

REPORTABLE (61)

UNIVERSITY OF ZIMBABWE
v
(1) KENNETH MUGUMBATE (2) GOHODZI GOHODZI (3)
MASINIRE RICHARD (4) MATEKU RICHARD (5)
MLAMBO TINASHE (6) NYAMUZHWA RINASHE

SUPREME COURT OF ZIMBABWE
BEFORE GWAUNZA JA, HLATSHWAYO JA and MAVANGIRA JA
HARARE, JULY 2 2015 and OCTOBER 16 2017

R. H. Goba, for the appellant

S. Banda, for the respondents

MAVANGIRA JA: On 20 February 2014 the High Court, in HC 3546/13, issued an order in the following terms:

- “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. Respondent be and is hereby ordered to pay the costs of suit.”

This is an appeal against the whole judgment of the High Court captioned above.

The Facts

The appellant invited interested parties to apply for different programmes that were on offer at the University of Zimbabwe through an advertisement that was flighted on

24 October 2010. The Faculty of Law offered a course called Diploma in Law (Conciliation and Arbitration). The respondents applied for the course and were accepted. There were several other courses offered by several faculties including Agriculture, Arts, Engineering and most of these were Masters' degrees. In *casu* the problem arose when, after graduation, the respondents went to collect their transcripts and certificates. Their certificates were inscribed "Diploma" only, yet the respondents believed that they had been studying for and were therefore expecting to receive not mere diplomas but **post-graduate diplomas**.

The facts suggest that at all relevant stages after the respondents' responses to the advertisement until after the respondents' graduation, the parties dealt with each other on a footing that the respondents were pursuing a post-graduate diploma course. It was only after their graduation that the respondents realised that their certificates were endorsed that they had successfully pursued a diploma and not a post-graduate diploma programme.

The admission or acceptance letters that were written to the respondents 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. (the underlining up to this stage of the letter is mine)

....

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 the 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.

In the court *a quo*, the appellant, which was then the respondent, argued that the prerogative to offer any course of study, to regulate it, and even withdraw it lies not with the then applicants who are the respondents herein, nor with the court nor with anyone else, but solely with the respondent's Senate. Notably, however, the appellant withdrew the respondents' post graduate diplomas, in circumstances where the acceptance letter empowered it to withdraw or cancel the offer only in the event of either the appellant or the respondents failing to meet the conditions of the offer.

It is the respondents' contention that the conditions of the offer as stipulated in the letter related to the registration times, the starting times for lectures and the payment of various fees for tuition and for registration, among other things expected from a student at a university. They contend that they adhered to the conditions and that the two parties had entered into contracts. They contend that they fulfilled the contractual obligations but the appellant breached the contract by failing to give the respondents the post graduate diplomas that they had studied for.

Aggrieved by the appellant's decision to reduce their post graduate diplomas to mere diplomas, the respondents applied to the High Court for a declaratory order. The High Court has the power to grant the same in terms of s 14 of the High Court Act, [*Chapter 7:06*]. The High Court granted the order that was sought, in the terms captured at the beginning of this judgment. The High Court confirmed that the respondents had studied for a post graduate diploma in Law (Conciliation and Arbitration). The appellant was ordered to issue the respondents with post-graduate diplomas.

Aggrieved by the decision of the court *a quo*, the appellant filed the instant appeal on the following grounds:

“The Court *a quo* failed to judiciously exercise its discretionary power in issuing a declarator in favour of Respondents in the circumstances, particularly that it:

- (a) Failed to properly take into account the undesirable consequences of interfering with the recommendations of the Appellant’s Senate in respect of the conferment, withdrawal or restoration of degrees, diplomas and any other award;
- (b) Failed to properly take into account the nature of the advertisement flighted by the Appellant inviting applications for the programme in issue and the respective responses by Respondents to the said invitation.”

In its prayer the appellant prays for the appeal to be allowed with costs and for the order of the court *a quo* to be set aside and substituted with an order dismissing the application with costs.

Mr *Goba* for the appellant submitted that the appellant is a creature of statute and that it is in the exercise of its statutory as opposed to its administrative functions that it determines, through its Senate, the degrees, diplomas and other programmes that it offers and the contents thereof. He cited ss 11 and 15 of the University of Zimbabwe Act, [*Chapter 25:16*] in support of his submission. He also submitted that the relationship between the appellant and students is not purely contractual but is also governed by administrative rules. He submitted that degree content and other related issues are not contractual issues but are issues for the appellant’s Senate to deal with and that in *casu* the Senate had made an error; the question then arising being whether the appellant should be held to the error.

It was Mr *Goba*’s further submission that the error that he was referring to was stated in the appellant’s Vice Chancellor’s opposing affidavit in the court *a quo* as being an error in the admission letter which referred to a post-graduate diploma when this was not in the

contemplation of the parties at the time of offer and acceptance. The respondents had applied for a Diploma in Law (Conciliation and Arbitration) and not a post-graduate diploma. He submitted that as stated by the Vice Chancellor, the error was a result of some “stereotyped minds” in the University Administration system who, unfortunately, did not care to verify the correctness of the diploma title as aptly described in the advertisement. He further submitted that there is a *caveat* in clause 9.1 of the “**REGULATIONS GOVERNING THE POST GRADUATE DIPLOMA IN LAW (CONCILIATION AND ARBITRATION)**”, (the Regulations) which reads:

“9 CLASSIFICATION

9.1 The classification of the Diploma shall be done in accordance with University of Zimbabwe regulations.”

Mr *Goba* went on to submit that subjects such as conciliation, mediation and arbitration fall within the sphere or domain of Alternative Dispute Resolution (ADR) and not Law. He made further reference to para 2.1 of the Regulations which provides:

“2. ADMISSION CRITERIA

2.1 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. Candidates with first degrees in other disciplines may be considered if they have achieved an appropriate academic standard or have relevant professional experience and work accomplishments in the proposed field of study on such conditions as Senate may specify. Further a person who holds any other academic or professional qualifications which Senate have approved may be admitted to the Diploma.”

He further submitted that whilst the appellant readily accepts that an embarrassing situation has arisen, the respondents were aware that the invitation to apply stated that what was being offered was a diploma and that is what was intended by the appellant when it conceived the programme.

It was Mr *Goba's* submission that the matter be referred back to the appellant for it to hear and consider the respondents' representations and take corrective action and thereby protect its reputation. In this regard he referred to *ERF 167 Orchards v Great Johannesburg Metropolitan Council* 1999 (1) SA 104 (S). It will be recalled at this juncture that in its Notice of Appeal the appellant prayed for its appeal to be allowed with costs and for the order of the court *a quo* to be set aside and substituted with a dismissal of the application with costs.

Mr *Goba* finally submitted that no one, the respondents included, can have a legitimate expectation for something that is contrary to law or to prevent a functionary from exercising its lawful functions. He referred the Court to *University of the Western Cape & Others v Member of Executive Committee for Health and Social Services & Others*, 1998 (3) SA 124 (C).

Mr *Banda* for the respondents submitted that the narrow issue that disposes of this matter is whether or not the court *a quo* properly exercised its discretion in interfering with the appellant's authority or exercise thereof. It was his submission that the court *a quo* was alive to the principle that courts are loathe to interfere with administrative authority and also to the exception to that principle to the effect that where an administrative body exercises its authority whimsically or capriciously, the court can interfere.

Regarding the submission by Mr *Goba* that the matter be referred back to the appellant, Mr *Banda's* response was that the court *a quo*, in the exercise of its discretion, did not find this to be a proper course to take in the circumstances of this case. He also submitted that the issue of error was raised in the court *a quo* but it found that it was not a *justus error*. He further submitted that he conceded that the appellant being the offeror of the course, is in a

better position than the court to grant the qualification, but the respondents' disgruntlement was caused by the way in which the appellant handled the matter. He highlighted that in the court *a quo* the appellant sought the dismissal of the respondents' application with costs.

A question was posed to Mr Banda by the Court whether an order by the court *a quo* to refer the matter back to the appellant would tie the appellant's hands in correcting the error by recalling all its degrees. In response, Mr *Banda* submitted that a referral back to the appellant by the court *a quo* would not tie the appellant's hands and that the appellant would have to exercise its functions or authority properly.

The court *a quo* exercised its discretion in terms of s 14 of the High Court Act, [Chapter 7:06] which provides:

“The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequent upon such determination.”

The appellant is of the view that the court *a quo* misdirected itself by failing to take into account the fact that the conferment of diplomas, degrees and honours is a complex process which is done by the appellant through its Chancellor, Council and Senate. It is also of the view that the court *a quo* erred in granting the order sought, in the face of ss 7 and 13 of the University of Zimbabwe Act. The sections provide as follows:

“7. The Chancellor

The Chancellor shall be the chief officer of the University who shall have the right-

(a)

(b) on the recommendation of the Council and the Senate, to confer degrees, diplomas and other awards and distinctions of the University and to withdraw or restore any such awards.”

“13. Powers of the Council

Without derogation from the generality of any other powers conferred on the Council by this Act, the Council shall have the following powers-

- (a)
- (b) To receive recommendations from the Senate for the conferment, withdrawal or restoration of degrees, including honorary degrees, and diplomas and other awards and distinctions of the University and, if approved, to submit them to the Chancellor.”

It is the appellant’s contention that the court *a quo* misdirected itself in substituting the appellant’s decision to withdraw the post-graduate diplomas when the withdrawal was solely governed by the appellant’s administrative board.

The issue for determination in this matter is whether or not the court *a quo* properly exercised its discretion when it interfered with the appellant’s decision to confer on the respondent’s diplomas instead of postgraduate diplomas. In their heads of argument filed of record both parties are agreed that this is an issue for determination by this Court. The appellant’s heads of argument however raise a second issue couched as: “whether the court *a quo* properly assessed the effect of the advertisement sent out by the appellant as well as the responses thereto by the respondents.” In my view, this need not be a stand-alone issue but can, and will be subsumed in the determination of the first issue identified.

Without reproducing the court *a quo*’s detailed examination of the facts, the following snippets or pieces of undisputed facts will show how and why the court came to the conclusion that it did.

Although the advertisement flighted by the appellant did not describe the programme as a post-graduate diploma in law, under entry requirements against the diploma in law, the advertisement stated:

“**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.”

The respondents responded to the advertisement and applied. They were accepted. The acceptance letter has already been quoted earlier in this judgment at page 3. It will therefore not be necessary to repeat its contents. Suffice to state that it informed them of their admission to a post graduate diploma course.

The student enrolment form had the denotation “**PDL**” for post graduate diploma in law with the code for each subject in the course starting with the letters “LLD”. That is the code that the respondents filled in for the course subjects. The faculty signed, thereby giving the requisite departmental and faculty approval for the course of study.

The whole programme was done over two semesters. The results slips for the two semesters had the following heading:

“EXAMINATION RESULTS FOR 2011 SEMESTER ... PDL POST GRAD DIPLOMA IN LAW (CONCILIATION & ARBITRATION)”

In addition to the student enrolment form there was also another form titled:

“POSTGRADUATE ADMISSION APPLICATION FORM”

All the application forms handed to the respondents had “**PDL**” inscribed by the appellant, in long hand, on the top right hand corner. The student identity documents issued for those doing the course had “**PDL**” inscribed on them. It is not disputed that “**PDL**” stands for “Post Graduate Diploma in Law.”

Also issued to the respondents was a document titled: “**REGULATIONS GOVERNING THE POST GRADUATE DIPLOMA IN LAW (CONCILIATION AND ARBITRATION)**” The document, under the heading “**ADMISSION CRITERIA**” 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 also state in para 2.3 that the “Senate may, in advance, approve an individual course or courses offered by another university, as a course which, if completed, will allow credit for and exemption from a course prescribed for the **Postgraduate Diploma in Law**. Para 9.1 then provides that the classification of the Diploma shall be done in accordance with University of Zimbabwe regulations.” Para 3 proceeds to state:

“3. COURSES UNDER THE PROGRAMME

3.1 The following shall be the **Post Graduate Diploma in Law**, courses:”

The course outlines and course objectives that were presented to the respondents by the lecturers in the various departments, for the various subjects to be taught all had “**POST GRADUATE DIPLOMA IN LAW**” as part of the headings. All examination papers were marked “**POST GRADUATE DIPLOMA IN LAW (CONCILIATION AND ARBITRATION.)**”

On graduation day the Dean of Law presented to the Chancellor graduands for the **POST GRADUATE DIPLOMA IN LAW (CONCILIATION AND ARBITRATION)** whereupon the respondents were capped by the appellant’s Chancellor. After graduation some of the participants in the programme collected their academic transcripts showing the list of subjects that they had passed as well as the grades that they had attained. The transcripts were marked “**POST GRADUATE DIPLOMA IN LAW (CONCILIATION AND ARBITRATION.)**” Three graduates from the respondents’ class collected their certificates. The designation on them, as in the certificates for students in previous intakes who attended and successfully completed the same programme with the same content in the preceding years,

was “POST GRADUATE DIPLOMA IN LAW (CONCILIATION AND ARBITRATION).”

It was only when the respondents went to collect their academic transcripts and/or certificates that the appellant claims that it realised that there was an error in the admission letter referring to a Post Graduate Diploma in Law as it was only a Diploma in Law (Conciliation and Arbitration) that was in the contemplation of the parties at the time of offer and acceptance.

The prejudice occasioned to the respondents by the appellant’s decision is also exhibited by their undisputed averments in the following respects. The first respondent secured funding to embark on the programme from his employer on the basis that it was postgraduate diploma. During the course of the programme he diligently furnished his employer with progress statements by way of semester results which showed that he was studying for a postgraduate diploma. Other respondents secured employment on the strength of a result statement which consolidated all the results for the programme and indicated that they were for a post graduate diploma that had been successfully completed.

The court *a quo* after carefully scrutinising all these factors in detail found that the appellant’s conduct was irrational. The learned judge found that the decision to withdraw the “**postgraduate**” designation from the diploma for only a section of the students in the respondents’ class could not possibly be blamed on an error by “stereotyped minds” in the appellant’s administration as claimed by the appellant. He found that the purported downgrading of the course by the appellant to a diploma was irrational in the *Wednesbury* sense and granted the relief sought by the respondents. The term “Wednesbury unreasonableness” refers to one of the common law grounds of judicial review of administrative action as

formulated in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223. It denotes a reasoning or decision that is so unreasonable that no reasonable person acting reasonably could have made it.

The court *a quo* relied on, amongst other authorities, *Affretair (Pvt) Ltd & Anor v MK Airlines* 1996 (2) ZLR 15 (S) wherein MCNALLY JA quoted the following excerpt from BAXTER *Administrative Law*, at p 681:

“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 Legislature". 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.”

The learned author also stated that a court will normally interfere in the sphere of practical administration only if:

- a) the end result is a foregone conclusion and it would be a waste of time to refer the matter back
- b) where further delay could prejudice the applicant
- c) 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
- d) where the court is in as good a position as the administrative body to make the decision

The court *a quo* found that all the four criteria were met and proceeded to substitute the decision of the administrative authority. The learned judge found that the case of *Mhanyami Fishing & Transport Co-operative Society Limited v Kubatana Nharira Fishing*

Co-operative Limited & Others, HH 92/11 case was distinguishable. This was on the basis that the court therein found itself unable to substitute its own decision for that of the Parks officials for the reason, and rightly so, that there was not sufficient information placed before it in order for it to grant the licences that were sought. He found that in *Gurta AG v Afaras Mtausi Gwaradzimba NO* HH 175/14 the court rightly substituted its decision for that of the administrative functionary after setting aside the functionary's decision as all the four criteria listed by the author in BAXTER *Administrative Law* existed.

Before us the case of *Potwana v University of Kwazulu Natal* (5347/2012) [2014] ZAKZHC 1 (24 January 2014) (unreported judgment of the High Court of KwaZulu Natal, South Africa) was cited in the appellant's heads of argument with special reliance being placed on the following portion of paragraph 33 which reads:

“There is indeed authority that Courts have long deferred to universities’ decisions to expel students on grounds of academic misconduct. Ms Gabriel referred me to a journal article which cited the decision of Board of Curators on University of Missouri v Horowitz [1978] USSC 31; 435 U.S. 78 (1978) where the Supreme Court held [at p. 91] that ‘judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint’. The focus of the Court’s attention was directed more at the students’ rights of procedural fairness. Once this threshold was satisfied, the Court found no basis to interfere in the university’s decision.”

The underlined portions of the excerpt above were omitted from the quote as presented in the appellant's heads of argument. The omission of the first underlined portion may not be of any moment in the proper understanding of the principle sought to be leant on. It therefore need not detain us. It is different with the second underlined portion and particularly so with the portion that is not only underlined but also italicised. My understanding of this portion of the quoted passage is that once the threshold of the students' rights of "procedural fairness" was reached in that case, the court found that it had no basis to interfere in the decision of the university. In my understanding of the court *a quo*'s judgment (*in casu*), the court went

beyond procedural fairness and addressed the substantive fairness of the appellant's decision. It addressed the University's substantive decision itself.

A reading of the *Potwana* case (*supra*) also shows that the position in South Africa might be slightly different from ours. It appears that the courts in South Africa can interfere with the decisions of an academic board. The case makes it clear that in a situation where a university decides to withdraw a degree or a diploma, the action has to be sanctioned by a court. The issues for determination by the court in that matter were stated in para 24 as firstly, whether the University of KwaZulu Natal had the power, in the absence of any express legislative provision, to withdraw the applicant's degree, without an application to court; the inquiry being said to be based on the common law position. The second was stated to be whether the provisions of the Higher Education Act No. 101 of 1977 could be interpreted in a manner so as to confer on the University authority to withdraw degrees in the absence of an express authority to do so. In *casu* the court *a quo* was asked to exercise its discretion in terms of s 14 of the High Court Act and this Court may only interfere with the decision if the learned judge *a quo* failed to exercise his discretion judiciously.

The *Potwana* case is thus not of any significant assistance to the appellant. The procedural unfairness attendant to this matter is in addition to the substantive unfairness of the appellant's decision and therein lay the justification of the court *a quo*'s exercise of its discretion.

In *casu* despite the advertisement referring to a Diploma, the acceptance letter that was issued to the respondents was to the effect that they had been admitted to a post graduate diploma and they accepted the offer by following or meeting the conditions set out in the acceptance letter. As already seen above literally all the subsequent documents and conduct thereafter referred and related to a post graduate diploma. In any event, the advertisement gave

as the entry requirement, a good “first degree”. The diploma that was being offered could therefore only be a post graduate diploma regard being had to the definition of the word or phrase “post graduate”. The Oxford English Dictionary gives the meaning of “postgraduate” as “relating to or denoting a course of study undertaken after completing a first degree.”

Importantly too, it was only a year later and after the public and obviously joyous graduation of the respondents that the appellant purported to unilaterally effect the downgrading and that being done to some and not all the students in the respondents’ class. Furthermore, the respondents were not heard before the decision was made, thus violating the *audi alteram partem* Rule. In *Taylor v Minister of Education and Another* 1996 (2) ZLR 772 (S) at 780 A-B, the following was stated:

“The maxim *audi alteram partem* expresses a flexible tenet of natural justice that has resounded through the ages. One is reminded that even God sought and heard Adam’s defence before banishing him from the Garden of Eden. Yet the proper limits of the principle are not precisely defined. In traditional formulation it prescribes that when a statute empowers a public official or body to give a decision which prejudicially affects a person in his liberty or property or existing rights, he or she has a right to be heard in the ordinary course before the decision is taken, see *Metsola v Chairman, Public Service Commission & Anor* 1989 (3) ZLR 147 (S) at 333 B-F.”

The respondents had a right to be heard before an adverse decision affecting them was made. See *Guruva v Traffic Safety Council of Zimbabwe* SC 30/08. They were not accorded this right by the appellant. They therefore decided, in the circumstances, to approach the High Court in terms of s 14 of the High Court Act for a declaratory order. There was no impediment to them adopting this course of action. In *Bulawayo Bottlers (Pvt) Ltd v Minister of Labour, Manpower Planning and Social Welfare & Ors* 1988 (2) ZLR 129 the following was stated:

“... my understanding of the law is that there is nothing to prevent the petitioner from applying for and obtaining a declaratory order, even if it was open to him to commence review proceedings, provided that the court is satisfied that the applicant is an interested person in an existing future or contingent right or

obligation and that the case is a proper one for the exercise of its discretion in granting the order ...”

On the facts before the court *a quo* can the court be said to have exercised its discretion improperly? I think not. In our view the irrationality of the appellant is only too blatant. It is palpable. The unfairness of the appellant’s decision and action has not and cannot be justified on the facts of this case. The lower court cannot in the circumstances be said to have failed to exercise its discretion judiciously. The learned judge was alive to the applicable law in matters of this nature and of the undesirability and reluctance of the courts to take over functions of an administrative authority. It was also alive to the permissible circumstances for a court’s interference which circumstances it found to be met and it thereafter proceeded to interfere.

The submission made before us that the matter be referred back to the appellant finds no justification. This is further compounded by the appellant’s failure to explain the basis of the difference in treatment between the respondents and their classmates whose postgraduate diplomas the appellant has not sought to downgrade to diplomas.

The appeal is without merit. The settled grounds for interference with the exercise of judicial discretion have not been established. Costs will follow the outcome.

Accordingly, it is ordered as follows:

“The appeal is dismissed with costs.”

GWAUNZA JA: I agree.

HLATSHWAYO JA: I agree.

Chihambakwe Mutizwa & Partners, appellant's legal practitioners

J. Mambara & Partners, respondents' legal practitioners