

**IN THE HIGH COURT OF SWAZILAND****HELD AT MBABANE****CASE NO. 4436/07****In the matter between:****PERCY NDLANGAMANDLA****1<sup>ST</sup> APPLICANT****MUSA SHONGWE****2<sup>ND</sup> APPLICANT****MACHAWE DLAMINI****3<sup>RD</sup> APPLICANT****NHLANHLA HLATSHWAKO****4<sup>TH</sup> APPLICANT****THABISO MAVUSO****5<sup>TH</sup> APPLICANT****AND****THE UNIVERSITY OF SWAZILAD****RESPONDENT****CORAM****MAMBA J****FOR APPLICANTS****MR. S.V. MDLADLA****FOR RESPONDENT****MR. M. MAGAGULA**

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**JUDGEMENT****15<sup>TH</sup> FEBRUARY, 2008**

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[1] The applicants are all students enrolled at the University of Swaziland. They have brought this application in their personal capacities as such students and also in their representative capacities as members of the Student Representative Council (hereinafter referred to as the SRC). The respondent is the University of Swaziland a statutory body established in terms of the Education Act.

[2] This application is a sequel to another application under case number 3997/2007 before this court involving almost the same parties. That application was filed on the 1<sup>st</sup> November 2007 and was finalized by the court on 29<sup>th</sup> November, 2007. In that application, the applicants sought amongst other things for an order “interdicting and restraining the respondent from proceeding with the registration which has been set for the period 1<sup>st</sup> November to 16<sup>th</sup> November, 2007 and from implementing the semesterisation programme.”

[3] My Colleague Justice Maphalala, dismissed the application. He held that the applicants had not exhausted all the alternative internal remedies available to them in the University regulations, before launching the application. The court recommended that the applicants should prosecute their grievances internally in terms of these regulations.

[4] The applicants have done so and have not been successful. As a result of this, they have filed this application claiming, *inter alia*, for an order

“3.1 interdicting and restraining the respondent from implementing the semesterisation programme in

respect of the faculties which have not yet implemented the programme pending the exhaustion of the internal remedies by the applicants as per the court's recommendations.

3.2 interdicting and restraining the respondent from proceeding with the irregular examination set for the 10<sup>th</sup> December, 2007."

[5] This application was filed on the 6<sup>th</sup> December, 2007 under a certificate of urgency and was set down for the following date. On that day I heard arguments on preliminary objections, including *inter alia* that the matter was not urgent. The objections were all dismissed and I ordered that as the writing of the examinations sought to be stayed or suspended was scheduled for the 10<sup>th</sup> December 2007, the hearing of the application should continue in the afternoon on Saturday the 8<sup>th</sup> December 2007 and that the respondent, who had not yet filed its opposing papers should do so by noon that day. These documents were not filed with the Registrar until about 4 pm that day.

[6] The application was argued on the 8<sup>th</sup> and 9<sup>th</sup> December, 2007 and immediately after submissions I dismissed the application and ordered that each party is to

bear its own costs. I indicated that written reasons for the order I made would follow. These are my reasons for judgement.

[7] The nub of the applicants case is that the respondent has set in motion a process of registration for examinations in accordance with its semesterisation programme. These are the first semester examinations for the 2007/2008 academic year and these would be the first of such examinations for the Faculties of Social Science, Humanities and Commerce. In introducing this programme, the respondent has not consulted with students in the said Faculties and this unilateral decision is contrary to the rules and regulations governing the operations of the University. The applicants argue that as a result of this flouting of the statutes and regulations the implementation of the semesterisation programme and the examinations set to be undertaken are illegal and the respondent has to be prevented from proceeding with them. "Pending the exhaustion of the internal remedies by the applicants as per the court's recommendations."

[8] It is common cause that the respondent has three Campuses; one at Luyengo which is principally for Agriculture, another in Mbabane for Health Sciences and the

third one at Kwaluseni which is multi disciplinary. It is only the Kwaluseni Campus Faculties that are affected or involved in this application.

[9] In its opposing affidavit, the respondent explains that “semesterisation is a mode of assessment by examination at the end of each semester following the taking of semester courses. ...Students have received instructions on the courses offered in the first semester and they are expected to write examinations.”

[10] It is common cause further that the issue of semesterisation was initiated and discussed by the respondent and the relevant Faculties concerned, a long time ago and it was decided that the programme would be introduced in stages or instalments in the various Faculties. The Faculties that are not involved in this application have already implemented the programme. First to do so was the Faculty of Agriculture which did so at the beginning of the 2004/2005 academic year.

[11] The three Faculties involved in this application, mentioned above were expected to implement it with effect from the commencement of the 2007/2008 academic year and this would complete the said implementation throughout the university. In fact I think it is fair to say that the

programme has already been implemented even in these Faculties inasmuch as the students have been offered or instructed on courses in accordance with the programme. The applicants now have to perform their part in furtherance of the implementation; the writing of examinations.

[12] The respondent's main defence to the application is that the relationship between the individual students of the University and the respondent is contractual. The terms of the contract are based *inter alia*, on the undertaking that is signed by each student that such student shall, whilst enrolled as such student at the University, obey and abide by the rules and regulations governing the University. These rules and regulations are contained, in the main, in the University Calendar that is issued every Academic year. The students of the University have their own representative in the body or committee that oversees and formulates these rules and regulations. The interactions between the two contradicting parties are largely consultative. The respondent argues further that the semesterisation programme and its implementation, in all the Faculties concerned has been done based on consultation amongst all the role players or stakeholders, including the students. The examinations that are sought to be stayed or postponed, argues the respondent, are as a result of the said

consultations and or implementation of the semesterisation programme. That being the case, it is argued by the respondent, the examinations are regular and should go ahead as scheduled.

[13] It is common cause that consultations on the semesterisation programme amongst the stakeholders started in about 1995. The programme was later to be introduced or implemented in the staggered form stated above.

[14] The applicants argue that the forthcoming examinations (sought to be suspended) are irregular because in terms of the rules and regulations of the University, in particular regulation 040.55 “Formal examinations shall be written by students at the end of each year [and a] year shall mean one Calendar year, ie 12 months.”

[15] The argument is taken further by the applicants who state that

there can be *one* examination within the period of twelve months or shorter. The respondent does not then in terms of its own statutes and regulations 040.55 have the power to set *two* examinations in *one* academic year. This would be *ultra vires* the enabling legislation

and as such be *void ab initio*.”

[16] The applicants further make the point that regulation 011/02 provides that registration by candidates for examinations must be done “two months before the commencement of the main examinations and a week before commencement of the supplementary examinations.”

[17] The applicants argue further that there has been no registration as yet for the examinations in question, although the respondent has set new dates for registration. Applicants argue that this new period for registration is irregular as it is shorter than the two months laid down in the regulations referred to earlier herein.

[18] Finally the applicants concede that:

28.5.2 I am advised and verily believe that the applicants and the respondent are bound by the terms of the University Calendar and as such the Calendar for 2007/2008 is now in force and its terms are binding on the parties. ...

28.5.4 I further submit that as students, we are obliged to acquaint ourselves with the regulations and to realize that we could not, in 2007/2008 academic year write two examinations and not register for the examination in good time or at all.”

[19] The University Calendar for the 2007/2008 has been



filed and forms part of the documents before me. Both parties accept its binding nature between them. I have gone through the Calendar and in particular examined the regulations for the Faculties relevant to this application, namely the Faculty of Humanities, the Faculty of Social Science and Faculty of Commerce.

[20] The courses offered in each of these Faculties are grouped or offered per semester. Depending on the formula that is employed for the assessment of each course, the assessment is based on marks awarded for tests, assignments and examinations administered during each semester. In each department, the semester courses are examined and or assessed per semester. For instance in the department of Business Administration, regulation 241.34(d) states that:

“At the end of the semester, students shall be examined by one 3 hour paper for each half course.” Rule 231.32(d) for the Diploma and Degree Programme in Commerce is similarly worded.

[21] Again, in the Faculty of Humanities, for a Diploma in Journalism and Mass Communication, regulation 6.2(a) provides that

“the performance of students in years 1, 2 and 3 shall be assessed at the end of each semester, except in the case of JMC 301 Research Projects...” For the BA Degree in Humanities, rule 441.51 stipulates that

“There shall be formal examinations at the end of each semester and, subject to Departmental regulations, each course shall be examined by means of a two hour paper.”

And for the LLB Degree programme within the Faculty of Social Sciences, rule 642.18 provides that

“with the exception of L505 Research paper, each course shall be examined by one paper of two (2) hour - duration at the end of each semester.”

[22] As stated above, these rules and regulations as contained in the University Calendar for the 2007/2008 academic year are binding on the parties herein. The regulations I have quoted above, in my view, put the issue beyond doubt that the parties agreed to introduce and implement the semesterisation programme this year. The examinations that are sought to be put in abeyance are an essential component or part of that process of implementing the programme. The applicants can not be heard to say that these regulations have been unilaterally imposed upon them by the respondent. The applicants, through their representative within the relevant structures of the University, participated in the drawing up and promulgation of these rules and regulations.

[23] There is, in my judgement, no merit in the argument that the registration for the examinations is irregular because it is outside the period of two months provided in the rules. I agree with the respondent's counsel that the stipulated period is primarily for the benefit of the respondent, the provider or facilitator of the examinations to know and be prepared well in advance about all the requirements and or needs that have to be in place for the examination to take place.

[24] The applicants are bound by the rules and regulations contained in the 2007/2008 University Calendar. They are required in terms of those regulations to write examinations, where applicable, per semester.

[25] There is yet another reason why the application can not succeed. As stated above, the applicants are seeking an injunction or interdict "restraining the respondent from implementing the semesterisation programme in respect of the Faculties which have not yet implemented the programme pending the exhaustion of the internal remedies by the applicants as per the court's recommendations." (The emphasis has been added by me.)

[26] There are no further internal remedies that remain to be exhausted or pursued herein. Following the court's recommendations that the parties should exhaust the

internal remedies provided in terms of the rules and regulations of the University, the applicants filed their grievances with the Senate of the University. According to the applicants,

¶22. The respondent's Senate has now dealt with the matter and has rejected our grievances submitted to them for determination which is a factor that has not surprised us due to their high handedness with regards to the issue, at hand. We have since filed an intention to appeal to Council, but unfortunately Council can not overturn the Senate as [on] matters that deal with academic issues. The fact that Council cannot deal with the academic issues raised at Senate is indicative of the fact that we have exhausted our internal remedies as it (Council) cannot overturn the Senate in that regard. Notwithstanding, we will proceed and prosecute the appeal."

[27] The applicants explicitly and impliedly make the following assertions in the preceding quoted passage:

- (a) Applicants have filed their appeal to Senate
- (b) Senate has rejected it.
- (c) An appeal against the decision of Senate lies with the University Council.
- (d) Senate has the final say on academic issues - to the exclusion of the Council of the University.
- (e) The Applicants' grievance pertains to an academic issue.
- (f) Although the applicants are fully aware that the

Council will not overturn the decision of Senate dismissing applicants' case, applicants "will proceed and prosecute the appeal."

- (g) The applicants have "exhausted our internal remedies."

[28] It is clear to me that as the applicants point out, they have exhausted the internal remedies that were recommended to them by Maphalala J. The appeal to Council is a non starter. The applicants do not have the slightest belief in its worth. It has been filed "notwithstanding" such knowledge and belief by the applicants. I do not want, and indeed it is not necessary for me to speculate or determine why the applicants have done this. What is certain though is that there is no *bona fides* in the notice of appeal.

[29] In the result, there being no appeal pending to Council; the applicants having exhausted all the internal remedies as per the courts' recommendation, the very edifice or basis for the interim interdict crumbles. The interdict or application can not be granted as all internal remedies have been exhausted. There is nothing pending. Consequently, on this ground alone, the application must fail.

[30] The application is dismissed. And for the reasons stated in my unwritten judgment immediately after submissions, each party is ordered to bear its own costs of the application.

**MAMBA J**