



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1908/2013

In the matter between:

GCEBILE DLAMINI

Applicant

And

THE UNIVERSITY OF SWAZILAND

Respondent

Neutral citation: *Gcebile Dlamini v The University of Swaziland (1908/2013) [2014] SZH 01 (16th January 2014)*

Coram: **M. Dlamini J.**

Heard: **13th January 2014**

Delivered: **16th January 2014**

Review application – failure to apply ones mind – adjudicator to consider both procedural and substantive matter – failure to consider substantive matter is travesty of justice – matter therefore reviewable.

Summary: The applicant, dissatisfied with the decision of respondent, has filed an application under a certificate of urgency seeking for an order directing respondent to register her as a student and setting special examination for applicant. Respondent opposes the application on the basis that applicant's request for registering was filed out of time.

Brief Resume

[1] It appears from the pleadings and submissions presented by both parties that the following are matters of common cause:

- The applicant enrolled at respondent's institution for an LLB Degree in the academic year 2010/2011. The government of Swaziland was responsible for tuition fees. The applicant progressed well until 2013/14 academic year. In this period, it would appear that the Government of Swaziland did not forward any payment of tuition fees to the respondent on behalf of applicant. This meant that the applicant could not be a student as one had to pay a certain amount of money before registering.
- The closing date for registering as determined by Senate was 19th September 2013. Before this date, applicant paid into respondent's account a sum of E2000.00. When she presented proof of payment in order to register, she was advised by respondent to raise a balance of E1,246.00 before she could be registered. However, applicant decided to raise the outstanding amount on the tuition fee. When she presented it to respondent, she was informed that the registration date had lapsed.

- Applicant lodged a petition before respondent's honourable Vice Chancellor requesting leave to register. Her prayer was dismissed on the basis that the gracious period for registering had passed. She noted an appeal to the respondent's Council who declined her prayer on similar grounds.

Issues

[2] The applicant has pleaded:

“28. Respondent's Vice Chancellor therefore, with respect, acted irregular and did not properly apply his mind in determining my application for extension. Further, the University Council also, with respect, acted irregular in endorsing the Vice Chancellor's decision. Had the Vice Chancellor and University Council applied their mind they would have ascertained that there was evidence of official delay which was beyond my control that led to the late registration and further they would have found out that my application for extension of registration deadline was still within the grace period provided for in Regulations, in particular Regulation 2.12.”

[3] The above assertion by applicant raises a number of pertinent questions. Had Council applied its mind when determining the matter? Or similarly did Council simply endorse the Vice Chancellor's decision? The next poser is whether applicant filed her application before the Vice Chancellor timeously?

Determination

Point of law

[4] A *point in limine* was raised on behalf of respondent in respect of the following prayers by applicant:

“3. *Ordering and directing the Respondent to register the Applicant as a student in Respondent’s University;*

4. *Ordering and directing the Respondent to set a special examination for the Applicant in terms of Regulation 011.49”.*

[5] From the prayers, respondent contends that the applicant has failed to file a review application.

[6] I agree with respondent that applicant has framed her prayers not in accordance with review application form. However, in her paragraph 28 cited above, it is clear that the ground for the application is based on the principles of review.

Merits

[7] The poser “*did respondent apply its mind to the matter before dismissing the applicant’s plea to be registered*” is to be answered by considering a number of factors.

[8] Two regulations are of relevance in this matter as pointed by both Counsel.

[9] Regulation 010.12 (a) reads:

“010.12 (a) Registration shall take place at the beginning of the academic year/semester or at such time as may be prescribed by the Senate”.

[10] Regulation 2.12 reads:

“2.12 Late registration is permitted 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 up to seven (7) working days, provided evidence of official delay beyond the control of the student is produced”.

[11] The first day of lectures was 12th September 2013. According to respondent, any grace period as per Regulation 2.12 ended on 29th August 2013. Applicant lodged her application on 2nd October, 2013, the respondent (Vice Chancellor) could not entertain her application as this was out of the extended grace period permitted under Regulation 2.12 as can be gleaned from paragraph 6.4 of respondent’s answering affidavit which is as follows:

“A further extension therefore in terms of this rule could not go beyond the 29th August 2013. Applicant submitted her Application on the 2nd October 2013, way after the grace period had expired. As such, she has no clear right in terms of Regulation 2.12 entitling her to the interdict sought.”

[12] At paragraph 6.9 and 6.10 respondent contends:

“6.9 *It therefore appeared to the Respondent that quite a number of other students were having problems regarding payment of tuition and/or registration. As such, the Respondent gratuitously granted an additional period for registration on the 29th August 2013 to the 13th September 2013. It issued a memorandum that was placed on notice boards, sent by emails to students and Faculty Deans and published in the media that the Respondent had granted an additional grace period for registration up to the 13th September 2013. A copy of the memorandum is annexed hereto marked “A1”. The Applicant still never took advantage of this additional grace period neither did she come to the Respondent to explain that she was having challenges of any sort;*

6.10 *After the expiry of the grace period of 13th September 2013, the Respondent again gratuitously granted another grace period up to the 19th September 2013 and likewise communicated this decision to all students. Still the Applicant failed to pay the minimum amount for registration. Having gone out of its way to accommodate prospective students who were encountering problems similar to the Applicant’s regarding registration and thus having granted an additional grace period for registration, the Respondent thereafter took a decision not to grant any further extension of the grace period after the 19th September 2013 because the grace period had initially ended on the 29th August 2013. A copy of the memorandum extending the grace period for registration to the 19th September 2013 is annexed hereto marked “A2”.*

[13] In fact the decision by Council as communicated to applicant bears testimony to the averment by respondent that it “took a decision not to grant any further extension of the grace period after the 19th September 2013...” The decision reads:

“Following your appeal to the University Council against the decision of the Vice Chancellor not to allow you to register, after the deadline for registration had passed, the University Council appointed a Sub-Committee to consider your appeal.

After careful consideration of your oral representation and that of the representative of the University, the Sub-Committee resolved that your appeal be dismissed since it was in violation of academic regulation 2.12.

The Council at the meeting held on 14th November, 2013 endorsed the decision of its Sub-Committee. The Council also resolved that you should be refunded the sum of E2000.00 which you paid to the University account on 10th August, 2013.”

[14] Glaring from the “*considerations*” is the following extract from the record of proceedings by Council deliberation on applicant’s application:

“(X) That the University tries to treat all students in an equitable manner”.

[15] This “*equitable manner*” is highlighted in the preceding paragraphs of the same record viz. “(ii) *That the University extended deadlines three times*” and more particularly:

“viii) That further request for late registration were received on 27th September 2013 and these were turned down by the Senate.”

[16] It is my considered view from the above circumstances that the respondent took a blanket approach towards all applications that were presented to it. It took the decision that as Senate “*turned down*” applications for registration on 27th September, 2013 of which applicant was not part, all

other applications ought to be refused. Its justification was based on the notion that “*the University tries to treat all students in an equitable manner.*”

[17] With due respect to the honourable respondent’s Council, the manner in which it approached or handled the present application is contrary to the principles and purpose of appeal or review as the case may be. The principle that like cases must be treated alike, could not by any stretch of imagination apply in the circumstances presented before respondent. The position of our law is that it was irregular for a body exercising *quasi judicial* powers such as Council to take a uniform decision that would apply equally across all applications presented to it appealing for registration. Functionaries vested with *quasi judicial* authority ought to know that human beings are diverse, intricate but extricable in nature. One therefore might be faced with the same subject matter but because it involves human beings, in most cases the circumstances or set of given facts will differ. It is for this reason therefore that those called upon to exercise such powers (judicial) whether *quasi* should take time to cautiously apply their minds in each and every case presented before them rather than to take an arm-chair critic approach.

[18] This approach by respondent is further aggravated by what appears on the minutes of Council in deliberating the matter i.e. “(viii) *..further requests for late registration were received on 27th September, 2013 and these were turned down by Senate, read together with (ix) ..in all cases of extension, memos and e-mails were sent to staff and students and (x) ..the university tries to treat all students in an equitable manner*”. Clearly from its observations that “... *further request for late registration were received on 27th September, 2013 and these were turned down by Senate, demonstrate*

that Council failed even to take its own decision in this matter. It merely endorsed the position taken by Senate. Further, one wonders as to why Senate had to take a decision on applications for an extended date of registration as in terms of Regulation 2.12 this is the prerogative of the Vice Chancellor. Senate, as clearly reflected at Regulation 010.12 is empowered to determine dates for registration. Of course, this does not mean that Senate cannot give varying deadline dates for registration as it commendably did so in 2013/14 academic year. In the absence of any averment that it was mandated by Vice Chancellor to consider applications for extension for registering, was in my humbly view, irregular for it to do so. Both Regulations 010.12 and 2.12 do not envisage a situation where Senate would sit and deliberate on applications for extended registration. It is for this reason that the applicant did not file any application before Senate for an extended registration nor did respondent challenge applicant in this regard.

[19] The totality of the above clearly demonstrates that respondent failed to apply its mind when considering applicant's application before it. On its own showing it merely endorsed the decision of Senate, a body without powers to deliberate on applications of this nature. That the Vice Chancellor seats in Senate as Chair as per Section 17 (2) of the enabling Act, does not by any means empower Senate to usurp the powers of the Vice Chancellor as clearly outlined in the Regulations.

[20] Further, in terms of regulation 2.12, the Vice Chancellor once presented with an application for a gracious registration date, ought to consider whether, as clearly stated by the Regulation, "*evidence of official delay beyond the control of the student*" is available. Correctly so, as the question on evidence "*beyond the student's control*" deals with the merit or

substance of the application. Similarly, the appellate body (Council *in casu*) is to look for the same. In addressing this query, the adjudicator ought to ascertain whether the applicant or appellant as the case may be, has submitted “*a reasonable and acceptable explanation for the default*” (See **Chetty v Law Society, Transvaal 1985 (2) S. A. 756.**) It would also ask whether applicant has any prospect of success. I say this much aware that functionaries such as respondent are not bound by rules applicable in a court of law. However, this does not detract from the principle that respondent ought to have applied its mind to the applicant’s case and not impose a decision taken on other matters of similar nature.

[21] It would appear that the respondent was merely concerned with the procedural aspect of applicant’s application as it dismissed it for having been filed out of time. I have demonstrated in the above paragraph that even that procedural aspect was not dealt with judiciously. They failed dismally to consider the substantive procedure which was whether “*evidence of official delay beyond the control of the student*” was available. The principle of our law that cases should be disposed of on the bases of their merits and not on procedural aspects only has since become a cardinal rule (see **Nokuthula N. Dlamini v Goodwill Tsela (11/2012)[2012]28 SZSC**). I see no reason why functionaries who discharge justice in their own right should be exempted from this rule.

[22] The honourable Vice Chancellor’s decision lacks clarity on reasons for declining applicant’s application to register. This, I must point out, is travesty of justice on its own, unfortunately.

[23] Had respondent applied its mind to the matter, it would have considered that the delay in registering within the stipulated period by Senate was not due to applicant's making. It would have noted that the delay was caused by Government's failure to remit payment to the respondent on behalf of applicant. In the absence of any notice to the applicant by Government of the withdrawal of the sponsorship, it was reasonable for applicant to anticipate that Government would pay. It would have made a finding that indeed this was an "*official delay*" as per the relevant Regulation. It would have further taken into account that the applicant had paid the sum of E2000.00 within the stipulated time by Senate and this factor alone would have been credited to the applicant in her endeavour to register in time. It would have considered that by the 2nd October 2013, ten days after Senate determined registration date, the applicant, desirous to be admitted, did not only raise the outstanding deposit of E1,246.00 but the total academic year tuition fee of E12,510.00. This would have persuaded respondent away from its notion that the applicant "*chose to ignore*" extended deadlines. The totality of the above would have convinced the honourable Vice Chancellor or Council to grant the applicant leave to register.

[24] In the circumstances it cannot be held therefore that respondent applied its mind when dealing with applicant's application. On this ground alone the application stands to succeed.

[25] Applicant has prayed as follows:

“4. *Ordering and directing the Respondent to set a special examination for the Applicant in terms of Regulation 011.49.*”

[26] The applicant was informed of Council's decision on 14th November 2013. The examination was scheduled to commence on 18th November 2013. Applicant lodged the present application on 4th December 2013. It is not clear why applicant failed to file an application before the commencement of the examination and only did so after the examination which ended on 29th November 2013. The reason advanced from the bar on behalf of applicant that applicant had to raise legal fees, unfortunately, is untenable in law. Applicant has herself to blame and her failure to act timeously cannot be laid at the doorstep of respondent. On this reason alone, I am not inclined to grant applicant prayer 4 but a substitute.

[27] During submission, it was contested on behalf of respondent that applicant cannot be granted prayer 4 because the Regulations do not provide for the same. Applicant, however, contested by informing the court that the Regulations for the academic year 2010/11 made provision for the same and therefore the University was bound by it. It is unnecessary under the circumstance of this case to deliberate on such in the light of applicant's failure to move the present application within time permissible.

[28] On the question of costs, I am not prepared to grant any party cost for the reason that applicant delayed in bringing the application to court.

[29] In the result, I enter the following orders:

The respondent is hereby ordered to:

1. Register the Applicant as a student at its institution.
2. Allow applicant to sit for the supplementary examination scheduled for 7th July 2014 ending 15th July 2014 as her

first semester examination.

3. No order as to costs.

**M. DLAMINI
JUDGE**

For Applicant: M. Nkomondze

For Respondent: Z. Shabangu