



IN THE SUPREME COURT OF SWAZILAND
JUDGMENT

Civil Appeal Case No. 75/2013

In the matter between:

THE UNIVERSITY OF SWAZILAND

Appellant

vs

QUEENETH NCOBILE DLAMINI

Respondent

Neutral citation: *The University of Swaziland v Queeneth Ncobile Dlamini*
(75/2013) [2014] SZSC 36 (30 May 2014)

Coram: **RAMODIBEDI CJ, MOORE JA and TWUM JA.**

Heard: 21 May 2014

Delivered: 30 May 2014

Summary : University final year student; non-payment of fees by sponsor; unable to register for the 2012-13 academic year; that notwithstanding

claims upon advice of Dean of Students Affairs she continued to attend lectures, seminars and completed her project. Sponsors promise to settle fees never materialised, Applicant applied to Senate to be allowed to register and take final examinations. Application rejected. Application filed in High Court for an order to compel University to register her. Judge substituted Applicant's case with one based on legitimate expectation. Order made as prayed. On appeal held:-

- (i) Court a quo erred in substituting new cause of action for applicant.*
- (ii) On the facts, case of legitimate expectation inapplicable to facts proved.*
- (iii) Legitimate expectation cannot over-ride statutory provisions applicable to applicant's circumstances. Appeal allowed accordingly.*

JUDGMENT

DR S. TWUM J.A.

[1] In this judgment the Applicant below is the Respondent and the Respondent below is the Appellant.

[2] This is an appeal from the judgment of M. Dlamini J. presiding over the High Court, Mbabane. In an ex tempore judgment given on 13th May 2013, and subsequently confirmed in a written judgment dated 19th September, 2013, she ordered the Appellant:

- (i) to register the Respondent, Miss Queeneth Ncobile Dlamini as a candidate for the Appellant's final examination;
- (ii) to permit her to take those examinations.

The Background Facts :

[3] On the eve of the commencement of the Appellants' official final examinations for students, the Respondent filed an application under a certificate of urgency in the High Court for relief which actually bifurcated into two (2) orders, as will soon appear.

[4] In her Founding Affidavit, the Respondent stated that the relief she was seeking was an "order directing the Appellant to register her as a student (of the University) and to allow her to sit for her final examinations which were scheduled to begin on 13th May 2013 at 2.00 p.m."

[5] The Respondent explained that in or about August 2012 when the Appellant's 2012-2013 academic year resumed she had difficulty in registering because her sponsor, the Swaziland Government, was reluctant to pay her fees for that academic year. She said there was an allegation levelled against her that she was not qualified for a scholarship. She said as she could not pay her fees she was told by the Appellant that she would not be registered for the 2012-13 academic year without a letter from the Ministry of Labour and Social Security, her immediate sponsor, saying that her fees would be paid. She said she discussed her predicament with the Dean of Students Affairs. It was her case that the Dean advised her to continue attending lectures whilst means to solve her problem were explored. Consequently she said she attended all her classes, wrote all her tests and completed her project. She also said she informed her sponsors of her predicament who advised her that the problem would be solved and her scholarship would be restored.

[6] On 7th May 2013 she claimed she received a letter from her sponsors telling her that they were processing the payment of her fees. The letter also requested the Appellant to allow her to take her examinations.

- [7] On the advice of the Dean of Students Affairs, she met the Registrar and discussed with him her problem. She said the Registrar advised her to write a letter which he would present to Senate to explain her predicament to them, obviously to persuade them to allow her to be registered.
- [8] The Respondent further stated in her Founding Affidavit that on 10th May 2013 at around 4.30 p.m. she received a letter from Senate rejecting her request to be registered as a student, and also to be allowed to sit for the imminent examinations.
- [9] These are the material facts upon which the Respondent applied to the High Court for relief.

Appellant's Response

- [10] (1) The Registrar of the Appellant promptly and under extreme pressure, in collaboration with the Appellant's lawyers prepared and caused to be filed an Answering Affidavit on the same 13th May 2013. In it he made it clear to the court that in the time available he could not answer all the individual allegations made by the Respondent and gave notice that if it became

necessary he would apply to the Court to be allowed to answer any lingering doubts.

(2) In his opening salvo, the Registrar stated that the Respondent had manifestly failed to establish that she had any right to the relief she sought, let alone, a clear right. In particular, the Registrar pointed out that it was common cause that the Respondent was not a registered student of the Appellant for the academic year 2012/2013. He stated that he as the Registrar of the University became aware of the Respondent's problem on 7th May 2013 when he was approached by the Respondent. In specific denial of the allegation by the Respondent that the Appellant held out any promise to her, he referred to a number of provisions in the Academic General Regulations promulgated under the University of Swaziland Act of 1983; relevant pages of which had been annexed to his affidavit to buttress the Appellant's stand that the Respondent was not a registered student of the University. These annexures will be referred to below.

Orders of the Court

[11] After hearing Counsel the court made the orders following:

(a) The *ex tempore* order given on 13.05.2013

1. The Respondent should register the Applicant as a student.
2. The Respondent should allow the Applicant to sit for her final examinations.

(b) Final order (dated 19th September 2013)

At paragraph 52 of her reasoned judgment, the learned Judge wrote:

“In the totality of the above, the Applicant’s application succeeds, except that each party is to bear its own costs.”

NOTICE OF APPEAL

[12] On 19th November 2013, the Appellant noted an appeal against the orders made by the Court a quo upon the following grounds:-

- “1.1 the Respondent had not pleaded her case on the basis of any alleged legitimate expectation, and this was not the case that the Appellant was called upon to meet;
- 1.2 legitimate expectation was not established on the papers;
- 1.3 There was no allegation made, nor any basis for inferring, that a legitimate expectation had been induced by the Appellant or its officials;

- 1.4 There was no allegation made, nor any basis for inferring, that there had been any regular practice or express promise or undertaking which could give rise to a legitimate expectation;
- 1.5 The fact that the Respondent was allowed to attend classes and participate in other activities of the University did not give rise to any legitimate expectation;
- 1.6 In any event, even if it be found that an expectation was induced by the Appellant or its officials, this was not a reasonable or legitimate expectation in the circumstances, particularly where the Appellant and its officials had no legal competence or authority to induce an expectation of something occurring which would exceed their legal authority and which would result in an illegality and nullity;
- 1.7 The Appellant, as a statutory body and administrative functionary, had no authority to register or allow the Respondent to sit for examinations where the time for registration had long since expired;
- 1.8 The Respondent had not alerted the Appellant or taken appropriate corrective steps in sufficient time;
- 1.9 The Court could not order the appellant to take action which would be in conflict with the provisions of the enabling Regulations.

2. The learned Judge erred in finding that the Respondent had alerted the Appellant in sufficient time, and in failing to have regard to the mandatory time limits prescribed by the University regulations, the lack of authority on the part of the Appellant and its officials to waive or ignore these mandatory time limits, and the failure of the Respondent to take adequate and timeous steps to regularise the situation to ensure that the necessary corrective action was taken in sufficient time.
3. The learned Judge accordingly erred, with respect, in granting the application and the relief that was ordered. The appropriate order would have been for the application to be dismissed, with costs.”

[13] At the Hearing of the appeal, Advocate P.E. Flynn appeared for the Appellant. The Respondent was absent, but Miss N. Ndlangamandla who had represented her at the court below appeared to inform the court that the Respondent had decided not to oppose the appeal. She said in the circumstances she had no instructions in respect of the appeal itself. She then sought leave and left.

[14] The Court regards this matter, affecting as it does, the application of the University's Regulations and the possible repercussions this may have on students' future if those regulations were not scrupulously complied with, as very important and notwithstanding that the Respondent was not minded to oppose it decided that a full judgment on the appeal should be written to give guidance for future students who may be similarly circumstanced as the Respondent herein.

[15] On the basis of the facts deposed to in her founding affidavit, there is no gainsaying the fact that the learned Judge herself hit the nail on the head when she opined at paragraph 11 of the judgment "that the applicant has not couched her prayers in the expected manner in applications of this nature." In the opinion of the Judge, the Respondent ought to have prayed for a review of the Respondent's decision. In my opinion Counsel for the Appellant was right when he complained in the first ground of appeal that:

"The learned Judge in the court a quo erred in finding that the Respondent was entitled to relief on the basis of "legitimate expectation" in circumstances where the Court ought, instead, to have found that the Respondent had not pleaded her case on the basis of

any alleged legitimate expectation, and this was not the case that the Appellant was called upon to meet.”

[16] I am persuaded that her reasons for granting the Respondent relief “directing the Appellant to register the Respondent and also directing the Appellant to allow the Respondent to sit for her final examination which are scheduled to begin on 13th May, 2013,” were not supported by the facts or the law. She explained in paragraph 12 of the written judgment that she allowed the application even though it was lacking in form and procedure. Her reason was that in view of its exigency, the interest of justice would best be served by deliberating on the merits. It is clear to me that the learned Judge misunderstood the Appellant’s complaint. The case of the Appellant was that on the merits as pleaded the Judge had substituted a case based on “legitimate expectation” for the Respondent whereas her case was that on the facts pleaded, she was entitled as of right to the orders she prayed for.

[17] It is a fundamental rule of law that a court should not mero motu substitute a case different from the one pleaded by a party and then proceed to give judgment on the substituted case. See *Commissioner of Correctional Services v Ntsetselelo Hlatshwako* Court of Appeal No. 67/09; paragraph 7;

See also to the same effect, *Umbane Ltd v Sofi Dlamini and 3 others*, Court of Appeal No. 13/2013.

[18] In my view, what the Judge did rather perverted the course of justice. The court clearly erred in finding that the Respondent did establish a case based on legitimate expectation.

[19] What are the ingredients of a claim based on legitimate expectation? As Counsel for the Appellant pointed out, the Appellant is a statutory body which is expected to act in accordance with Regulations promulgated under the University of Swaziland Act 1983. Now, legitimate expectation may not be invoked in defiance of statutory obligations. In other words, the principle cannot prevail against legislation. No official of the Appellant waived or ignored the Regulations. It is also true that a public body cannot give unto itself authority it does not have. Not even the Senate of the University had power to register the Respondent when she had not paid her fees.

[20] In the Answering Affidavit, the Registrar annexed a copy of the University's Academic General Regulations, promulgated as official Regulation. Regulation 010.19 provided that it shall be the responsibility of each student

to familiarise himself/herself with the contents of the current copy of the University Calendar. According to regulation 2.12 “late registration is permitted for up to 7 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 up to 7 working days, provided evidence of official delay beyond the control of the student is produced.” Another important regulation is 030.37 which provides that “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.” Finally for our present purpose, Regulation 011.02 states that “any assignments 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.”

- [21] The Respondent’s case in her application was based on two matters, either or both of which contained no representation, reasonable or otherwise held out to her. These are:-

(a) “7. I approached the Respondent’s Dean of Students Affairs, Mr Nkambule, to inform him of my problem and that the reason why the Swaziland Government classified me as 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 Students Affairs, informed me that I was not the only person who had a similar problem and efforts were being made to have same resolved. He further *advised* me to continue attending whilst means to have the matter resolved were being made.”

[22] Even a cursory reading of these paragraphs cannot by any stretch of the imagination conjure up any notion that any representation that she would be registered and allowed to sit for the final examination was being dangled before her.

A perfectly innocuous pleading by the Registrar that “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,” evoked this response from the learned Judge.

“There being no evidence to demonstrate that the Dean of Students Affairs who is respondent did not grant permission to the applicant to continue

attending classes and no allegation by the Respondent that it actually interdicted applicant from attending classes, it is clear that the respondent made the representation the applicant is relying upon in her application.”
(See paragraph 46 of the judgment)

[23] It is worth pointing out that Respondent’s application was filed on 13th May 2013. It was to be moved in court that same day at 9.30 am. The Appellant managed to prepare and file an Answering Affidavit that very morning so that the matter could be heard about 2 pm that day. So when in all the circumstances, the Appellant had bent over backwards to have the matter heard but indicated that the Dean of Students Affairs was not immediately available for his response to paragraph 7 of the Respondent’s Founding Affidavit, I am bewildered by the Judge’s cynicism which greeted the Appellant’s answer. In the first place, the Respondent herself never said she was given permission to attend classes by the Dean of Students Affairs. Secondly, the regulations did not require, and the Respondent never said so, that the Registrar failed to interdict her for attending classes. Regulation 011.02 automatically declares any assignments and tests submitted by her null and void. Indeed, upon discovery that the Respondent who was not properly registered attended lectures, she may be rusticated. As I have

shown above, the Respondent's case was that her sponsors promised to pay her fees and that on that basis she should be registered and allowed/to take the final examination.

[24] It is proposed now to examine a few concrete examples which adumbrate the valid reliance on legitimate expectation to found a claim. In *Egan v Minister of Defence*, (unreported High Court, Ireland, November 24, 1958) the applicant was an aircraft pilot with the Air Corps but because of a large number of such pilots who were leaving the Defence Forces in order to fly with commercial airlines, the Minister refused him permission to retire prematurely. It was claimed that the applicant had a legitimate expectation that such permission would be granted. The court held that previous practice which permitted easy retirement would not derogate from the Minister's statutory right to refuse permission on reasonable grounds in any particular case. The court emphasised that such practice, however firmly entrenched it may have been in the life of the permanent Defence Force, did not amount to an implied promise or representation made by the Minister to the officer corps, that permission to retire would be granted in each and every case.

In *Ghneim v Minister of Justice* (The Irish Times, September 2, 1989), the applicant was a Lybian national who had illegally remained in Ireland beyond the time period stipulated by his entry visa. He had however, applied in March 1988 for permission to stay to complete his studies in Ireland and at the date of the hearing in September 1989, this request was still under consideration. The court held that this delay in informing the applicant of a decision in his case was such that it developed a reasonable expectation that his request that he be permitted to complete his studies would be granted. The court granted an injunction restraining the Minister from taking steps to force the applicant to leave the jurisdiction until the latter had a reasonable time to complete his studies.

From the cases the critical test is that to succeed in a legitimate expectation claim, the applicant must be able to bring himself within the scope or terms of the expectation.

[25] In the present case, the Respondent had sought registration as a student of the University and also to be enabled to take her final examination. Contrary to the facts which the learned Judge purported to find for her, as at 13th May 2013 when her application was heard, her fees had still not been

paid. The learned Judge rather found that her sponsors had offered a *guarantee* that payment of the fees would be forthcoming. The truth is that nobody in authority at the University had represented to the Respondent that if her sponsors offered a *guarantee* she would be registered. On all facts, the Respondent had not legitimate expectation. She did not speak to the Vice Chancellor of the University. At the date of hearing, the Senate had turned down her application for late registration. The sweep of judicial opinion suggests that in the context of statutory powers, the principle of legitimate expectations must yield to the over-riding principle that the discharge of such powers may not be fettered by estoppel. In sum for the doctrine of legitimate expectation to operate, it would have to be proved that an unqualified assurance was given to the applicant which formed an integral part of the transaction upon which the applicant made her application. There is no equivocation that no such unqualified assurance was given to the Respondent by any of the officers of the Appellant.

[26] In the result this appeal succeeds. The orders made by the learned Judge are hereby set aside. In view of the fact that the Respondent did not oppose the appeal, there will be no order as to costs; each party must bear their own costs.

Ordered accordingly.

Dated at Mbabane on the 30th May, 2014.

DR. S. TWUM
JUSTICE OF APPEAL

M.M. RAMODIBEDI
CHIEF JUSTICE

S. A. MOORE
JUSTICE OF APPEAL

For Appellant : **Advocate P.E. Flynn**

For Respondent : **No Appearance**