IN THE COURT OF APPEAL OF SWAZILAND

CIVIL CASE NO.51/2004

In the matter between:

THE SENATE OF UNIVERSITY OF SWAZILAND **APPELLANT**

THE UNIVERSITY OF SWAZILAND

VS

TIYAMIKE RUDOLPH NDUNA MAZIYA **RESPONDENT**

CORAM	**BROWDE JA STEYN JA ZIETSMAN JA MR. M.I. MAZIYA MR. M. MAGAGULA**
FOR THE APPELLANT FOR THE RESPONDENT	

JUDGMENT

Steyn JA

[1.] The respondent was at the time of the institution of these proceedings a 19 year old law student at the Kwaluseni campus of the University of Swaziland. He had enrolled during the academic year 2003 - 2004 and had conscientiously attended

the prescribed classes during the year. Although two appellants are cited in these papers, for practical purposes I refer to the two appellants as the "University."

[2.] One of the requirements for the respondent to be promoted to the second year LLB, was to sit for examinations scheduled to take place from the 26th of April to the 13th of May 2004. The time table for the examinations which was issued for general information, provided that one of the subjects in which he was to be examined, i.e. Legal System and Legal Method was scheduled to take place on Saturday the 1st of May 2004.

[3.] The respondent is a Christian and a devout member of the Seventh Day Adventist Church. Both his parents and the other members of his family are also devout members, whilst his father is an elder of the Church in Swaziland. This evidence was not disputed by the appellants.

[4.] Having been informed of the University's time table and apprehensive of the conflict between his religious convictions and the academic obligations the time table required him to comply with, he in good time informed the University of his dilemma and sought their good offices to help address his concerns.

[5.] His letter to the Registrar of the University is dated March 2004 and reads as follows:

"Dear Mr. Vilakati,

REQUEST TO TAKE THE FINAL LEGAL SYSTEMS EXAM ON AN ALTERNATIVE DATE

I would like to kindly request for permission to take the final legal systems exam on an alternative day. The exam in question is currently scheduled for May 1, 2004 which falls on a Saturday. For me Saturday is a Sabbath day on which I can not take an exam for religious reasons. I am writing to request your office to designate an alternative date on which I can take the exam since the currently scheduled date will unfairly force me to choose between complying with the Ten Commandments and writing the exam yet I believe both activities are important. I would like to submit that I am willing to write the exam at any other appointed time.

Your positive consideration of my request will greatly appreciated because it will afford me fair and equal treatment with my classmates.

Sincerely,
Tiyamike Rudolph Nduna Maziya
FIRST YEAR LAW STUDENT

CC: Prof. Mabwirize (Course Lecturer)
Tutor

[6.] In order to confirm the genuineness of his religious convictions he also made available to the University authorities a certificate by the educational director of his church. This document -directed at "TO WHOM IT MAY CONCERN" - reads as follows:

"REQUEST FOR SPECIAL CONCESSION - SATURDAY EXAMINATION FOR TIYAMIKE RUDOLPH N. MAZIYA

This is to confirm that TIYAMIKE RUDOLPH N. MAZIYA is a Seventh-day Adventist believing Christian, and in accordance with our fundamental beliefs we are required to obey the TEN COMMANDMENTS as contained in the Bible (Exodus 20:1-17).

In view of this, I humbly wish to make a special appeal to you, to allow him to write the forthcoming examinations which are programmed for SATURDAY on any other day either prior or after the Saturday examination has been written or at any time which suits the University.

The SABBATH begins on Friday at sunset and ends on Saturday at sunset. This 24-hour period is regarded to be holy sacred time for worship, no secular activity is engaged in.

Special concessions have been obtained for many of our students at most of the other universities e.g. University of the Free State, Potchofstroom University, University of Cape Town and Wits University, and it is hoped that on compassionate grounds for religious purposes, your institution will kindly accede to the request being made on behalf of Mr. Tiyamike Rudolph N. Maziya who is a *bona fide* member of the Seventh-day Adventist Church.

Your kind consideration in this matter will be greatly appreciated.

Yours faithfully,

P.B. PETERS

SAU EDUCATION DIRECTOR"

[7.] On March 16, 2004 the Registrar responded to respondent's letter in the following terms:

"Dear Mr. Maziya,

RE: REQUEST TO TAKE THE FINAL EXAMINATION IN THE COURSE L101 ON AN ALTERNATIVE DATE

We received your letter dated March 8, 2004 on the above subject.

If it were possible, we would not be scheduling any examination on a weekend at all. You will note that examinations are scheduled on Sundays as well. This is for the simple reason that space and time constraints do not allow us the luxury of avoiding scheduling examinations on weekends.

It is therefore unfortunate that you will indeed have to choose between writing the examination and complying with your ten commandments, (emphasis supplied)

Yours sincerely,

S.S. VILAKATI

REGISTRAR"

[8.] It is clear that the respondent made further efforts to try to obtain a negotiated resolution of his problems. This is evident from a letter he wrote to the Registrar two days after he had been due to sit for the examination ***in casu*** on the 1st of May.

He sought in this letter dated May 3, 2004, permission to be allowed to write a supplementary examination, based on regulation 0.11.09 of the relevant Examination Regulations. This letter reads as follows:

"Dear Mr. Vilakati,

APPLICATION FOR AN OPPORTUNITY TO WRITE THE FINAL EXAMINATION FOR LEGAL SYSTEMS AND METHODS (L101)

Reference is made to my letter of March 8, 2004 and several discussions I have had with you during which I drew your attention sir to the fact that I could not sit for an examination on May 1, 2004 for religious reasons since it fell on the biblical Sabbath Day. This letter serves to draw your attention to the fact that I was not able to sit for the scheduled final examination on May 1, 2004 for the reasons discussed previously with you. I am writing therefore to request for an opportunity to write the said exam during the supplementary examination period based on regulation 011.09 on page 75 of University calendar of 2003/4. Religious reasons are important to me as evident in that I have not been able to participate in other university activities which fall on the Sabbath day such as Fresher's Ball, Lawyer's Cup, Mr.

UNISWA, the sports trip to Botswana and the Lawyer's Night at which I was asked to serve as Master of Ceremonies.

Your support will be greatly appreciated.

Sincerely

Tiyamike Rudolph Nduna Maziya

FIRST YEAR STUDENT

CC: Dean (Students Affairs)

Faculty Dean (Social Science) Faculty Tutor (Social Science) Lecturer (Legal Systems and Methods)"

The regulation the respondent sought to invoke is couched in the following terms.

"11.09 In the case of absence from an examination due to serious causes (other than the candidate's own ill health), the candidate (or someone acting on his/her behalf) must submit to the Examinations Office: (a) evidence of the cause, where possible and (b) a written explanation of the absence within seven working days (7) after the examination has taken place."

[10.] Some two months later and on the 6th of July 2004 the University via the Registrar responded as follows to the respondent's request. The letter reads as follows

"Dear Sir,

RE: YOUR REQUEST TO WRITE THE FINAL EXAMINATION IN COURSE L101 DURING SUPPLEMENTARY EXAMINATION PERIOD

We refer to your letter dated 8 May, 2004.

The Senate considered your request to write the final examination in Course L101 during supplementary examination period.

Regrettably, after taking into account all relevant considerations, the Senate decided that your request cannot be accepted.

Yours faithfully,

S.S. VILAKATI

REGISTRAR"

It should be noted that the supplementary examinations were scheduled to be written from 12th July - 20th July 2004.

A fee of El50.00 per paper was to be paid by any student writing such supplementary examination.

[11.] It is relevant that the respondent sat for six of the seven examinations he was required to write to complete his first year course and that he passed all six of these obtaining two "A"s, three "C"s and one "D". However, it was recorded in the examination results conveyed to him on the 6th of July 2004 that he had failed "Legal System and Legal Method" - the examination that

was to have been written on Saturday May 1st - and therefore was deemed to have failed. He was accordingly directed to repeat his "first year law course - referred to as L101.ll." It is the respondent's contention that had he been allowed to sit for the examination he was deemed to have failed, he would have passed and have proceeded to his second year of study. The conduct of the University was - so he submitted -irregular, unfair and unreasonable in not allowing him to write on another day or not allowing him to write a supplementary examination. He also averred that he was seriously prejudiced by the conduct of the University such conduct impacted negatively on his future and on the availability of his government scholarship.

[12.] He concluded by stating the following:

> **"Most importantly the University of Swaziland failed to properly consider my request as it just dismissed same without giving me the opportunity to state and support my case or to bring evidence supporting my request."**

[13.] Based on these allegations the respondent sought the following court orders:

> **"1. Reviewing and setting aside the decision of the first respondent whereby it refused to reschedule and afford the applicant an opportunity to write the subject i.e. Legal Systems and Legal Methods during supplementary examinations.**
>
> 2. **Directing the second respondent to set an examination for the applicant of the subject, Legal Systems and Legal Method, and afford him an**

opportunity to write such examination and for him to receive results for such subject before The University of Swaziland opens for the new academic year that starts on the 19th day of August, 2004.

3. **Failing compliance with paragraph 2 above, directing and ordering the respondents to admit the applicant to his second year of study in the Degree of Bachelor of Laws.**

2. **Costs of this application.**

3. **Further and/or alternative relief."**

[14.] The University opposed the respondent's application for relief. Its Acting Vice Chancellor deposed to an affidavit in which the following averments were made. Whilst not disputing the genuineness of the respondent's religious beliefs, the University contended that the respondent was the architect of his misfortune because of his failure to adhere to Rules and Regulations by not sitting for the examination "when he had been informed that his request to write an examination on an alternative date was not acceptable." Had the respondent "strictly adhered" to the University's regulations he would not have suffered any prejudice.

15. In seeking to justify its refusal to accommodate the respondent and accede to his request the University says the following:

"12.4 Due to the increased number of enrolment at the University over the years, space, time constraints and scarcity of resources, the University has had to schedule examinations on weekends. This does not only affect students with the applicant's religious beliefs but also those with different religious beliefs.

12.5 For instance a predominant number of students at the University belong to denominations, which attend church on Sundays, despite this, they did write examinations scheduled on Sundays."

The University also averred that the only good cause envisaged in the regulations is ill-health as provided in Regulation 011:08 or other serious causes which makes (sic) it impossible for a student to attend. "Religious grounds," it contended, "are not a good reason for not writing an examination." The Acting Vice Chancellor also sought to justify the University's decision on the ground that "it would be unfair to subject other students to University Regulations and excuse the applicant from them without a legitimate reason." He goes on to say that "to accede to the applicant's request would have set a dangerous precedent." This, he contended would have resulted in "a multiplicity of other requests. This would not have been "envisaged in the regulations" and the University could not be expected to cope with the "floodgate of requests" to be excused from writing examinations for whatever reason" (emphasis added)

[17.] The deponent concluded this affidavit by making the following assertion:

"**The application is frivolous and without any basis in law and in fact. The applicant cannot expect to be treated differently from other students."** (own emphasis)

[18.] In his reply the respondent says that he was of the view that his religious beliefs are a good reason in terms of the University's Statute and Regulations and that they could have allowed him to write on an alternative date or during the supplementary examination, more particularly as he had given them adequate notice of his concerns and his requests. Finally, he points out that it is unusual for a University to set

examinations on Saturdays and Sundays - not being normal working days - and that this deviation from the norm was not communicated to him when he registered. It is clear, he says, that the University authorities acted in a high-handed manner in considering his request and that their decision was unfair.

[19.] These are the facts before us and on which we have to decide the respondent's application to review and set aside the decision of the University refusing him an opportunity to write his examination on any day other than a Saturday.

[20.] When the application came before the High Court it upheld the respondent's contention that the University had not applied their minds to the issue as to "whether the reasons for the respondent's absence from other examination was a good one or not." The court then proceeded to consider the relief to be granted. It was contended by the University's counsel that by this time - 21st October 2004 the application was academic and that the order sought could no longer be enforced - the academic year was already underway having commenced sometime in August of that year. The court therefore ruled that an order for specific performance would create hardship for the University and that an award for damages would be most appropriate under these circumstances. His order in this regard reads as follows:

> **"Applicant to file papers so that evidence may be led to prove**
>
> **damages."**

Because of the high-handed manner in which the appellant had dealt with the matter, it was ordered to pay punitive costs on the scale as between attorney and client. The propriety of this cost award was also challenged before us as was the decision to allow the respondent to prove damages.

[21.] The appellant did not - either in the court below or before us on appeal - challenge the right of a court to review the decision of the University ***in casu.*** Although there has in the past been differing views in different jurisdictions concerning where the public/private law boundary lay, the development of the law appears to have extended the jurisdictional boundaries to include cases like those ***in casu*** within the realm of public law and therefore subject to review by a court of law. See in this regard **ADMINISTRATIVE LAW IN IRELAND, HOGAN AND MORGAN, 3rd ED (1998)** under chapter **The Scope of Public Law** at pages 777-778; **BAXTER ADMINISTRATIVE LAW** (we have only had access to the 1st edition) at page 340 et. seq. In

South Africa also, even prior to the adoption of its new constitution that puts this beyond doubt, the courts have reviewed decisions like those ***in casu.*** See the seminal judgment of Howie J (as he then was) in **LUNT V UNIVERSITY OF CAPE TOWN AND ANOTHER 1989(2) SA 438 (C)** and the cases cited. See also the decision of Hlophe JP and Brand J -as he then was - in **HAMATA AND ANOTHER V CHAIRPERSON, PENUNSULA TECHNIKON 2000(2) SA 621** at 630 (C). (This case was however decided with reliance ***inter alia*** on the terms of the South African constitution and its reasoning may not have application in this jurisdiction prior to the enactment of its own constitution.)

[22.] In these circumstances we have to examine the decision of the University and test its processes and its reasoning to see whether it exercised its powers in a manner consistent with the principles of natural justice. In order to do so we must have due to regard to the provisions of its charter as formulated in its statute and in the regulations issued thereunder.

[23.] The University was established by the University of Swaziland Act, 1983 (Act 2 of 1983). It is in terms of Section 3(2) a body corporate with perpetual succession and has all the attributes of such a body. Included in its powers is the right to conduct examinations for granting degrees, diplomas, certificates and other awards. In Section 5(2) the University is directed not to "discriminate against any person on race, religion, sex and any other ground in respect of -

(a) the registration of any person as a student of the University

or

(b) the appointment of any person to the academic or other staff of the University.

The Act also provides for the appointment of a Council and Senate and sets out their powers and duties. The Senate is empowered by the Statutes of the University to make regulations on matters affecting the academic sphere of the University's activities. Under and by virtue of this power the Senate issued academic regulations some of which are relevant for present purposes.

[24.] In the preamble to the regulations it is decreed that the Senate is the "final authority for the interpretation of these regulations." Regulation 10.02 which follows on this provision says that "The Senate has the power to exempt any student from any of the academic regulations."

[25.] What is of significant relevance in this appeal are the regulations that deal with examinations - particularly those that deal with the "Absence from an examination", one of which has been cited in part above (See paragraph 9.) Because of its importance the relevant regulations are set out in full. The Section reads as follows:

"**0:11:07 <u>Absence from an Examination</u>**

(a) **if a candidate fails to attend for an examination for no good reason, special papers will not be set and the candidate will be deemed to have failed. Misreading of the time table is no excuse.**

(b) **In the case of absence from an examination through ill-health, the candidate (or someone acting on his/her behalf) must submit a relevant medical certificate to the Examinations Officer within seven (7) working days. In order to be counted as relevant a medical certificate must relate to the period of examination or the preceding weeks of the examination or both. Evidence of illness will not normally be taken into account unless substantiated by a valid medical certificate.**

11.8 **It will be the candidate's own responsibility to arrange with his/her doctor for any medical evidence to be sent to the Examinations Office.**

11.9 **In the case of absence from an examination <u>due to serious causes</u> (other than the candidate's own ill health), the candidate (or someone acting on his/her behalf) must submit to the Examinations Office: (a) evidence of the cause, where possible and (b) a written explanation of the absence within seven working days (7) after the examination has taken place."**

[26.] The Court below based its decision to grant relief on the ground that it was unreasonable for the University to have refused to re-schedule the paper in question, i.e. either initially pursuant to the student's request as per his

letter of the 5th of March 2004, or at the supplementary examination stage as suggested by him in his letter of May 3, 2004. It held that this request was reasonable, genuine and ***bona fide.*** (Whatever it was, it was certainly on any reasonable objective approach, not frivolous as alleged by the University in its affidavit opposing the application.)

[27.] Clearly regulation 011:07 confers a discretion on the University. It has that discretion both generally under its Statutes as indicated above and specifically i.r.o. requests made for purposes of sitting for an examination. It gives the University the right to grant relief to a candidate on good cause shown, or as the Regulation puts it "good reason". This discretion is one to be exercised by the University and the court will not readily interfere with the exercise of such a discretion simply because it may have a different opinion. Provided that it appears that the discretion was exercised reasonably and with due consideration of the facts the Court would not be inclined to substitute its discretion for that of the authority charged with the responsibility to adjudicate on the matter. The administration of a University makes complex and multi-faceted demands on its staff - both administrative and academic. It knows and understands what is practically possible and what is not and will by and large be trusted by the courts to act sensibly and in a properly informed manner.

[28.] Having said that however, it cannot act arbitrarily, dogmatically, or inflexibly. It must also have due regard to all the facets of the problem such a request poses. There should be no bias and there should be evidence that all the criteria laid down by the regulations have duly been considered and evaluated.

[29.] As pointed out above if "good reasons" exist the University is entitled and indeed obliged to set a special paper(s). From the tenor of its case as presented to the Court it would appear that it applied its regulations in a most restrictive manner. Thus for example it says in paragraph 16.3 of its opposing affidavit that:

> **"The only good causes envisaged by the regulations is ill health as provided in Regulation 011.08 or other serious causes which makes it impossible for a student to attend an examination as provided in regulation 011.09 of the Academic General regulations. The latter regulation presupposes a situation where by a student does not attend an examination and give an explanation of his failure to sit for the exam after it has taken place."**

[30.] It would seem from these comments that ill-health is regarded as the only or principal ground which the authorities would consider as good reason for not setting a special paper and that, certainly, religious convictions could never be such a ground. It would also seem as if the University adopted an attitude that it could in terms of the regulations not grant an applicant the relief he sought because he applied for it before the examination and not after. This is clearly an absurd reading of the section. It would mean that someone who is considerate enough to give the University prior notice of his concerns and that, even if he has "good reasons" and establishes that his absence was due to serious causes, he cannot be granted relief. This is an untenable approach and clearly not in conformity with the provisions of the regulations. The words in the Regulations "seven working days after the examination has taken place" were obviously inserted merely to time bind the submission of applications for relief.

[31.] In contending for the blanket exclusion of religious grounds as a good reason the University is mounting an unruly horse. Whilst I can understand the

problems it faces when opening this door, such a rigid approach could well prove to be untenable. It is not necessary for us to decide this matter ***in casu,*** but I would point out that many Christians do regard Sunday as a day of rest and strictly observe this tenet of their faith. The University has done the unusual by scheduling examinations on non-working days, i.e. Saturdays and Sundays and to adhere to this dogmatic rule could cause considerable disaffection on the part of many of its stakeholders.

[32.] However, what is of real significance ***in casu,*** is the failure of the University on the papers before us to have adequate grounds and to give compelling reasons why it was impossible to accommodate this bright, indisputably conscientious student from writing a supplementary examination. It seems to me to be highly unlikely that the "floodgates" would open and masses of students would opt for the painful process of writing a supplementary examination with all its inconvenience and cost (both financial and otherwise - such as working during vacation). Moreover the University has not gainsaid the evidence tendered by the respondent that ameliorative provisions have been made by other institutions of higher learning in neighbouring states. (The evidence identifies five major Universities that have done so.) If there are special reasons why it is impossible to do so locally, no such reasons have been placed before us.

[33.] It appears to us that the appellant adhered blindly to rigid policy considerations. It therefore failed to apply its mind to the provisions of the regulations which give it the power to come to the assistance of a candidate who had furnished "good reasons" why he could not sit on the Saturday designated. The University is entitled to formulate policy guidelines and to apply these in practice. But it may not convert them into hard and fast rules that do not permit of exception in an appropriate case. See in this regard the judgment of Marais J in **RICHARDSON AND**

OTHERS V ADMINISTRATOR TRANSVAAL 1957(1) SA 521 at 530 (T) where the Court says the following:

> **"A person who has a statutory duty to exercise his discretion in matters affecting the interests of others, may use as a guide principles of policy which assist him in attaining uniformity where uniformity is desirable. The Administration is in a position where it has to exercise its discretion in regard to conflicts between the wishes of the parents on the one hand and the demands of economical and efficient tuition on the other. Its function and duty is to resolve such conflicts. And it may evolve general, guiding principles to assist it in speedily, fairly and wisely deciding each conflict. But, of course, those guides must not develop into hard and fast rules which preclude the person exercising the discretion from bringing his mind to bear in a real sense on the particular circumstances of each and every individual case coming up for decision. (See BRITTEN AND OTHERS V POPE, 1916 AD 150.)**
>
> **As it is usually put, he must not fetter his discretion with inflexible, preconceived ideas." See also MAHLAELA V. DE BEER N.O. 1986 (4) SA 782 (T).**

[34.] Counsel for the respondent in his well-reasoned argument submitted that:

> **"In this case the appellant was blinded by what seems to be its policy not to recognize religion as a basis for setting alternative examination, that to be fair to other students setting alternative examinations for students must be avoided as much as possible, that setting an alternative examination on religious grounds would result in a**

> **multiplicity of similar requests. The result was that the appellant allowed itself to be blinded by its dogmatic and rigid reliance on these policy considerations and consequently failed to decide the respondent's request in light of the individual circumstances of the cases."**

This approach has been accepted by the courts in South Africa. See in this regard also: **MORELETTASENTRUM (Edms) BPK V DIE DRANKRAAD 1987(4) SA 405 (T); HARTMAN V CHAIRMAN, BOARD FOR RELIGIOUS OBJECTION 1987 (1) SA 922 (O)** and **UNION GOVERNMENT V UNION STEEL CORPORATION 1928 AD 220** at 234.

[35.] Finally, the language used in the correspondence and in the affidavit filed on behalf of the University create the perception that the University is arrogant and high-handed. Its own counsel described the wording of the letter dated March 16, 2004 as "unfortunate". It will be recalled that the letter reads as follows:

> **"We received your letter dated March 8, 2004 on the above subject.**
>
> **If it were possible, we would not be scheduling any examination on a weekend at all. You will note that examinations are scheduled on Sundays as well. This is for the simple reason that space and time constraints do no allow us the luxury of avoiding scheduling examinations on weekends.**
>
> **<u>It is therefore unfortunate that you will indeed have to choose between writing the examination and complying with your ten commandments</u>."** (own emphasis)

The last sentence in particular manifests a contemptuous attitude unbecoming for an authority who is dealing with the sensitive, emotionally charged issue of religious convictions.

[36.] For all these reasons I conclude that ***court a quo*** was right when it found that the University's decision to deny the student

in casu any relief was procedurally flawed, arbitrary, misdirected and grossly unreasonable. In the result the appeal most fail.

[37.] I come to deal with the second facet of the order directing the respondent to file papers to enable him to prove damages. Mr. Magagula in dealing with the matter both in his heads of argument and his address to us, persisted in contending that the Judge a quo acted irregularly in as much as he was not entitled "to award" damages. This contention is patently incorrect. What the Court in essence did was to find that the respondent had been unfairly treated and that provided he could establish that he had suffered damages and could prove the quantum thereof, the Court could on papers filed and evidence led grant him such damages as it may find he suffered. It was a process devised by the High Court not to embarrass the appellant by having to implement an order for specific performance which it would not be able to do. At the same time it facilitated an expeditious resolution of any claim for damages which the respondent may be able to prove, after filing process in a court with jurisdiction to entertain and to adjudicate on such a claim. The merits of the issue of liability had been resolved by the High Court. Its decision has now been upheld by us and the issue of whether the respondent has suffered damages and if so how much has to be resolved by the Court on

papers filed and evidence led before a court of law. Hopefully, now that the issue of liability has been determined by us, the parties may find that they are able to settle the dispute without incurring further legal costs.

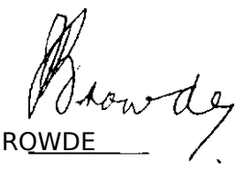
[38.] The ***Court a quo*** exercised its discretion to award costs on the punitive scale as between attorney and client. Its reasoning was not impugned in any way and there is no basis for us to interfere with the exercise of its discretion. The appeal against the costs order must therefore also fail.

In the result, the appeal is dismissed with costs.

[39.]

H. STEYN

Judge of Appeal



I AGREE J. BROWDE

Judge of Appeal

I AGREE

N.W. ZIETSMAN

Judge of Appeal

Delivered on the 24th June 2005.