IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 2039/2016

In the matter between:

CAB'LILE ZIYANDA NDLOVU **Applicant**

And

SWAZILAND CHRISTIAN UNIVERSITY **Respondent**

Neutral citation: ***Cab'lile Ziyanda Ndlovu v Swaziland Christian University (2039/2016) [2017] SZHC 70 (21st April 2017)***

Coram: **M. Dlamini J.**

Heard: **06th March 2017**

Delivered: **21st April 2017**

- **The plainest principle of justice which is universally accepted is that no man should be condemned unheard. It is applicable where one's liberty, property or existing rights are affected.**
- **audi alteram partem -**

Summary: A finding of gross misconduct was pronounced against the applicant by respondent's Chair following a disciplinary hearing. Applicant, a student at respondent's institution, was found to have unlawfully obtained an examination question paper prior to sitting for it. Although the Chair had recommended a suspended sentence, respondent's Senate and Council ordered the expulsion of applicant. She now seeks for a review and setting aside of the sentence by Senate and Council.

The parties

[1] The applicant Ziyanda Cab'lile Ndlovu (Ziyanda), is described as:

> *"1. [A]n adult female Swazi of Malindza area in the Manzini district and a fourth year student in the Respondent."*

[2] The respondent is:

> *"2. [T]he Swaziland Christian University, an academic institution operating in Swaziland and based in Lomkiri Zone 4, Mahwalala area (Mbabane) in the Hhohho district with a legal capacity to sue and be sued in its name."*

Chronicles

[3] It is common cause that the respondent conducted examination for its students. One of the examination paper BNS 305, was scheduled for 11th July 2016 at 9:00 a.m. Unknown to respondent some of the third year students were either in possession of the paper or had seen it prior to sitting for the examination. Upon discovery of this fact, respondent was caused to reset the paper and cause the students to re-write it, pending investigation of the culprits.

[4] It is not in dispute that respondent eventually laid hold of the culprits, one of them in the name of Ziyanda. Respondent duly appointed a disciplinary committee chaired by M. Z. Nxumalo. Charges were read to Ziyanda and she entered a plea of not guilty. At the end of the hearing the Chair then authored:

> *"Recommendation*
>
> *Having seen evidence as adduced by the University, the committee is persuaded to find the student guilty of misconduct and gross misconduct. Before we pronounce an appropriate ruling on the matter, we wish to comment on the conduct of the student during the hearing. In our considered view, the student did show any sign of remorse [sic] she was unapologetic and shifted the blame to other people. For the above reason, the committee finds her guilty as charged on both counts.*
>
> *In light of the aforementioned, it is recommended as follows:*
>
> *i) The student must be suspended for this academic year, and that, the suspension is suspended for a period of one academic year. But, in the event that the student is found guilty of misconduct during the time she is a registered student; the sentence as meted shall be revived and be enforced as if it has not been suspended; and*
>
> *ii) That she must carry out community service, such as working in the Library for free: one and a half hours (1:30) every day until the end of the sentence. The university must ensure that such is happening diligently;*
>
> *iii) That she refunds the other students the money she purportedly took for the paper; and*
>
> *iv) That, her academic transcript be recorded with this sanction."*

[5] Following the above, the Registrar, by correspondence, communicated to Ziyanda as follows:[1]

> *"Dear Ziyanda*

[1] see page 42 of the book of pleadings

YOUR DISCIPLINARY HEARING

I would like to inform you that after the disciplinary hearing that you had on the 24th August 2016, you were found guilty of misconduct and gross misconduct.

Senate has decided to discontinue you from the University.

Hope that you understand the contents of this letter. If you do not understand, please contact the undersigned.

However, you may appeal to Senate [sic](Council) if you so wish."

[6] Ziyanda exercised her right of appeal to Council. Her appeal was dismissed as clearly outlined under correspondence dated 14th November 2016. I will refer to this correspondence later herein. Ziyanda is not happy with the decision to have her expelled. She has applied to this court for the sentence to be reviewed and set aside.

Ziyanda's case

[7] In her founding affidavit, Ziyanda raised a number of procedural irregularities at the instance of the Chair of the disciplinary hearing. She alleged that she was never present when evidence against her was led. She was only invited to state her side of the matter at the end of the University's witnesses. No student was called upon to give evidence. The Chair relied on hearsay evidence. The staff officer who was said to have given her the examination paper was not called to testify.

[8] The Chair relied on the evidence of Mr. Menon who had been tasked by the University to investigate the leakage. However, Mr. Menon refused to

tender as part of his evidence, the report on the basis that it contained highly confidential information.

[9] Although printout messages of what's-app were submitted on behalf of the University, the recipients of such what's-app were never called to give evidence. This evidence was hearsay. The university witnesses kept on referring to a whistle blower. Such whistle blower was never called upon to give oral evidence for purposes of cross examination.

[10] Having deposed to the above grounds, Ziyanda then asserted immediately thereafter:[2]

> "*7. Even though I was given chance to appeal such decision I decided not to do so, to simply let it pass as I understood that I escaped with a warning as my sentence had been suspended. I hastened to add that after all I re-wrote the BNS 305 paper and passed it and my end year results per clause 0.21 of the Academic General Regulations 2015/2016 of the respondent were written "Proceed Unconditionally" in the recommendation remarks meaning I have passed to Level 4."*

[11] During the submission, it was enquired from Ziyanda's Counsel whether Ziyanda was attacking the findings of the Chair and his recommendation. The response was that Ziyanda had accepted both the findings and the recommendations of the Chair. It is not clear why Ziyanda decided to burden this application by alluding to procedural irregularities when at the end of the day she accepted the final finding and recommendation flowing from the said procedure. In the result it is apposite to refer to the principle of our law as propounded by **Inns CJ** that:[3]

[2] at page 9 para 7 of the book of
[3] in Goldenhuys and Neethling v Beuthin 1918 AD 426 at 441

> *"[A]fter all courts of law exist for the settlements of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions or to advise upon differing contentions, however important."*

[12] I must hasten though to point out that Ziyanda was bound not to challenge the findings of the Chair for the reason that she deposed in her founding affidavit before this court as follows:[4]

> *"4.3 I do humbly state that as the paper (BNS 305) was a talk of the University, I also tried to confirm my fears to the truthfulness of the leak and I was led by my colleagues to believe that one of the Respondent's staff was allegedly selling to students even though I reluctantly purchased the same (soft copy) from the staffer on the 11th July 2016 at about 07:45 a.m. and perused it with other colleagues before proceeding to write the exam at the same day at 09:00 a.m."* (my emphasis)

[13] Glaringly from the above quoted averment, Ziyanda admitted to receiving the examination paper which was the subject of the disciplinary hearing and also showing it to her colleagues. In fact Ziyanda's admission of the charge as pointed above lends credence to the Chair's guilty verdict. Ziyanda has also disposed that she was happy with the Chair's verdict and sentence. She decided not to appeal. It would be folly of this court to now revisit the Chairs findings in light of the assertions by Ziyanda.

Ziyanda's appeal

[14] Ziyanda contended that when the 2016/2017 academic year started, she proceeded to register. She was however advised that she could not register. She was then called to receive a letter to the effect that Senate had decided that she should be expelled from the University. She appealed this decision to Council.

[4] at page 7 para 4.3 of the book of pleadings

[15] She then received a second correspondence which confirmed her expulsion. Ziyanda then deposed:[5]

> "*9. AD IRREGULARITIES*
>
> *9.1 I humbly submit that it is extremely irregular of the respondent to wake up to dismiss me from University while citing/or making as an excuse a matter which was finalized by an independent Chairperson of a Disciplinary Committee as shown in "annexure A" herein above. No reasons are given why the ruling of the Disciplinary hearing has been overturned, if that the case*."

[16] She further complains that Senate and Council did not invite her for oral presentation. She challenges the power of Senate to alter the penalty by the Chair. She also averred:[6]

> "*9.5 I hasten to add that the decision in question was arrived at arbitrarily or capriciously, mala fide as a result of unwanted adherence to an unknown fixed principle of respondent in order to further an ulterior or improper purpose. I submit that the Senate and Council of the Respondent seriously misconceived its functions and while at it took into account irrelevant considerations and ignored relevant one thus reaching such a grossly unreasonable decision to expel me. I submit therefore that the Respondent's bodies never applied its mind into the matter, not even when I had appealed the gross unreasonable decision to dismiss me from the institution.*
>
> *9.6 I submit that the Respondent's Senate took into consideration the guilty verdict of the August 2016 hearing and never red the recommendations by the Chairperson who heard the matter. Both Senate and Council never heard the matter, so they were in possession of no facts of the matter when deciding to expel me, hence then one wonders how they reached such a decision.*
>
> *9.9 Therefore since such decision deeply affects my right to education and to a bright future, same is suffered to subject such arbitrary decision to the procedures required by natural justice."*

[5] see page 10 para 9 of the book of pleadings
[6] see also page 11 paras 9.5, 9.6 and 9.9 of the book of pleadings

Determination of the review

[17] Ziyanda complains about the appeal's failure to invite her to make oral submission. The University contends that a hearing was afforded to Ziyanda as Council considered her written submission. Ziyanda on the other hand states that she merely filed grounds of appeal and that she had anticipated that Council would invite her to motivate the same.

[18] The plainest principle of justice which is universally accepted is that no man should be condemned unheard. It is applicable where one's liberty, property or existing rights are affected. It is almost impossible to deal with this principle – *audi alteram partem* – without making reference to **Lord Denning** who expressed at page 1153 h-g:[7]

> "***It is now well settled that a statutory body, which is entrusted by a statute with a discretion, must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand, or as administrative on the other hand, or what you will. Still it must act fairly. It must, in a proper case, give a party a chance to be heard...***"

Issue

[19] The question facing this court is whether Council ought to have given Ziyanda an opportunity to be heard orally. Was her written appeal sufficient for purposes of the appeal?

Adjudication

[7] see Administrator, Transvaal and Others v Traub & Others 1989 (4) SA 731 at 755

[20] I must hasten to point out that the words of **Lord Denning** at ages 1154 g-h[8] are apposite:

> ***"Then comes the problem: ought such a body, statutory or domestic, to give reasons for its decision or to give the person concerned a chance of being heard? Not always, but sometimes. It all depends on what is fair in the circumstances. If a man seeks a privilege to which he has no particular claim - such as an appointment to some post or other - then he can be turned away without a word. He need not be heard. No explanation need be given: see the case cited in Schmidt v Secretary of State for Home Affairs. But, if he is a man whose property is at stake, or who is being deprived of his livelihood, then reasons should be given why he is being turned down, and he should be given a chance to be heard. I go further. If he is a man who has some right or interest, or some legitimate expectation, of which it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded him, according as the case may demand."***

[21] With the above citation at the backdrop of my mind, it is common cause that the University set up a disciplinary committee whose composition is not a subject of this review. It is further common cause that Ziyanda was satisfied with its verdict and recommendation. In this regard the University fully discharged the *audi alterum partem* obligation in favour of Ziyanda at the first stage of the proceedings at the instance of Senate.

[22] In order to ascertain whether the body responsible to pass a penalty was obligated to give Ziyanda a further opportunity to make *viva voce* representation, I turn to the University's Regulations of 2015/2016. Article 11.21 reads:

> *"11.21 APPEAL AGAINST PENALTIES FOR INFRINGEMENT OF EXAMINATION REGULATION*
>
> *a) A candidate who wishes to appeal against a penalty imposed by the Senate for misconduct in an examination*

[8] *supra*

shall do so in writing to the University Council within two weeks of the Senate ruling."

[23] This regulation demonstrates clearly the procedures laid down on what is expected of a candidate who wishes to appeal. In the case at hand, Ziyanda exercised her right in accordance with this regulation. It would be remise of me not to mention that Ziyanda reduced her appeal in writing. Reading her appeal points out that she did not challenge the disciplinary hearing's verdict. In her written appeal she earnestly pleaded for a lesser penalty than expulsion. This fell on deaf ears.

Senate imposing a penalty not consistent to disciplinary hearing

[24] It is not disputed that the main purpose of setting up the disciplinary hearing was to assess the evidence and come up with a verdict. Room for a recommended sentence was also provided. Ziyanda submits that Senate was bound by the penalty imposed by the Chair of the disciplinary hearing. This argument fall from the onset as the Chair's main duty was to decide on the moral worthiness of Ziyanda.

[25] From the record of proceedings compiled by the Chair, it is clear that the Chair did not impose a penalty but merely made recommendation of a measure to be taken. By simple definition of the term "recommendation", Senate cannot be faulted for imposing a penalty which it deemed appropriate. At any rate Ziyanda was found guilty of both misconduct and gross misconduct. Added to this was the Chair's observations as evident in the disciplinary hearing's records that Ziyanda failed to show any remorsefulness during the hearing. Senate was empowered to impose the penalty of expulsion by Regulation 11.18 which reads:

> *"11.18 PENALTIES FOR INFRINGEMENT OF EXAMINATION REGULATION*
>
> *b) When it is determined that either:*
> *A candidate has committed misconduct calculated to affect improperly his/her performance or that of another candidate in the Swaziland Christian University.*
>
> *e) The University Senate may take any other disciplinary measures deemed appropriate."*

[26] The expulsion penalty imposed by Senate is provided under 11.18(d):

> *"PENALTIES FOR INFRINGEMENT OF EXAMINATION REGULATION*
>
> *d) The candidate may be dismissed from the University for a <u>Serious Case of misconduct</u>."*(my emphasis)

[27] Ziyanda is not complaining that Council failed to consider her written appeal but that she ought to have been given an opportunity to make oral representation. I have already shown that Council was not obliged to invite her to do so following Regulation 11.21. Her appeal was considered by Council.

<u>Reasons for dismissal of appeal</u>

[28] Ziyanda complains that when Council dismissed her, it did not furnish her with reasons. **Lord Denning** expresses that a party whose rights are affected by a decision of an administrative body is entitled to reasons.

[29] Turning to the case before me, the Registrar, having advised Ziyanda that Council confirmed Senate's sentence upon her, then wrote in the same correspondence:

> "*I hope you do understand the contents of this letter, if you do not, please do not hesitate to contact the undersigned*."

[30] From the above it is clear that Ziyanda was invited to contact the Registrar if she needed any clarity on her dismissal. Reason for expulsion form part of that clarity. However, instead of rising to the occasion, she decided to come to court. It follows therefore that there is no merit on the submission that the decision to have her expelled must be set aside for want of reasons.

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

1. The applicant's application is hereby dismissed.
2. No order as to costs.

M. DLAMINI
JUDGE

For the Applicant: **N. Ginindza of N. E. Ginindza Attorneys**

For the Respondent: **B. Gamedze of Musa M. Sibandze Attorneys**