

IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO. 2637/04

MHLONISHWA MASILELA & 9 OTHERS

AND

UNIVERSITY OF SWAZILAND

CORAM

KAMBULE – J

FOR APPLICANTS

X. HLATSHWAYO

FOR RESPONDENT

MR. S. DLAMINI

JUDGEMENT 30/9/04

Before me is an application launched under a certificate of urgency and in which the applicants pray for inter alia:-

1. Directing the respondent to register the applicants into the Bachelor of Commerce degree under full time programme.
2. Costs.
3. Further or alternative relief.

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The respondent offers a three-year diploma course in commerce. Students who complete this programme with an overall credit pass or distinction may be recommended by the faculty board to senate, to proceed to year four of a degree programme offered by the respondent. The transfer of students from Diploma to the degree programme is governed by Regulation 9.5.0 of the university calendar.

All ten applicants completed their diploma programme at the end of 2003/04 academic year. Their final results were transmitted to them in letters from the respondents senior assistant registrar, one R.W. Masuku. The letters were dated 30th June, 2004. According to the letters the results read as follows:

OVERALL AVERAGE : PASS WITH CREDIT

RECOMMENDATION : MAY TRANSFER TO B. COMM.

In submission the applicants stated that when they were admitted to the respondent institution, the following were express conditions set out in the statutes:

1. To pursue a Diploma in commerce course under the programme of distant education, and
2. If they pass under the credit, or distinction categories, they transfer to the Bachelor of commerce course, and
3. The Bachelor of commerce is a two-year programme, that is, it includes Fourth and Fifth years.

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According to the applicants, as a matter of practice and procedure, the students from the IDE Diploma in commerce programme, upon completion of the said programme and upon attainment of the relevant credit and/or distinction they qualify for admission in the full time Bachelor of commerce programme.

Armed with their results the applicants presented themselves for registration under the full time Bachelor of commerce programme only to be told that they can only register under IDE part time programme whose duration is three years compared to the two years offered at the full time programme.

Applicants therefore, submit that the action or conduct of the respondent is unreasonable for the following reasons:

1. It is practice that the admission is only on condition that one obtains a credit or distinction as stipulated or provided in the rules.
2. The past practice accords a legitimate expectation of admission to all IDE students who meet the passing standards set out in the rules.

Respondent contends that nowhere in the regulations does it state that holders of a Diploma in commerce (IDE) automatically qualify to transfer to the Bachelor of commerce without specifying whether it is part time or the full time. Respondent states that it was neither an express nor an implied condition that the applicant would automatically transfer to the Bachelor of commerce full time programme if they pass with either the credit or distinction categories,

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According to respondent the Bachelor of commerce full time programme is ordinarily Two years for the full time students only and the applicants are not eligible to automatic qualification into the programme by virtue of their results in the part-time Diploma in commerce programme.'

REGULATIONS.

The relevant Regulation is 8.5.0.1 of the 2001/02 calendar which states that the applicants shall be eligible for admission into the Fourth year of the Bachelor of commerce programme. Applicant Annexure "B" extracted from 2003/04 calendar (Regulation 9.5.0.1) is worded in the same manner as 2001/02 calendar Regulation 8.5.0.1.

According to Regulation 1012.121 in the university calendar, unlike full-time Diploma in commerce, students who have passed with either a credit or a distinction category qualify to proceed to full time programme, students who are on the part time programme have to apply for transfer into the full time programme. From interpretation of this regulation it is clear that the respondent has a discretion either to grant or reject such applications.

From the foregoing it is clear and not in dispute that the students entered into agreements with the respondents to pursue part-time Diploma in commerce. They successfully completed their programme in 2003/04 academic year. On completion of this programme they qualified to proceed to the next programme, the degree programme. Currently the University offers two streams of this programme. There is the full time programme and part time programme. People who are on part time programme have to apply if they want to enroll on full time programme.

It is therefore clear that the relationship between the students and the university of Swaziland is a contractual one, and having regard to the

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provisions of the above - regulations, it is a contract in respect of each programme of study. The contract is entered into by acceptance of the students' application for admission; be it an admission to the Diploma programme or subsequent admission on completion of the Diploma into a degree programme.

Applicant's submission that it has been the practice over the years that students who successfully complete their Diploma programme and attain a credit or a distinction automatically transfer to the degree programme on full time basis cannot stand. In the absence of an implied term binding the university to acceptance in the next programme, the university is free to accept or refuse the offer contained in the application for enrolment in the full time programme.

The decision of a person (in this case the university) not to accept an offer to enter into a contract is ordinarily not one which has to be arrived at after application of the rules of natural justice, . The application for admission constituted an offer to contract with the university. The university is free to accept or reject the offer without affording the applicant an opportunity to be heard or furnishing reasons for rejection. SEE SIBANYONI AND OTHERS VS THE UNIVERSITY OF FORT HARE 1985 (1) SA 19 at 30 D.

The decision by the university not to admit the students in the full time programme was pure administrative as opposed to a quasi-judicial act and accordingly the principles of natural justice, and the audi alteram partem rule, did not apply.

It is the opinion of this court and one supported by respondent's submission that the university had acted bona-fide and had applied its mind properly to the applications and that it had come to the conclusion

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that due to the shortage of classrooms and other teaching aid the part time students should pursue their degree programme on part time basis.

In ALFRED MCALPINE AND SON (PTY) LTD VS TRANSVAAL PROVINCIAL ADMINISTRATION 1974 (3) SA 506 at 532 H - 533 B it is held as follows:

"The court cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before it can imply a tacit term the court must be satisfied, upon a consideration in a reasonable and business like manner of the terms of the contract and the admissible evidence of the surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested terms ... The practical test to be applied is ... 'you must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that you can be confident that if at the time the contract was being negotiated, someone had said to the parties: "what will happen in such a case?" They would have both replied: Of course, so-and-so. We did not trouble to say that; it is too clear"."

For the foregoing reasons and conclusions the application is in the circumstances dismissed. Costs will follow the event.

K.P. NKAMBULE

JUDGE.

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