IN THE HIGH COURT OF SWAZILAND

Civ.T.527/93

In the matter of

ARMSTRONG SIMELANE — Applicant

and

SENATE DISCIPLINE COMMITTEE — 1st Respondent
UNIVERSITY OF SWAZILAND — 2nd Respondent

CORAM :Hull, C.J.
FOR APPLICANT :Mr. Dunseith
FOR RESPONDENTS :Mr. Sapire and Mr. Millin for the respondents

J U D G M E N T
(28/04/93)

Hull, C.J.

In this application, brought on a basis of urgency, Mr. Simelane seeks an order requiring the University of Swaziland to re-admit him unconditionally and forthwith to his course of study at the Luyengo Campus for the degree of Bachelor of Science, pending the outcome of proceedings that he intends to bring for the review of disciplinary action taken against him by the academic authorities culminating in a decision to dismiss him from the university.

(The second paragraph of his notice of application does not describe this head of relief in those terms precisely. However from his founding affidavit and the submissions made on his behalf, this is what he is seeking in substance in that regard. Opposing counsel understood and opposed it on that basis).

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He also asks for an order granting him leave to institute an application for review - i.e. of the University's deliberations - on a notice of application to be supported by the same affidavits and other supporting documents as he has used here, supplemented by further documents so far as it may be necessary.

On the application for interim relief, it is not appropriate to embark on a trial of the merits of the proposed case on review. I do, however have to consider (inter alia) whether Mr. Simelane has made out a prima facie right in respect of the merits of his claim for a review. I also have to consider (inter alia) whether in the meantime, the balance of convenience favours the interim relief that he seeks.

In proceedings that are brought by way of application, a litigant in the first instance presents his evidence in writing, in the form of an affidavit. There is of course nothing objectionable about that. However, in the nature of things, the manner of taking evidence on affidavit differs from that of doing so orally. The deponent has the opportunity, in his own time, of preparing his written deposition. His attorney, in drafting the affidavit, will elicit from him and set out in an orderly way the relevant facts. He will, no doubt, explain to him that it is a solemn document. The court, for its part, is entitled to assume that the affidavit is a considered, accurate statement of his evidence presented in such a way that it does not mislead.

In the present case, I do proceed on an assumption that Mr. Simelane has given careful consideration to what he says in his affidavit. On that assumption, in some respects, I draw certain inferences from the way in which it is couched.

The granting of an interim interdict is a matter of discretion, though one to be exercised judicially.

In his founding affidavit, Mr. Simelane says that he is in his third year of studies and is the elected President of the Student Representative Council. The circumstances in which he says that the episode that led to the taking of disciplinary action against him occurred are set out in paragraphs 5 to 15 of his affidavit. I do not intend to repeat them in full.

In those paragraphs, however, he himself acknowledges or asserts the following facts:

(a) In a statutory general meeting on 11th February 1993, the student body resolved to implement a class boycott if the university's employees proceeded with a threatened strike on 16th February.

(b) The employees did go on strike on 16th February.

(c) He chaired the meeting of students that, according to him, occurred spontaneously at 7 o'clock in the morning of 16th February.

(d) At that meeting, the students resolved to picket the senior students who were writing a test in Classroom 1. They proceeded to the room.

(e) After making a report to other students who were not present at the meeting, Mr. Simelane himself went to Classroom 1, where students were disrupting the test.

(f) When he was called on by the Dean of the Faculty of Agriculture and the Assistant Registrar to stop the disruption, he declined to do so.

(g) After the Dean had made the students leave the room, they held a further meeting. A decision was taken to persist in the disruption of the test. The whole student body then proceeded to do so. The mood was aggressive. Sporadic fighting broke out with the students who were writing the test.

(h) Mr. Simelane himself returned to Classroom 1.

(i) The Vice-Chancellor, in the presence of the Dean, then called on Mr. Simelane to take the students out of the classroom. He declined to do so.

(j) The test had to be cancelled because of the disruption.

I infer from Mr. Simelane's account that he is saying that he did not participate in the second meeting of the students on 16th February (i.e. after they left Classroom 1 the first time) and that he is also saying that he returned to that classroom after the students as a whole had done so.

On the other hand, he acknowledges, in paragraph 8 of the affidavit that he did have some measure of control over the students in his capacity as chairman in the proposing and passing of the resolution a the first informal meeting on that day.

He is saying too that he tried to bring some order to the proceedings and to prevent violence and that he did his best to maintain order.

By "chairman", I take him to mean de facto chairman, for elsewhere his affidavit specifically refers to his role as President of the Council and his powers. Although he speaks of the students at the first meeting "reaffirming" as "their

resolution" the decision that had been taken formally on 11th February, it is also clear from his affidavit that he acknowledges - and indeed himself emphasises - that the meeting that he chaired on 16th February was an informal gathering. He himself does not refer to the proportion of the student body that was present at the first meeting, but he subsequently speaks of going off to talk to other students and, later, of the "whole student body" entering classroom 1 on the second occasion.

The issue in the proposed application for a review will of course be as to whether the disciplinary action that was later taken against Mr. Simelane was properly carried out. As far as that is concerned, Mr. Simelane goes on in his affidavit to describe the ensuing sequence of events.

On Thursday 4th March, he received a summons to attend a disciplinary hearing before the Senate Discipline Committee on Tuesday 9th March. This was in the following terms, to be found in Annexure B to his affidavit:

"To: Armstrong Simelane

"SUMMONS

"You are summoned to appear before the above named committee on Tuesday 9th March, 1993 at 2.30 p.m. at the Conference Room, Kwaluseni Campus to answer the following charges preferred against you namely:

"1. That on Tuesday, 16th February, 1993 you, in the company of other students, opened the door of classroom (room 1) at the Luyengo campus where a fourth year Agriculture class was writing a test, and the group of students you were with went in and sang and danced inside.

"2. That the Dean of Agriculture and the Senior Assistant Registrar (L) asked you to talk to the students to stop what they were doing, and you did not do that.

"You did all this in breach of paragraphs 1.1, 1.2.1 and 1.3.1 of the Regulations for Student Discipline.

"You may if you wish, seek the assistance, at the hearing of any member of the University who is prepared to assist you. You may also invite any witness to come and testify on your behalf.

"S.J. NKAMBULE
"SECRETARY"

The hearing of the charges proceeded on that latter day. The record of the proceedings is exhibited as annexure "D" to Mr. Simelane's affidavit. The outcome was that the Committee found that he was acting in common purpose with a group of students that he was leading and found him guilty of contravening paragraphs 1.1, 1.2.1 and 1.3.1 of the Regulations for Student Discipline in the ways specified in paragraph 2 of the Committee's decision, which is exhibited as annexure "E" to his affidavit. Put shortly, the Committee found that he was guilty of engaging in an act of intimidation by leading a group of dancing and singing students to Classroom 1 and opening the door, knowing that students were writing an examination there, and by refusing to tell the intervening students to stop when asked by the Dean to do so, and again when later asked by the Vice-Chancellor to do so.

The Committee further decided to recommend to the Senate that Mr. Simelane be expelled from the University forthwith.

On 18th March 1993, the Senate accepted and acted on the recommendation. Mr. Simelane subsequently appealed to the University Council. On 29th March 1993, it rejected his appeal.

The grounds on which Mr. Simelane challenges these proceedings of the University, as they are now formulated, can be summarised as follows:

(1) The regulations under which the proceedings were conducted are a subordinate form of statute law. Accordingly he was not given the period of notice prescribed by law.

(2) He was in fact prejudiced in his defence because he was unable to contact two material witnesses.

(3) He did not consent to the hearing proceeding on the notice that was actually given.

(4) It was grossly unreasonable for the University to require him to pay for the use of its vehicle to fetch his witnesses, as he had no money to do so.

(5) Throughout the hearing, the Senate Discipline Committee evinced bias towards him, and the hearing was conducted in an irregular manner, in the following respects:

    (i) He was sporadically cross-examined while prosecution witnesses were testifying.

    (ii) The prosecution witnesses were given full rein to explain their opinions and views.

    (iii) Whereas detailed notes were taken of the

evidence of prosecution witnesses, most of the defence evidence was either summarised, incorrectly, or omitted.

(iv) His application for an adjournment was dismissed as a delaying tactic.

(6) The Committee insisted that he called his witnesses and did not give him an opportunity to testify.

(7) The Committee prevented him from calling eye witnesses.

(8) The Committee apparently accepted the evidence of one Dr. Barnabas Dlamini for no apparent reason other than that he was a member of the academic staff.

He annexes at "D" the Committee's minutes of its proceedings. At "G" he also annexes his notice of appeal to the University Council. This did not, at least in terms, allege all of the complaints now raised on this application. Nothing adverse to him is to be inferred from that. At that time, he may not have had legal advice. The notice does however show that he appreciated that the charges had been brought against him not as President of the Student Representative Council but instead as an individual student.

Mr. Simelane concludes his affidavit by saying that (at the time when it was sworn, i.e. 16th April) classes were due to be resumed shortly, and that he is anxious that his studies should not be prejudiced further. At this hearing, it was acknowledged by the respondents that examinations will begin on 29th April, i.e. tomorrow, and that if Mr. Simelane has been wrongly expelled, but the interim relief that he now seeks is not granted, he will not be able to sit further examinations until the end of the year. In saying that, I

take the respondents to be saying themselves that in that event, he will be able to sit the examinations at the end of the year. In any case, if reinstated, he will obviously be able to sit them at this time next year.

An affidavit has been filed in answer to the present application by the Registrar of the University (the second respondent) on its behalf.

It asserts that Mr. Simelane is known to the University as an agitator and a person who provokes disruption and interference in its affairs, and that he was rusticated for such activities on one earlier occasion, some years ago. It alleges that he was the active leader of the group that interfered with the test. It asserts that his return to the University would cause interference and disruption and prejudice the majority of students and that the meeting of 11th February did not have a quorum. It expresses concern as to the credibility of the University authorities if Mr. Simelane is allowed to return and beyond that it includes (as does Mr. Simelane's own affidavit in certain respects and as is indeed common in this jurisdiction), argument which is properly a matter for submissions by counsel.

On this present application Mr. Simelane has to show:

(a) a prima facie right to the substantive relief which he is seeking;

(b) a well-grounded apprehension of irreparable harm if interim relief is refused and the ultimate relief is eventually granted;

(c) that the balance of convenience favours the granting of the interim relief; and

(d) that he has no other satisfactory remedy.

Mr. Dunseith submitted that Mr. Simelane disclosed on his own papers a very clear right. With due respect, I do not agree. The record of the hearing before the Senate Disciplinary Committee annexed to his affidavit indicates that the procedure to be followed was explained to him at the outset - see paragraph 4 of annexure "D". On the issue of short notice, it does say at paragraph 11.1 that he had "consented to the fact that he had enough time". In fact, if not in law, he had had 4 clear days notice.

The record does not on its face disclose a refusal by the Committee to allow him to give evidence on his own behalf. On the issue of a postponement to enable him to bring witnesses, it indicates that the Committee thought that he was attempting to delay the proceedings: paragraph 11.4.

It does appear from it that there was a time, while the case against him still being presented, when he was questioned at some length. This, however, appears to have been in the nature of an intention relating to a letter he is said to have written in March.

This was a hearing before a domestic academic disciplinary board or tribunal. It did have a duty to act fairly. On the review, the question of whether it duly followed its statutory procedures and observed the rules of natural justice will be in issue and it will certainly be open to Mr. Simelane to challenge the procedures that were followed, and in doing so the accuracy of the record. However on his papers now before me, I do not consider that it can be said that he has (as contended by Mr. Dunseith) a clear right of relief.

The test for present purposes of course is whether there is a prima facie proof of a right in terms of substantive law. If the facts alleged by him are taken for the argument as being true, then on one view I think it can be said that he may have prima facie the expectations of eventual relief but I myself have reservations about that. I do not think it is shown, at this point, that his prospects for success are strong.

If he does not obtain the interim relief sought, there is no doubt that he will suffer. If he does in that event nevertheless obtain the substantive relief he desires, his university studies will have been delayed (and I think it is proper to add) and delayed seriously. In that event he would have no other way of preventing that consequence. But it would not be irreparable harm. He could nevertheless, in time, finish his course.

The balance of convenience in my opinion, favours strongly the refusal of the interim relief sought. On the evidence, there was a serious disruption at the university. On his own evidence, Mr. Simelane was involved in some measure in that. The respondents of course are contending that he was heavily involved in it - in short that he played a leading part in it.

The respondents have the responsibility for running the university. If eventually they are right - that there was nothing in the disciplinary proceedings that calls for review - but in the meantime Mr. Simelane is allowed to return on an interim basis to the university, then I think that there is a very real risk that the university's interests - including that of the students as a whole - may be seriously prejudiced. I do not think that as it stands

at present, his own case for a review is shown to have strong prospects of success. All parties agree that there was no point in ordering an early hearing, as I have offered to do. I do not think it is an appropriate case in which to attach conditions to his interim return. The balance of convenience in my view, as I say, is in favour of refusing interim relief.

I accordingly exercise my discretion by refusing such relief.

The order sought in paragraph 3 of the notice of application is not contentious. Mr. Simelane in that regard has been to proceed accordingly.

Costs in the course in the review.

D. Hull.

David Hull
CHIEF JUSTICE