



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1819/2013

In the matter between:

MAXWELL DLAMINI	1st Applicant
ANTHONY MTHEMBU	2nd Applicant
JABULANI SEYAMA	3rd Applicant
NATHI METHULA	4th Applicant
NJABULO MAZIBUKO	5th Applicant
PHUMLANI CEKO	6th Applicant
BONKHE SHABANGU	7th Applicant
ZINHLE NGCOBO	8th Applicant
AKHONA DLAMINI	9th Applicant
NJABULO NDZIMANDZE	10th Applicant

And

UNIVERSITY OF SWAZILAND	Respondent
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Neutral citation: *Maxwell Dlamini & 9 Others v The University of Swaziland (1819/2013) [2013] SZHC 255 (17th November 2013)*

Coram: M. Dlamini J.

Heard: 17th November 2013

Delivered: 17th November 2013

Locus standi – meaning thereof – causa – lack thereof – dispute of fact – Plascon-Evans rule – new facts in reply – effect thereof.

Summary: The applicants are seeking for an order interdicting respondent from proceeding with the examination scheduled on 18th November 2013 pending their appeal lodged with Council to have the examination postponed to 25th November 2013. Respondent strenuously opposes this application.

The applicants and their contention

[1] The applicants have described themselves as follows:

- “1. I am an adult Swazi male President of the Students’ Representative Council of the University of Swaziland*
- 2. I have authority to depose to this affidavit by virtue of my position as such and by virtue of the fact that I have within my own personal knowledge the facts pertaining to this matter.*
- 3. The 2nd Applicant is Anthony Mthembu, an adult Swazi male of Mzilikazi, Siteki, district of Lubombo and the vice President of the Students’ Representative Council of the University of Swaziland.*
- 4. The 3rd Applicant is Jabulani Seyame, an adult Swazi male of Nkwene area, Shiselweni region and the Chairperson of the Mbabane Campus Student Representative Council.*
- 5. The 4th Applicant is Nathi Methula, an adult Swazi male of Nkambeni area, district of Hhohho and the Minister of Finance for the Students Representative Council of the University of Swaziland.*

6. *The 5th Applicant is Njabulo Mazibuko, an adult Swazi male of Makholokholo, Mbabane, district of Hhohho and Chairperson of Luyengo complex Students Representative Council of the University of Swaziland.*
7. *The 6th Applicant is Phumlani Ceko, an adult Swazi male of Mashobeni area, district of Hhohho and Chairperson of Kwaluseni campus Students Representative Council of the University of Swaziland.*
8. *The 7th Applicant is Bonkhe Shabangu, an adult Swazi male of Sigwe area, district of Shiselweni and Minister of Internal Affairs in the Students Representative Council of the University of Swaziland.*
9. *The 8th Applicant is Zinhle Ngcobo, an adult Swazi spinster of Nhlangano, district Shiselweni and Secretary General of the Luyengo Campus Students Representative Council of the University of Swaziland.*
10. *The 9th Applicant is Manqoba Dlamini, an adult Swazi male of Nkhaba area, district of HHohho and Secretary of Kwaluseni Campus Students Representative Council of the University of Swaziland.*
11. *The 10th Applicant is Akhona Dlamini, an adult Swazi male of Nkhaba area, district of HHohho and Secretary General of the Students Representative Council of the University of Swaziland.*
12. *The 11th Applicant is Njabuliso Ndzimandze, an adult Swazi male of Dvokolwako area, district of Hhhohho and Secretary of Mbabane Campus Students Representative Council of the University of Swaziland.”*

[2] I must point out that this eleventh applicant and Mancoba Dlamini do not appear in the citation of the application.

[3] Respondents have raised *points in limine viz.*, the applicants lack of urgency, *locus standi* and *non-joinder* and lack of urgency.

Determination

Urgency

[4] The respondent submits that the urgency is self created in that applicants knew from the beginning of the semester that examination would commence on the 18th November 2013. Applicants on the other hand state that they could not reasonably anticipate that their study week would be used to complete assignments and tests.

[5] Using my discretion, I will accept that applicants could not have reasonably foreseen the situation they now find themselves in and therefore consider the matter as urgent.

[6] The court notes that in their reply the applicants aver:

“In particular I wish to explain that the Applicants are not claiming any special tuition from the Respondent but are rightfully claiming their revision week and or study break to adequately prepare for the exams.”

[7] However, this averments were not in the founding affidavit nor in their application presented to Senate.

[8] **Short v Naisby 1955 (3) S.A. 572** at 574 points:

“An application must stand or fall by his petition or original affidavit as the case may be, and the facts therein alleged and it is not permissible to make out new grounds for the application in the replying affidavits.”

Locus standi:

[9] As appears in paragraphs 1to12, the applicants have described themselves as members of Students' Representatives Council.

[10] On reading their description, one forms the opinion that they appear in the capacity in which they have described themselves.

[11] However, when respondent challenged their authority to institute the present application without a mandate from the entire students, in their reply they state:

“5. In particular I deny that I am acting in any representative capacity as the Application could have been brought by the Student Representative Council.

7. Applicants are therefore not acting in any representative capacity but in their own personal capacity hence they appear individually as Applicants and not collectively as the Student Representative Council. In any event the S.R.S. is not a legal personal and it cannot such and be sued in its own name.”

[12] In paragraph 15 of the founding affidavit the applicants defined themselves as follows:

“15. All the Applicants herein are registered students of University of Swaziland.”

[13] It is not clear why applicants had to cloud their description in this way.

[14] The applicants having asserted that they appear in their personal capacity as students then stated:

- “18. *I wish to state that the Respondent flouted this clause of the Calendar in that it afforded some of the students less than thirteen weeks of learning / teaching time. The normal registration date was on the 9th August,2013.*
19. *Some of the students, particularly fourth year students were registered about five weeks on the 17th September 2013 after the official registration date and as such they have less than thirteen weeks of learning.*
20. *The late registration of these students was done by the Respondent in contravention of clause 030.31 of the Respondent’s Calendar.*
22. *This in effect means that these students have less than thirteen (13) learning weeks and therefore not prepared and ready for the exams.*
23. *I wish to state that the week of 11th November to 15th November 2013 was supposed to be a study / revision week in preparation for the exams.*

I wish to state that the Applicants and all the students are still having classes and writing tests during this week.

24. *The Applicants have had no time to study and or revise prior to the exams as envisaged by the regulations. Some students are still writing their assignments which have to be submitted on the first week of the proposed exams.”*

[15] During the hearing, the court asked learned Counsel for applicants whether the applicants were the students who registered late and therefore affected in that they could not complete their courses. This poser was necessitated by reason that the founding affidavit failed to aver that the applicants registered late. The attestation on late registration as pointed out above referred to the general body of students. Learned Counsel for applicants Mr. Mkhwanazi responded to the negative.

[16] **Searle JP in Rescue Committee, D.R.C. v Martheze 1926 C.P.D. 300** had the following to say on *locus standi*:

“Everyone has a right to be heard in his own cause, and no one, save a qualified practitioner, has a right to be heard in the cause of another.”

[17] The honourable judge proceed in the same page on the test:

“has the person appearing a direct personal interest in the suit?”

[18] If the answer to the above poser is “yes”, then the applicant is considered to be appearing in his own cause. If he does not have a direct personal interest in the suit, then it is not his cause. *In casu*, therefore applicants cannot be said to have a *locus standi* in so far as the alleged predicament caused by the late registration by reason that they are not affected by it.

[19] Applicants also averred another ground for the application. They stated:

“26. *I wish to state that the Applicants and most of the students have not yet signed for their continuous assessment marks yet the exams are due to start on Monday, 18th November 2013.*

27. *The applicants and most of the students will therefore be prejudiced in that in terms of Regulations, no students with a continuous assessment mark that is below 30% is allowed to sit for the exams.*

28. *The manner in which this exam is intended to be conducted will create uncertainty whether the students qualify to sit for the exam or not if he/she does not know his /her continuous assessment marks.”*

[20] The difficulty about this second ground is that the prejudice suffered by applicants is not clearly articulated. They attest “*that in terms of the*

regulations, no student with a continuous assessment of marks that is below 30% is allowed to sit for the exams". However, they do not say that the said regulation has been violated by the respondent in that it has compelled them to sit for the examination or that they reasonably assume that their marks shall be 30% and nevertheless be compelled to sit for the examination.

[21] **Beck's Theory and Principles of Pleadings in Civil Action citing Speeding v Fitzpatrick 38 Ch.D** at page 40 stated:

"The old system of pleading at common law was to conceal as much as possible what was going to be proved at the trial (hearing); but under the present system we ought to see that a party so states his case that his opponent shall not be taken by surprise It follows therefore that the plaintiff (applicant) must set out his fact with such particularity that the defendant (respondent) will know exactly what facts he will have to meet so as to enable him to disprove the corrections of the facts against him."
(words in brackets my own)

[22] In common daily language the above position is as stated in the **University of Swaziland v Percy Ndlangamandla and Others Civil Appeal No. 10/08** as the honourable court drew reference from **Innes J. in Geldenhuys and Neethling v Geuthiri 1918 A.D. 426** at 441 as follows:

"After all courts of law exist for the settlement of concrete controversies and actual infringement of rights, not to pronounce upon abstract question, or to advise upon differing contentions however important"

[23] For this reason the second ground stands to fall.

[24] I need not deal much with paragraph 28 of applicants' founding affidavit as it refers to "students". I have demonstrated that the applicants in their own showing are not representing the students. They cannot therefore seek to enforce rights which would be enjoyed by the persons they are not representing as per **Searle JP** (*supra*).

[25] This is because the applicants, as clearly outlined in their reply, have stated that they appear in their personal capacity and seek to enforce rights which affects themselves.

[26] This leads to the question of non-joinder.

Non-joinder

[27] The applicants having asserted that they do not speak on behalf of the students, the question on non-joinder should not be an issue. In other words where applicants refer to students or seek to enforce rights to benefit "students" other than themselves such should be struck out. Otherwise to maintain such would be to allow applicants to approbate and reprobate at the same time.

Ad merits

[28] Their Lordships in paragraph [40] of **Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors, Appeal Case No. 23/2006** stated:

"This court has observed a tendency among judges to uphold technical points in limine in order it seems, I would dare add, to avoid having grapple with the real merits of a matter. It is an approach which this court feels should be strongly discouraged."

[29] For the above, I now deal with the merits.

[30] Applicants contend in paragraph 30 of the founding affidavit:

“On or about the 11th November 2013, the Applicants wrote a letter to the Respondent’s Senate, requesting that the exams be at least postponed to begin on the 25th November 2013, raising the above prejudices that may jeopardize Applicants in writing the intended exams.”

[31] Annexure “A” reads partly:

- “1. Due to the continued class boycott by students, that has prevailed since last week Wednesday of the 6th November 2013, it has become apparent that students have had to abandon writing of tests for they were forced to leave classes by a minority pursuant to a resolution that was taken by students in a joint student body meeting which was held on Wednesday afternoon at the Multi Purpose Hall. Pursuit of the same resolution has subsequently led to the closure of Mbabane Campus and the students there have been prejudiced of the opportunity to write their tests for they do not have access to the university facilities.*
- 2. Wherefore then, as the SRC mandated with the task of protecting the resolution and interests of the students find it fit to humbly request the esteemed senate to postpone the examination to allow lectures and students to finish writing tests and the course outline. This is due to the fact that the rules and regulations of the university states it clearly that for a student to write exams, he or she must have written a minimum of two pieces of work as per regulation 010.22 of the calendar of 2013/2014 academic year which is not the case in this particular semester due to the aforementioned class boycott.*
- 3. We appreciate that we have also contributed one way or the other to the current state of affairs that prevails through our engagement in class*

boycotts which have taken at least 5 days of lectures.” (underlining my emphasis)

- [32] Senate considered their application and dismissed the same. As pointed out by applicants they have since appealed.
- [33] One notes from annexure “A” the ground for the application is different from the one *in casu*.
- [34] From the reading of annexure “A” the Student Representative Council and not applicants sought to request for a postponement of the examination by reason that they had engaged in a five day boycott and thereby could not complete their “*course outline and writing of tests.*”
- [35] *In casu*, the applicants are stating that the respondent has failed to comply with its regulations. This was not before Senate. It is therefore not clear as to the basis applicants call upon the court to interdict respondent from proceeding with the examination in the absence of an application on similar grounds taken before Senate.
- [36] This court notes further that applicants or Student Representative Council have appealed to Council. The grounds of appeal are based on respondent’s failure to comply with its regulation. However, it is not clear why applicants or its body representative failed to canvass the same grounds before senate. In brief the matter before Court is prematurely as Senate did not deliberate on it. The submission on behalf of applicants that there was no need to go back to Senate after they were dismissed is ill advised in law.

[37] It is apposite to refer to the wise words of **Comrie J** in **Mokgoko and Others v Acting Rector, Setlogelo Technicon and Others 1994 (4) S.A. 104** at 112 F

“To the lay reader of this judgment I should explain that in this realm of the law the Courts distinguished carefully between the merits of an administrative decision and the manner by which that decision is taken... With rare exception Judges do not substitute their own opinion or decision for the opinion or decision of the functionary board to whom the relevant power is entrusted by statute or subordinate legislation. Nor, generally speaking, are we qualified to do so. But we do insist that the repository of the power, which may be a far-reaching power affecting life, liberty or property, goes about his task in the right manner.”

[38] I make reference to the above *dictum* because the applicants pray as follows:

“2. That pending the decision of Council on our appeal to have the first semester examinations postponed to the 25th November 2013, the Respondent be interdicted from proceeding with the examinations scheduled for the 18th November 2013.”

[39] The effect of this prayer, especially on this eleventh hour, (on 17th November 2013) as examinations are scheduled to commence on 18th November 2013 is to postpone the examination. The applicants do not seek for an order to compel Council to deliberate on their appeal before the date scheduled for the examination.

[40] In brief, this court lacks the necessary mandate to make decision on behalf of respondent as a functionary. Its power lies in a review as pointed by the honourable **Comrie J.** (*supra*).

[41] Lastly, the respondent in their answer refutes that they have violated their regulations. It states as follows:

“AD PARAGRAPH 22

The allegations contained in this paragraph are denied and the Applicants are put to the proof thereof. I reiterate that the period commencing from 12 August 2013 to 8th November 2013 constitutes thirteen weeks of lectures which is in terms of the Regulations stipulates in the Respondent’s calendar.”

[42] Applicants’ reply as follows:

“AD PARAGRAPH 2728

34. Contents hereof are disputed and Respondent is put to strict proof thereof.

[43] In instances of this nature, where the parties contest a question of fact on motion proceedings, the principle of our law is to apply the Plascan-Evans rule. This rule was stated by honourable **Ramodabedi CJ** sitting with **Moore JA** and **Dr. Twum JA** in **Khumalo v Attorney General Civil Appeal No.20/2010** as follows:

“See also Plascon Evans Paints Ltd v Van Reibeeck Paints (Pty) Ltd 1984 (3) S.A. 623A at 634-635. On this principle therefore, and there being a dispute of facts in the matter, the learned Judge a quo was justified in accepting respondent’s version and dismissing the appellants’ application on that basis.”

[44] *Fortiori, in casu*, I accept the version by respondent that they have not flouted the regulations.

[45] As pointed out by learned Counsel for respondent, the applicants' case is confounded by their annexure "A" where they state that they have contributed to the prevailing situation (i.e. failure to complete course outline and writing of tests) by engaging in a boycott. It was submitted on behalf of applicants that respondent acquiesced to their class boycott. However, their very annexure "A" reads:

"It is also worth noting that the SRC has called off the class boycott and perpetrators of any disturbances will be held personally liable to all university disciplinary procedures."

[46] The assertion that perpetrators should face disciplinary hearing defeats the averment on acquiescence. This therefore leads to the inference drawn by respondent that the applicants *in casu*, as they did so before Senate, seek to have the examination postponed in order to recover the five days lost during the boycott.

[47] *In casu*, however, the applicants lay the blame for losing five days to the respondent's door steps without any legitimate justification. The *dictum* found in **Jajbhay v Cassin 1939 AD 537** at 551 is apposite:

"All writers upon our law agree in this no polluted hand shall touch the pure fountains of justice."

[48] Of further note, applicants depose in their reply:

"Firstly, the applicants have demonstrated that they have been deprived of their study / revision week as even on the last week before the exams, they were still learning, writing tests and assignments."

[49] One wonders what exactly is the remedy sought by applicants. Before Senate as evidenced by annexure “A” they pleaded to be granted an opportunity to continue with learning and writing tests and assignments. At paragraph 39 of the reply they contest:

“39. *In fact lecturers imposed on us that we would be learning on this week and as students we could not object or rebel.*”

[50] One therefore wonders whether applicants application is *bona fide*. The fears by respondent as highlighted in their paragraph 17 that applicants are “*playing politics*” seems to me to be with merit in the face of the above.

[51] In the totality of the foregoing, I enter the following orders:

1. Applicant’s application is dismissed.
2. Applicants are ordered jointly and severally to pay respondent’s costs one to pay the other to be absolved.

M. DLAMINI
JUDGE

For Applicants : Mr. M. Mkhwanazi

For Respondent : Mr. M. B. Magagula and Mr. Z. Shabangu