

IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 1795/98

IN THE MATTER BETWEEN

ABNER THABANI DLAMINI

APPLICANT

VS

SWAZILAND SCHOLARSHIP SELECTION

BOARD

1st RESPONDENT

THE ATTORNEY GENERAL

2nd RESPONDENT

CORAM

S.B. MAPHALALA - J

FOR APPLICANT

MR MAHLALELA

FOR RESPONDENT

MR SIMELANE

JUDGEMENT

(22/10/98)

The matter came before court on a certificate of urgency for an order in the following terms:

1. Dispensing with the rules and provisions relating to service and time limits as provided in the rules of this court and treating this matter as an urgent application.
2. An order setting aside the decision by the first respondent refusing to grant a scholarship to the applicant.
3. An order compelling the first respondent to grant a scholarship to the applicant to study at the University of Lesotho.

2

4. That rule 2 and 3 hereof operate as an interim relief pending finalization of this application.
5. That the rule nisi do issue calling upon the respondent to show cause, if any, on a date to be determined by this court, why:
 - 5.1. Rule 2 and 3 should not be made final; and why?
 - 5.2. They should not be ordered to pay costs of this application
6. Further and/or alternative relief as this court deems fit.

The application is supported by the founding affidavit of the applicant Abner Thabani Dlamini who deposed that on or about the 2nd July, 1998 he received a letter of admission from the National University of Lesotho to enroll under the Bachelor of Arts in Social Sciences and in particular to pursue a course in Development Studies. On or about the 21st July 1998, he was called to appear before the Swaziland

Scholarship Selection Board. The board rejected his application for a scholarship in that he should have applied to the University of Swaziland for enrolment. He informed the board the he had applied to the University of Swaziland but his application was unsuccessful. To this end he annexed exhibit "B" which is letter dated the 11th July, 1997 by the Assistant Registrar (academic) Mr. R.N. Masuku addressed to the applicant which reads as follows:

"Application for admission to the University

Your application was considered at the recent meeting of the admissions committee. It is with regret that I should inform you that your application was unsuccessful. Thank you for your interest in the University"

Attached to the letter was a document called "Data checking form student information system" which covers applicant's personal and other information in two pages. The last heading is entitled "Admission Decisions" and list the following information.

Rejected for:	B.A. Soc, Sci
Considered for:	B.A. Law
Year	1
Qualified:	Yes
Clarification:	Meets all general and faculty requirements
Decision adm/rej:	Reject
Clarification:	Qualified, but not enough places available

He was informed by the board that there is a policy which forbids them to grant scholarship to students who intend to pursue courses outside the country, whereas the courses are offered by the local universities, notwithstanding his submissions, the first respondent rejected his application for a scholarship and maintained that they cannot grant him a scholarship to study in Lesotho. As he has been offered a place at the University of Lesotho, he registered with them and this is the only opportunity available

3

to him as he has been rejected by the local University of Swaziland because there are no enough places in the University.

He submits that the matter is urgent as he has already registered with the National University of Lesotho and according to their regulations new students are expected on the 30th July 1998 for allocation of rooms and financial clearances. The orientation course will begin on the 3rd August, 1998 and his failure to avail himself on this date will result to his acceptance being cancelled by the University. He submits that further that the decision by the Board was unfair and unreasonable because he complied with all their requirements to be granted a scholarship. The Board did not act impartially and fairly and has previously awarded scholarship to students studying at the University of Lesotho and it is still granting same to other students. That his failure to get enrolment at the University of Lesotho will greatly affect his life because he may not get such a chance again. Moreover, his parents are poor to pay for his tuition and fees at the University.

On the 5th August, 1998 applicant filed a supplementary affidavit where he deposed that it is the policy of the first respondent to assist deserving and qualifying Swazi nationals in pursuit of tertiary training by granting scholarship on such terms and conditions as government seems fit. This program is administered by the Ministry of Education through the first respondent. The behavior of the first

respondent in refusing to grant him the scholarship can only be explained in terms of malafides because of the following reasons:

3.1 A fellow Swazi national Wandile Nhleko, who is also been admitted to Lesotho to pursue the same program as he has.

3.2 A fellow Swazi national Jabu Khumalo who has also been admitted to Lesotho to pursue a course in Science has been granted a scholarship

3.3 A fellow Swazi national Gcinile Mamba who has been admitted to Rhodes University to pursue a course in Computer Science has been granted the scholarship. That it is worth mentioning that this university is far more expensive that the one he has been admitted to.

3.4 The first respondent is aware that it is only because he was not given a place locally that he applied for and was given a place in Lesotho.

3.5 The first respondent could and should have told him from the onset that he was not entitled to a scholarship grant from the Government of Swaziland instead of waiting until the last moment before arbitrarily told him that he would not be given the grant.

He is advised and verily believe that the first respondent has a discretion to either grant and/or refuse scholarships however, he is further advised and verily believe that such discretion should be exercised judiciously. It is, never was the policy of government to discriminate against the citizens of this country.

This application is opposed by the first respondent who filed an opposing affidavit of one Mfanawendlela Daniel Magagula who is the chairperson of the first respondent. He admits paragraphs 1, 2, 3, 4, 5, 7 and 8 but on paragraph 8 avers that the policy of the

4

Board is to award scholarship outside Swaziland if the course of study is critical to development. The priority areas of study include Bachelor of Science, Medicine, Engineering, Pharmacy, Architect, Veterinary Sciences, Quality Surveying and Paramedical programs. That on the 12th and 13th June, 1997 a press statement was published in the local Swazi Observer newspaper concerning scholarship award and external training for 1997/98. First respondent annexed the said press statement marked "R1". The applicant wanted to pursue a B.A. Social Science program of study which course n offered at the local university. Applicant's application for a scholarship was rejected and he was informed that he would not be granted a scholarship to pursue the program of study in Lesotho when the same is offered in the country. Before making applications to institutions outside of the country students are required to consult with the Ministry of Education.. Respondents denies paragraphs 12, 13.1, 13.2, 14, 15 of the applicant's founding affidavit. In respect of the applicant's supplementary affidavit respondent denies paragraphs 1, 2,-3,3.4, 3.5 and 4 and admit paragraphs 3.1 , 3.2, 3.3 of the said affidavit.

The applicant then files a replying affidavit to answer to the respondent's answering affidavit. AD paragraphs 7, 8, and 9 he avers that as per the press statement by the first respondent annexed to the opposing affidavit of its chairperson he is entitled to a scholarship award as paragraphs 3(a) and (b) state categorically that scholarship awards outside of Swaziland shall be considered only under the conditions that the student qualifies for entry at a local institution but cannot be admitted due to non availability of space. He qualified but there were not enough places available as per his annexure "B". The third requirement that a course of study must be critical for development of the country is a separate one from the two and cannot be mixed. Be that as it may, he submits that the course he intends to pursue is also critical for the development of the country. He denies that the B.A. Social Science program of study which he intends to pursue is offered at the local University. The course is demography and urban and Regional Planning. The courses/subjects offered at the University of Swaziland are more fully listed in the attachment marked "A1" which is a prospectus for under graduate courses and this course is not amongst them. He denies further that before making applications to institutions outside the country students have

to consult with the Ministry of Education. He furthermore states that all the students namely Wandile Nhleko, Jabu Khumalo and Gcinile Mamba have been offered scholarships to pursue studies which are offered by the local University and they did not bother to apply and were not rejected for unavailability of space at the University of Swaziland. This shows the discrimination, partiality and malice of the first respondent in awarding the scholarship to equally deserving students.

These are the facts before me. The matter came before me on the 24th August, 1998 for arguments. The applicant is represented by Mr. Mahlalela and the respondent is represented by Mr. Simelane.

Mr. Mahlalela contended that the first respondent did not apply its mind to the merits of the matter. The course the applicant is desiring to pursue is not offered by the local University. He argued that the respondent failed to exercise its discretion judicially.

5

In the present case the court can rightfully interfere with the Board's decision.

Mr. Simelane for the respondent contended that the whole application does not establish a cause of action. There is no legal basis why the matter is before court. According to law there must be a clear right which has been violated (refer *Abraham & Son vs South African Railways and Harbours* 1933 A.D. 636 at page 637). Mr Simelane contends that a scholarship is not a right but a privilege. He also cited the case of *Union Government (Minister of Mines and Industries) vs Union Steel Corporation (South Africa) Ltd* 1928 AD. 220 at page 236-7 where the court held as follows:

"In my judgement... the unreasonableness of the minister by itself affords no ground for a court's interference with the exercise of his discretion.... There is no authority that I know of, and none has been cited, for the proposition that a court of law will interfere with the exercise of a discretion on the mere ground of its unreasonableness. It is true that the word is often used in the cases on the subject, but nowhere has it been held that unreasonableness sufficient ground for interference; emphasis is always laid upon the necessity of the unreasonableness being so gross that something else can be inferred from it, either that it is "inexplicable except on the assumption of malafides or interior motive... ..or it amounts to proof that the person on whom the discretion is conferred has not applied his mind to the matter..."

He also referred the court to *Baxter on Administrative Law* at page 477 and 478 where the learned author observed that although some early judicial dicta seemed to indicate that unreasonableness might be a ground for challenging administrative action since 1894 our courts have often appeared anxious to disavow any power to set aside administrative action on the grounds of unreasonableness.

These are the issues before me. It is clear that the applicant is applying to the court to exercise its powers of review on the proceedings of the Scholarship Board which he perceives as having been unreasonable, actuated by malafides and ulterior motives. Further more, as having been discriminatory in that its decisions tendered to favour others. However, it appears to me, that before the court exercises its powers of review in the instant case the applicant has to overcome a legal impediment as contended by Mr. Simelane. Does the applicant have a right, and if so, has the right been violated? The applicant is to have a cause of action. A cause of action is defined by Lord Esher, in *Read vs Brown* (22QBD 131) to be every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved". I seem to be at addedum with Mr. Simelane's proposition that a grant of scholarship is not a right but a privilege. Mr. Mahlalela failed to persuade me otherwise. It is inevitable therefore; that before this court exercises its powers of review it has to satisfy itself that a right has been infringed. Here now such has not been proved. Further it appears that the Swaziland Scholarship

6

Selection Board is an adhoc body of unknown statutory origin. Mr, Simelane submitted to the court that

the only legal instrument which purports to deal with this body is a Bill piloted sometime in the early 80s and from that time no one knows what happened to that Bill. This state of affairs does not seem to be disputed by Mr. Mahlalela. The only statutory enactment which may be closely related to the Board is The Study Loan and Scholarship Agreement Order No. 8 of 1977. However, this order does not assist the court in this case. It is trite law that without statutory authority, the court may not venture to question the merits or wisdom of any administrative decision that may be in dispute (see Baxter (supra).

In the result, I dismiss this application with costs.

S.B. MAPHALALA

JUDGE