fishing is clearly distinguishable. The court held that it could not substitute its own decision for that of the Parks Officials because there had simply been no sufficient information laid before it to grant the licences sought. That position, with due respect, was correct on the facts of that case.

In *Gurta* the court substituted its decision for that of the administrative functionary after it had set aside his decision. It found that all the four criteria above existed. Again that decision was, with due respect, correct.

In casu I considered that all the four criteria existed to enable me to substitute my own decision for that of the respondent. In the premises, I granted the order in terms of the draft. The order was as follows:

“IT IS ORDERED THAT

1. The Diplomas issued to the Applicants be and are hereby declared [to be] Post – Graduate Diplomas in Law (Conciliation and Arbitration).
2. The Respondent be and is hereby ordered to issue to the Applicants the Diplomas referred to in (1) above.
3. The Respondent be and is hereby ordered to pay the costs of suit.”

J. Mambara & Partners, applicants’ legal practitioners
Chihambakwe, Mutizwa & Partners, respondent’s legal practitioners