

ANCILLA NYARADZO RUFASHA
versus
BINDURA UNIVERSITY OF SCIENCE EDUCATION
and
THE VICE CHANCELLOR
and
THE REGISTRAR
and
THE DEAN OF FACULTY AND COMMERCE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO, 2 & 28 December 2016

Urgent chamber application

Mr *C. Ndlovu*, for the applicant
Ms *G. Bwanya*, for the respondents

MAFUSIRE J: On 2 December 2016 I granted a provisional order restraining the respondents from preventing the applicant sitting an examination that was scheduled for 5 December 2016.

At all relevant times the applicant was a student with the first respondent [*“the University”*]. When she launched her urgent chamber application the examination in question was just three court days away. She was now in the fourth and final year of her degree course. Her application was for a provisional order restraining the University from barring her from writing the examination pending a final order directing the University to register her for the completion of the degree. The final order sought seemed confused. But that was not of immediate concern.

The applicant’s case was that some six court days before that examination, she had been shocked to learn, quite by chance, that her name had been removed from the list of those students scheduled to sit. She had gone to the University’s administration offices to check on the details and logistics of the examination. She says when she enquired as to why her name had been deleted, all she ever got were some verbal indications that she had an outstanding course from part one. Her degree was a four year course, broken down into two semesters per year.

The details of the applicant's case were these. She enrolled with the University in August 2013 and commenced her studies as a full time student in the Bachelor of Business Studies [Honours], Marketing. She failed a course in the second semester of the first year. However, the University allowed her to proceed to the second year. She also failed a course in the second semester of the second year. But again the University allowed her to proceed to the third year. The third year was the one for industrial attachment. She successfully completed it. In August 2016 she went back to the University and enrolled successfully for the fourth year. She paid the requisite fees and completed all the other registration formalities.

The applicant says after registering for the fourth year she religiously attended all the course lessons and tutorials. She did all the assignments and passed them. All along she had been preparing for the examination aforesaid. Her discovery that she was no longer on the list was on 25 November 2016. Her urgent chamber application was filed on 29 December 2016.

The applicant's argument was that the respondents should not have unilaterally deregistered her without first having afforded her the chance to be heard. She said the University's regulations did not provide for deregistration; that she ought to have been furnished with written reasons for the deregistration and that given that she had progressed to the fourth year and completed her course work and all the registration formalities, the University must be deemed to have waived its entitlement to require strict compliance with any such of its regulations as might have required her to pass all her courses before proceeding to the final year. She said she would suffer irreparable harm if she was not allowed to sit the pending examination.

The respondents opposed the application. And, as if points *in limine* are a mandatory ritual, it was argued that the matter was not urgent. The University's Regulation 8.3 from its Prospectus was quoted. It reads:

“Normally [*my emphasis*], a student will not be allowed to proceed from one part to the next without having registered and passed formal examinations in courses in the preceding part and having satisfied all prerequisites for proceeding as may be set out by the Faculty Regulations. No student shall be allowed to proceed from part three to part four without having passed all the required part one courses.”

The argument on urgency was that when she enrolled for her first year of study [i.e. in August 2013] the applicant knew, by reason of that Regulation, that she would not be

permitted to proceed into fourth year if she had uncompleted courses from any preceding year. At best, the need for her to act had been then. At worst, the need to act had been on 23 September 2016. It was argued that on that date the third respondent herein, the Registrar, had issued a notice to all the students. It read:

“All students are reminded of General Academic Regulation 8.3 for undergraduate studies which stipulates that a student cannot proceed to register for part four courses without having cleared required part one courses. All students are expected to comply with this Regulation.

Any student who had breached this Regulation is required to deregister part four courses. Those who ignore this Regulation shall be made compliant administratively.”

At the hearing, Ms *Bwany*, for the respondents, advised that the notice was posted to all the halls of residents. But the applicant claimed she was seeing the notice for the first time during the hearing. She denied that it had been posted to the halls of residents. Mr *Ndlovu*, for the applicant, pressed that in the absence of some proof of service, the notice was undoubtedly a forgery.

I dismissed the respondents’ point *in limine* and ruled that the matter was urgent. Going by the seminal test in *Kuvarega v Registrar-General & Anor*¹ I considered that the need for the applicant to act had arisen on 25 November 2016.

In the absence of evidence *aliunde*, I could not accept that the applicant had seen, or must be deemed to have seen, the third respondent’s notice. I did not necessarily buy the audacious argument that the notice was a forgery. What weighed heavily with me was that the applicant had all along anticipated sitting the examination scheduled for 5 December 2016. The respondents had, by their own conduct or inaction, fed that expectation. Among other things, they had allowed her to carry forward failed courses for the first and second years. She had successfully enrolled for the fourth year. She had attended lectures for that year. The University had accepted her fees for it. She had completed the course work. The University had marked and passed her. She had been entered for the final examination. Only at the eleventh hour was she removed from the list of those to sit the examination. She was not advised in person. She had discovered it through her own effort, and quite by chance. That was on 25 November 2016. That to me was when her clock had begun to tick. On 29 November 2016, i.e. less than four days later, her application was lying in the Registry. The matter was classically urgent.

¹ 1988 [1] ZLR 188 [H]

The arguments for and against urgency formed the bulk of the arguments on the merits. The respondents' major point was that the applicant had failed to establish a *prima facie* right to sit those examinations given that she was unqualified by reason of the uncompleted courses from the first and second years.

The respondents also argued that the applicant had taken advantage of the loopholes in the University's registration system. Students enrol online. Ineligible students are not immediately picked up. It was said the applicant knew that. She knew she was disqualified to proceed to the fourth year if she had uncompleted courses from the preceding years. She did not need the respondents to tell her that. It was all there in the Prospectus.

The respondents further argued that the applicant would suffer no irretrievable harm. It was common cause that she was scheduled to re-write the failed courses on 12 December 2016. If she passed them she would then legitimately enrol for the fourth part of her degree.

I was not persuaded by the respondents' argument. The requirements for an interdict are well known. The applicant must show a *prima facie* right having been infringed, or about to be infringed even if it be open to some doubt; an apprehension of an irreparable harm if the interdict is not granted; a balance of convenience favouring the granting of the interdict, and the absence of any other satisfactory remedy: see *Setlogelo v Setlogelo*²; *Tribac (Pvt) Ltd v Tobacco Marketing Board*³; *Hix Networking Technologies v System Publishers (Pty) Ltd & Anor*⁴; *Flame Lily Investment Company (Pvt) Ltd v Zimbabwe Salvage (Pvt) Ltd and Anor*⁵ and *Universal Merchant Bank Zimbabwe Ltd v The Zimbabwe Independent & Anor*⁶.

As said before, the respondents' cumulative conduct, starting from allowing the applicant to progress to the final year despite her uncompleted courses, culminating in them, *inter alia*, accepting her fees for the fourth year; allowing her to register for the fourth year, and allowing her to complete the course work, which they marked, must have created a legitimate expectation in the mind of the applicant that she had been granted the dispensation to sit her final examination despite her carry overs.

Even without delving into the complex question of waiver, by its own wording Regulation 8.3 did not seem to be cast in stone. The word "*naturally*" which prefaces the substantive part of the Regulation, evidently referred to the ideal situation, the norm, the rule.

² 1914 Ad 221

³ 1996 (1) ZLR 289 (SC)

⁴ 1997 (1) SA 391 (A)

⁵ 1980 ZLR 378

⁶ 2000 (1) ZLR 234 (H)

But invariably, to every rule there are exceptions. The applicant was not saying she was the exception. She was saying the respondents had relaxed the rule in her case.

Admittedly, the second part of Regulation 8.3 imports a more forceful or commanding meaning. It says **no** student **shall be allowed** to proceed from part three to part four without having passed all the required part one courses. But this is not addressing anything about the right of a student, who is now in part four, to sit final course examinations. It is addressing the right, or the ineligibility thereof, to proceed to the fourth part, something which the respondents had already condoned in the case of the applicant.

In all this, it could not be argued intelligibly that the applicant did not have a *prima facie* right. She did. The right might have been open to some doubt. But that would be of little concern where all that was sought was an interim relief.

If the registration process was faulty, as the respondents argued, then in my view, it was unfair to hold it against the applicant. But again, it was difficult to accept that the system was faulty. The applicant did not suddenly find herself in the fourth year. She had steadily been allowed to progress ahead despite her having failed some two courses way back in part one and two.

The applicant's fear that she could, after all those years, suddenly miss the forthcoming examination, was more than just an apprehension of an irreparable harm. It was a harm that was real.

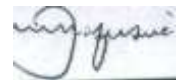
The greatest consideration by myself, when I granted the provisional order, was that the balance of convenience eminently favoured the applicant. Here was somebody who was in the final lap of her four year degree course. The crown was now within grasp. She had done everything required to attain it except for those two courses that she had failed in the lower parts. It was not as if in writing the 5 December 2016 examination the crown was automatically guaranteed. It was common cause that she was scheduled to re-write those outstanding courses on 12 December 2016. Furthermore, the respondents held all the aces. If for any reason she failed to fulfil all the requirements for the degree, including those two uncompleted courses, the respondents could always withhold her certificate.

On the other hand, if the applicant missed the 5 December 2016 examination there was no telling when next she would sit it. Ms *Bwanya* fumbled for an answer. Doubtless, all the applicant's four years of study would go to waste. All the money she had paid for tuition and other things would go down the drain. She would not be able to retrieve all those years lost. It seemed such a cruel fate. It would be the height of injustice.

Admittedly all educational institutions strive for excellence in all their endeavours. *In casu*, the right or duty of the University to uphold and maintain academic excellence, and all else that it offers, was never in question. The courts would not interfere with what would be the prerogative of the University's Senate, except in cases of manifest injustice. However, there was nothing the provisional order sought by the applicant would do to compromise the University's set goals; its core-values or its core-mission. There was no other remedy that would effectively counter the threat posed by the actions of the respondents to bar the applicant from sitting an examination that she had sweated for in all those years.

It was for the above reasons that I granted the provisional order.

28 December 2016

A handwritten signature in blue ink, appearing to read 'M. J. J. J.', is written over a horizontal line.

Ndlovu & Hwacha, legal practitioners for the applicant
Chihambakwe & Makonese, legal practitioners for the respondents