IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 716/2013

In the matter between:

QUEENETH NCOBILE DLAMINI **Applicant**

And

UNIVERSITY OF SWAZILAND **Respondent**

Neutral citation: ***Queeneth Ncobile Dlamini v The University of Swaziland (716/2013) [2013] SZHC 195 (19th September 2013)***

Coram: **M. Dlamini J.**

Heard: **13th May 2013**

Delivered: **19th September 2013**

Application proceedings – circumstances warranting condonation for non-compliance with Rules of Court – students' required to register as per university's regulation – doctrine of legitimate expectation – requirements thereof – a case is authority for what it decides.

Summary: Applicant lodged an application by way of urgency seeking for an order compelling respondent *inter alia* to register and allow her to sit for the final examination. The respondent opposed the application on the basis that the period for registering had long lapsed in terms of its regulations.

Parties contentions

[1] Applicant premised her application on the following averments:-

> *"**AD BRIEF BACKGROUND***
>
> *5. In around August 2012, when the Respondent's 2012/2013 academic year, I experienced difficulties with my sponsor, the Swaziland Government who was reluctant to pay my fees for the academic year as it had been alleged that I was a civil servant and therefore I did not qualify for the scholarship.*
>
> *6. I was informed by the Respondent that I could not register without a letter from the Ministry of Labour and Social Security (my sponsor) indicating that it would pay my fees for the 2012/2013 academic year.*
>
> *7. I approached the Respondent's Dean of Student Affairs, Mr. Nkambule to inform him of my problem and that the reason why the Swaziland Government classified me a civil servant was because I had worked for the Swaziland Government in 2010 for a period of two (2) months in the Ministry of Education doing a survey.*
>
> *7.1 The Dean of Student Affairs informed me that I was not the only person who had a similar problem and efforts were being made to have same resolve. He further advised me to continue attending whilst means to have the matter resolved were being made.*
>
> *8. I approached the Ministry of Labour and Social Security to inform them of my predicament and I was also advised that the matter would be resolved and my scholarship would be paid out.*

8.1 *Thereafter, the Ministry of Labour and Social Security sent a list of students who were in the same predicament as myself to the Respondent and the Respondent placed the list in its premises' notice boards with a notice that we should submit certain documents to the Ministry of Labour and Social Security which documents included graded tax, letters of awards of scholarship and Identity Documents amongst other things. I duly submitted the said documents to the ministry.*

9. *I attended all my classes thereafter, wrote all my tests and I have just completed my project like all other students of the Respondent.*

10. *On the 7th day of May, 2013, having received a letter from my sponsor confirming that they were processing my payments and requesting that I be allowed to register and sit for my final examination, I duly sent it to the Dean of Student Affairs who advised me to meet with the Registrar of the Respondent and submit the letter to him. A copy of the said letter is annexed hereto marked "QND1".*

11. *I duly met the Registrar who advised me to write a letter which he can present to the Senate of the Respondent and explain my situation to them. I wrote a letter the said letter and submitted it to him having attached the letter from my sponsor. A copy of the letter is annexed hereto marked "QND2".*

12. *On Friday the 10th day of May, 2013 and at around 4.30 p.m. the Registrar gave me a letter which he said was a response from the Senate rejecting my request to register as a student and subsequently to sit for the examination without providing me with an explanation for the rejection. A copy of the letter is annexed hereto marked "QND3".*

13. ***AD PRESENT APPLICATION***

I submit that the Respondent has been aware of my predicament from the beginning of the academic year and therefore they cannot now turn and inform me that I will not be in a position to sit for my examinations.

14. *I submit further that I am doing my final year in the Bachelor of Commerce (level 7) and I have been religiously attending classes and all other related*

projects for the whole academic year and therefore I have a clear right to sit for the examination like all other students."

[2] Respondent submitted *au contraire*:-

"*4.* *I am advised and submit that the Applicant is applying for a final mandatory interdict and that in order for the Applicant to succeed she must establish that she has a clear right to the relief sought.*

5. *I am further advised and submit that the Applicant has manifestly failed to establish that she has any right to the relief she seeks, let alone a clear right.*

6. *It is common cause that the Applicant is not a registered student of the Respondent.*

7. *In terms of the University of Swaziland Academic General Regulations which are promulgated as Regulations under the University of Swaziland Act of 1983, Regulation 010.19, "**it shall be the responsibility of each student to familiarize himself/herself with the contents of the current copy of the University Calendar**". The Regulations are contained in the calendar, a copy of the relevant Regulation is attached hereto marked "**SV.1**".*

8. *According to Regulation 2.12, "**late registration is permitted for up to seven (7) days after to commencement of lectures as stipulated in the University Calendar. Registration beyond this grace period may be permitted by the Vice Chancellor for a period of up to 7 working days, provided evidence of official delay beyond the control of the student is produced**". A copy of the relevant Regulation 2.12 is attached hereto marked "**SV.2**".*

9. *According to Regulation 030.37, "**A person who is not registered in accordance with the Registration procedures prescribed by the University shall not be entitled to attend lectures, tutorials, write tests and assignments and / or partake in any other academic and extra curriculum activities of the University**". A copy of the relevant Regulation 030.37 is attached hereto marked "**SV.3**".*

10. *Regulation 030.38, "**Any assignment and tests submitted by unregistered persons shall be declared null and void, nor shall he / she be entitled to register and / or write examinations. The University shall upon discovery that any person who is not properly registered attends lectures require the person to leave the University".** A copy of the relevant Regulation 030.38 is attached hereto marked "**SV.4**".*

11. *According to Regulation 011.02, "**candidates may be required to register before the commencement of their examinations at such time as may be determined by the Registrar's office**". A copy of the relevant Regulation 011.02 is attached hereto marked "**SV.5**".*

12. *Registration for Examination was done in March, 2013, but Applicant even then did not bring the matter to my attention.*

13. *According to Regulation 011.50,"**Ignorance of these Regulations is no excuse**". A copy of the relevant Regulation 011.50 is attached hereto marked "**SV.6**".*

14. *Wherefore I submit that I as Registrar only became aware of the Applicant's issue on or about 7th May, 2013 when I was approached by Applicant.*

15. *The Dean of Student Affairs is not present or available but I honestly doubt that he would have instructed an unregistered person to attend lectures and if he did so he had no authority to do so."*

Background

[3] Before one adjudges the merits and demerits herein, it is apposite to mention that the applicant filed the present application on the verge of the eleventh hour. Both parties appeared before me in chambers around 10.00 a.m. on the 13th May 2013. Applicant's Counsel informed the court that she was not available until about 8.00 a. m. for the instructions. Due to the exigency of the application, the court ordered respondent to file not later than 12.00 noon as the examination was due to commence at 2.00 p.m. on

the same day. I must highly commend respondent and its Counsel for the *promptu* filing of the answering affidavit.

[4] I must further point out that having heard both Counsel on the same day I delivered an *ex tempore* ruling. I now embark on the reasons.

Common cause

[5] The following are matters of common cause between the parties:

- the applicant is pursuing her final year by virtue of being in her seventh year;

- Respondent has failed to register as 2012-2013 academic year student in terms of regulation;

- throughout respondent's academic calendar year 2012-2013, applicant has been attending lectures and tutorials and submitting all corresponding assignments and tests which were duly marked by the respective lecturers and tutors;

- serving before respondent is a correspondence by the Ministry of Labour and Social Security *viz.* applicant's sponsor which gaurantees payments.

Issues

[6] Applicant has given an elaborate explanation for her failure to register in time.

[7] Respondent on the other hand contends that it is bound by its regulations. As custodians of the Regulations, it cannot be seen to violate its regulation by registering the applicant at the eleventh hour. It would be flouting its own regulations. It would be disingenuous for it as the custodian of the regulations to be seen to violate its own regulations, respondent expatiated.

Adjudication

[8] No doubt, respondent is a creature of statute, endowed with administrative powers in the discharge of its functions and duties. It is expected therefore, that in this process, it will make laws regulating the smooth running of its business. It is for this reason that the principle by **Chaskalson P. Goldstone J.** and **O' Regan J.** in **Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) S.A. 374** is in all fours with respondent:

> "*Laws are frequently made by functionaries in whom the power to do so has been vested by a competent legislature. Although the result of the action taken in such circumstances may be "legislation" the process by which the legislation is made is in subsistence "administrative*"

[9] First and foremost in approaching the case *in casu*, I bear in mind the wise words which run across all decision taken by functionaries such as respondent in *casu*, of the honourable **Comrie J**. on **Mokgoko and Others v Acting Rector, Setlogelo Technicon and Others 1994 (4) S.A. 104** at **112F.**

> *"To the lay reader of this judgment I should explain that in this realm of the law the Courts distinguished carefully between the merits of an administrative decision and the manner by which that decision is taken…. **With rare exception** Judges do not substitute their own opinion or decision for the opinion or decision of the functionary board to whom the relevant power is entrusted by statute or subordinate legislation. Nor, generally speaking, are we qualified to do so. But we do insist that the repository of the power, which may be a far-reaching power affecting life, liberty or property, goes about his task in the right manner.*"

[10] The above citation leads me to point out that the applicant has not couched her prayers in the expected manner in applications of this nature. She prays as follows:

> *"3. Directing the Respondent to register the Applicant as a student.*
>
> *4. Directing the Respondent to allow the Applicant to sit for her final examinations which are scheduled to begin on the 13th May, 2013."*

[11] In the spirit of honourable **Comrie J**. *supra*, the applicant ought to have prayed for a review of respondent's decision. This is because respondent took a decision which was communicated to applicant. In so doing, respondent was discharging its administrative action in terms of its subordinate legislation and *in casu,* the regulations as correctly pointed out by respondent's attorney.

[12] I allowed the application even though it was lacking in form and procedure by the reasons that in view of its exigency, the interest of justice would best be served by deliberating on the merits.

[13] Further the applicant had prayed as follows:

> *"1. Dispensing with the procedures and manner of service pertaining to form and time limits prescribed by the rules of the above Honourable Court and directing that the matter be heard as one of urgency.*
>
> *2. Condoning the Applicant for non-compliance with the said Rules of Court."*

[14] Owing to the facts that it was a matter of two hours before the examination commenced, the court felt that this was an appropriate case where the general principle that the rules of court are sacrosanct and therefore meant to be observed could not apply. A further leaf was drawn from the *dictum* by **Millins J**. in **Chelsea Estate and Contractors cc v Speed – O'rama 1993 (1) S.A. 198** at **201** where he stated:

> "*The Rules of Court which constitute the procedural machinery of the courts, are intended to expedite the business of the Courts, and will be interpreted and applied in a spirit which will facilitate the work of the courts and enable litigants to resolve their differences in a speedy and inexpensive a manner as possible."*

[15] The learned judge *supra* proceeded to state in his wisdom:

> *"The court also has inherent power to adopt the provisions of the Rules to meet particular circumstances."*

[16] It would appear, I guess, the above *dicta* also operated in the mind of respondent and its counsel as it was not raised as an issue that applicant did not call for a review of its decision.

Merits

[17] The averments as cited above demonstrate that the applicant, as expected of her in terms of the respondent's regulation, attempted to register for the academic year 2012/2013. She was unsuccessful because her sponsor had at first declined to submit a letter of guarantee that tuition and other relevant fees shall be paid on her behalf.

[18] While she was attending to her sponsor, she was also faithfully attending all lectures, tutorials and submitting tests, and assignments and a project. She points out at paragraphs 7 and 7.1:-

> *7. I approached the Respondent's Dean of Student Affairs, Mr. Nkambule to inform him of my problem and that the reason why the Swaziland Government classified me a civil servant was because I had worked for the Swaziland Government in 2010 for a period of two (2) months in the Ministry of Education doing a survey.*
>
> *7.1 The Dean of Student Affairs informed me that I was not the only person who had a similar problem and efforts were being made to have same resolve. He further advised to continue attending whilst means to have the matter resolved were being made.*

[19] Eventually her sponsor dispatched a correspondence to the effect that it was processing applicant's payment and further requested that applicant be registered and permitted to sit for the examination. However, both applicant's and her sponsor's request to register the applicant and attend the examination were rejected by respondent by correspondence which reads:

"***RE: APPLICATION FOR LATE REGISTRATION***

We acknowledge receipt of your letter dated 7th April 2013, which was, however, received by ourselves on 7th May, 2013.

We regret to advise that your request for late registration could not be granted.

Yours sincerely,

S. S. VILAKATI
REGISTRAR"

[20] On applicant's averments at paragraph 7 and 7.1, the respondent answers

> *"15. The Dean of Student Affairs is not present or available but I honestly doubt that he would have instructed an unregistered person to attend lectures and if he did so he had no authority to do so."*

[21] Respondent submitted that it could not register the applicant because in terms of its registration regulation, registration ought to be within a specific period which had lapsed.

[22] The Regulations read:

> "*010.19 It shall be the responsibility of each student to familiarize himself/herself with the contents of the current copy of the University Calendar.*
>
> *2.12 Late Registration is permitted for up to seven (7) working days after the commencement of lectures as stipulated in the University Calendar. Registration beyond this grace period may be permitted by the Vice Chancellor for a period of seven (7) working days, provided evidence of official delay beyond the control of the student is produced.*
>
> *030.37 A person who is not registered in accordance with the registration procedures prescribed by the University shall not be entitled to attend*

lectures, tutorials, write tests and assignments and/or partake in any other academic and extra curricular activities of the University."

[23] On applicant's attestation that she has attended all lectures and submitted assignments and written tests and projects, regulation 030.38 stipulates:

> "030.38 *Any assignments and tests submitted by an unregistered person shall be declared null and void, nor shall he/she be entitled to register and/or write the examinations. The University shall upon discovering that any person who is not properly registered attends lectures, require the person to leave the University."*

[24] It appears that respondent took the view that its regulations are peremptory and therefore must be complied with.

[25] **Van der Heever J.** on the classification of clauses had this to say:

> "*We have a number of decisions in which the question is discussed whether statutory provisions are "peremptory" or "directory". In this connection those are unfortunate expressions; we are* ***not concerned with the quality of the command but with the unexpressed consequences flowing from it.*** *It is now generally accepted that much learning has been wasted on the spurious classification of laws into perfectae, minus quam perfectae and impefectae and that the rescript of* ***Theodosins*** *and* ***Valentinian*** *recorded in C.1.12.5 has no bearing on modern statutes. Ultimately the problem resolves itself into the question which was the intention of the legislator, and this intention must be derived from the words of the statute itself, its general plan and its objects."* (see **Lion Match Co. Ltd v Wessels 1946 O.P.D. 376** at **380**).

[26] Clearly, the intention of the legislature in the regulations cited was to bring efficacy to the business of the respondent. The regulations, in other words, are the machinery by which the respondent achieve its mandate. Its mandate is clear; to produce qualified professionals in each line of its various disciplines.

[27] **Millins J**. in **Chelsea** *op. cit*. once concluded in relation to rules of court:

> *"…the Rules are made for the Courts not the Courts for the Rules."*

[28] *Fortiori*, the regulations are made for the respondent not respondent for the regulations. In summary, rigid application of the regulations without regard to its consequences should be rejected.

[29] I say the above, as I pointed out during hearing, that in view of the circumstances of the case *in casu*, it would be in the best interest of respondent as well to have applicant sit for the examination. This is because, respondent, as it has not been challenged, throughout the academic year 2012/2013 expended its services to the applicant fully. All lectures and tutorials were extended, tests and assignments attended and a project supervised. One would expect respondent to accept the letter from the sponsor guaranteeing payment of the services rendered by respondent to applicant and therefore allow applicant to sit for the final examination. This is with more force as applicant is in her seventh final academic year.

[30] I must mention on the basis of the last preceding sentence herein that I am very much alive to the number of authorities to the effect that:

"*It has been laid down that a student who is admitted as such concludes a contract with the University and that the contract endures for the period of registration. A student who pursues a course of study over several periods of registration, thus concludes a series of consecutive contracts with his University." (**Comrie J.** in **Mokgoko** op. cit.)*

[31] I am further aware of the *ratio* in **Mkhize v Rector University of Zululand and Another 1986 (1) S.A. 901** at **904** F that:

"*The decision of a person not to accept an offer to enter into a contract with another is ordinarily not a reviewable decision."*

[32] However, as pointed out by honourable **Comrie J.** that there is a further aspect of the law that must be considered in matters of this nature *wit.*, legitimate expectation. It is the application of this doctrine of legitimate or reasonable expectation to the circumstances in *casu* that influenced me to take the view that justice would best be served if the application was granted in favour of applicant.

Doctrine of legitimate expectation:

[33] This principle of our law was well canvassed in **National Director of Public Prosecutions v Phillips and Others 2002 (4) S. A. 60** at pages **101 – 104.** Citing various authorities, the learned **Heher J.** revealed:

"*A legitimate expectation arises where a person responsible for taking a decision has induced in someone who may be affected by the decision, a reasonable expectation that he will receive or attain a benefit or that he will be granted a hearing before the decision is taken.*"

[34] He then cites **De Smith, Woolf and Jowell**, **Judicial Review of Administrative Action 5th Ed.** at **417, para 8-037** as follows:

> "*Such an expectation may arise, either from an express promise given on or on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."*

[35] The Honourable Judge wisely proceeds on this subject:

> *"[28] The law does not protect every expectation but only those which are 'legitimate'. The requirements for legitimacy of the expectation, include the following:*
>
> *(i) The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification': De Smith, sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril;*
>
> *(ii) The expectation must be reasonable: Administrator, Transvaal Traub (supra at 7561-757B); De Smith, Woolf and Jowell (supra at 417 para 8-037);*

(iii) *The representation must have been induced by the decision-maker: De Smith, Woolf and Jowell (op. cit at 422 para 8-050); Attorney-General of Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346 (PC) at 350h-j;*

(iv) *The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate: Hauptfleisch v Caledon Divisional Council 1963 (4) S.A. 53 (C) at 59E-G.*"

[36] It is apposite to highlight briefly the case before his **Lordship Heher J.** in **National Director of Public Prosecutions** *supra*. The applicant had obtained *ex parte* restraint orders against respondent in terms of the Prevention of Organized Crime Act pending application for a confiscation orders in due course by applicant.

[37] On the return date respondents raised a number of grounds in opposition to applicant orders, *wit, inter alia,* the principle of legitimate expectation. The 1st respondent contended that having engaged in the business of prostitution for a considerable time, the police being aware of the nature of his business over an extended period of time and having not taken any action against him or the business, he had a legitimate expectation that he will not be prosecuted for the same. On these averments, his **Lordship Heher J.** *op. cit* adjudged at page 103:

"*The evidence goes no further than to suggest that prostitution was rife and practiced openly and that the police and prosecuting authorities were*

lax in their prosecution of it because it was "a low priority offence." There is no suggestion that by word or conduct the police promised or represented that brothel-keepers would enjoy immunity from prosecution. To be lax in enforcement of the law against offenders, even a great number or even to say that one intends to target a certain category of offenders, is not sufficient to suggest or imply a promise or intention not to act against others in circumstances which are deemed appropriate at the time of action. It is absurd in the circumstances to infer that the police and prosecuting authorities unambiguously represented by their words and conduct that they would allow brothel keepers to flout the law openly and brazenly."

[38] The learned Judge proceeds:

"*The first respondent no doubt hoped that police and prosecuting authorities would not act against him. He may also have thought that it was unlikely that they would do so simply because his crime seemed to be of little importance to their book. He must, however, always realized that such a possibility existed. If he did not, his expectations was naïve, unreasonable and consequently, not legitimate.*"

[39] I now turn to the contention *in casu*. Could it be said that the case of applicant meets the requirements as laid down in **National Director of Public Prosecutions** *op. cit.*?

[40] Firstly was there a representation? If yes, was this representation, whether direct or implied, "*clear, unambiguous and devoid of relevant qualification*"?

[41] The applicant was allowed to attend all relevant classes. Her scripts in the nature of assignments and tests were marked. She was fully supervised for her project. She alerted the administration of her predicament in time. She was never interdicted from continuing attending classes.

[42] To me these exigencies conduce to representation by respondent which is "*clear, unambiguous and devoid of relevant qualification,*" as per **Heher J.** *supra.*

[43] I accept the position mentioned by his Lordship **Comrie J.** that a student cannot legitimately expect to be re-registered where there is "*failure to make satisfactory academic progress, the lack of funds or bursaries with which to pay the fees or changes of direction in the courses of study which should be pursued.*"

[44] However, it should be noted that *in casu*, the applicant was refused re-registration when its sponsor had submitted a letter guaranteeing payment of fees. The non availability of fees was therefore no longer an impediment to registration. In other words, in the circumstances of having made satisfactory academic progress from his attendance of classes and writing of assignments and project, with the funding for tuition and other relevant fees available as can be gathered from the letter by her sponsor, it cannot be said that her expectation to be registered was "*naïve, unreasonable and consequently not legitimate"* for reason that the possibility that she would not be registered could not be present. In other words, the expectation was reasonable in the circumstance.

[45] On the question whether the representation was induced by respondent, reference is made to applicant's averment at paragraph 7.1 which reads:

"*7.1 The Dean of Student Affairs informed me that I was not the only person who had a similar problem and efforts were being made to have same resolve. He further advised to continue attending whilst means to have the matter resolved were being made.*"

[46] Respondent answered:

"*15. The Dean of Student Affairs is not present or available but I honestly doubt that he would have instructed an unregistered person to attend lectures and if he did so he had no authority to do so.*"

[47] There being no evidence to demonstrate that the Dean of Student Affairs who is respondent did not grant permission to the applicant to continue attending classes and no allegation by respondent that it actually interdicted applicant from attending classes, it is clear that respondent made the representation the applicant is relying upon in her application.

[48] It would be remise of this court not to end by stating that the doctrine of legitimate expectation which later found its way from English Courts into the Roman Dutch jurisdictions is a result of robust decisions by our courts to develop the common law on the basis that court are enjoined to develop common law. However, in so doing:

"*Judges should be mindful of the fact that the major engine for the law reform should be the legislature and not the Judiciary*" (see **Bongzo v Minister of Correctional Services and Others 2002 (6) S.A. 330** at **345**.

[49] From the *dictum* in **Bongzo** case *supra*, the *ratio* by **Cobertt C. J**. in **Administrator, Transvaal and Others 1989 (4) S. A. 731** at **716F** is very much apposite as it highlights:

> "'*At the same time, whereas the concepts of liberty, property and existing rights are reasonably well defined, that of legitimate expectation is not. Like public policy, unless carefully handled it could become an unruly horse. And, in working out, incrementally, on the facts of each case, where the doctrine of legitimate expression applies and where it does not, the Courts will no doubt, bear in mind the need from time to time to apply the curb. A reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by public authority (and by certain domestic tribunals) and the contrary desirability of avoiding undue judicial interference in their administration.'* (words underlined my emphasis)

[50] I may add as per his **Lordship Hoexter J. A**. in **Jurgens and Others v Volkskaas bank Ltd 1993 (1) S.A. 214** at **221** quoting from **Quinn v Leathem [1901] A. C. 495 (HL)** at **506.**

> *"…that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since generality of the expression which may be found there are not intended to be exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found, …. that a case is only authority for what it actually decides.*"

[51] With the above last *dicta*, the present case holds true.

[52] In the totality of the above, applicant's application succeeds except that each party is to bear its own costs.

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M. DLAMINI

JUDGE

For the Applicant: **Ms. N. Ndlangamandla**

For the Respondents: **Mr. M. Nsibandze**