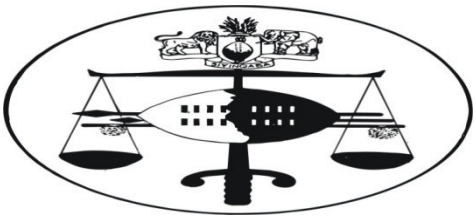


IN THE HIGH COURT OF SWAZILAND

JUDGMENT

CIVIL CASE NO. 534/2016

In the matter between:

BHEKILE SITHOLE **1ST APPLICANT**

MCINISELI VILAKATI **2ND APPLICANT**

AND

NOLWAZI DLAMINI-MATSE N.O. **1ST RESPONDENT**

LIMKOKWING UNIVERSITY OF CREATIVE TECHNOLOGY **2ND RESPONDENT**

Neutral Citation: *Bhekile Sithole & Mciniseli Vilakati vs. Nolwazi Dlamini-Matse & Limkokwing*

University of Creative Technology (Case No. 534/16) [2016] SZHC (70) (2016)

Coram: MLANGENI J.

Heard: 30/03/16

Delivered: 12/04/16

Summary: *Civil procedure – review of decision of disciplinary hearing in terms of which students were suspended from last term of their last year of university training.*

Charges so vague as to make no sense; notice of hearing given was two days instead of minimum of seven; Applicants' defence rejected without giving any reasons; manner in which hearing was done suggesting that conclusion was foregone.

Decision set aside, with costs, and second Respondent directed to register the Applicants.

JUDGMENT

[1] On the 16th March 2016 the Applicants approached this court on grounds of urgency seeking review of the First Respondent's decision dated 3rd March 2016 in terms of which Applicants were found guilty of what is described as **"vague, ambiguous and unspecified**

offences." The above quotation is a summary of prayer 3.1 of the Applicant's notice of motion dated 14th March 2016. The full prayer is undoubtedly verbose and includes aspects that properly belong to pleadings on the merits of the case. I accept, nonetheless, that the prayer is good enough for its purpose.

[2] In terms of prayer 3.2 the Applicants also sought provisional up-liftment of their suspension and that the Second Respondent was to forthwith facilitate their provisional registration for the 2nd semester, pending finalization of this application. I have no doubt in my mind that this prayer was necessitated by the fact that registration for the second semester at the university (the Second Respondent) was on the 15th February 2016. In any institution of learning, especially one of higher learning such as the Second Respondent, time is always of the essence. Time lost might be very difficult to make up for.

[3] For reasons that I am unable to discern, interim relief was not granted at the first hearing or any other time later. It is my view that the Applicant had made out a prima facie case that warranted interim relief, and certainly the balance of convenience highly favoured the Applicants. I would certainly have granted interim relief, even without having sight of the minutes.

THE BACKGROUND

[4] The Applicants are final year students at Limkokwing University of Creative Technology. An academic year comprises two successive semesters. The date of registration for the second and their last semester at the institution was the 15th February 2016. As I write this judgment they have effectively lost about seven weeks of training due to the suspension which is the subject matter of this review application.

[5] It is common cause that the Applicants were two of the SRC (Students Representative Council) members who were in office for the academic year 2014-2015. The Council has nine (9) members in all.

[6] On the date of registration for the second semester, being the 15th February 2016, all the members of the SRC, including the two Applicants, were served with suspension letters, which letters included an invitation to a disciplinary hearing which was to be chaired by the Second Respondent. The Applicants have attached to the application the letters of suspension which also served as Notice of Disciplinary Hearing. Annexure **"MV1"** is at page 18 of the Book. It's last paragraph says:-

“Further, be notified that <u>your enrolment</u> at this institution is <u>suspended</u> pending finalization of the matter as charged.”

The underlining is mine. It reflects the bold print that the author of the letter has used in respect of the words that I have underlined.

[7] The Notice of Disciplinary Hearing and Suspension is dated 12th February 2016, which was a Friday. The Applicants allege that they were served upon them on the 15th February 2016, which was a Monday. So, as they came in on the Monday to register for their second and final semester they were confronted with the Notice of Suspension and Disciplinary Hearing. In the circumstances of this case this strikes me as very unpleasant ambush.

[8] The date of hearing was set as 18th February 2016, an effective notice of two (2) days only.

[9] The charges are something of a spectacle. In a different case arising out of the same factual circumstances as that of the present

applicants, Justice M.D. Mamba said the following in relation to similarly worded charges –

> "---- these charges are unacceptably too vague. They mean absolutely nothing to me." (See **MUZI MNISI vs. THE CHAIRPERSON, LIMKOKWING UNIVERSITY OF CREATIVE TECHNOLOGY DISCIPLINARY COMMITTEE AND ANOTHER, H/C** Case No. 443/2016, heard on 11/03/16 and granted on 24/03/2016.

[10] Herein I list the charges, verbatim. If I had my wish I would be referring to only one, but in a matter of this importance I will list all of them.

> **"YOU ARE CHARGED WITH THE FOLLOWING**
>
> **<u>Count 1</u>**
>
> Contravention of Chapter 8 of the Constitution of the SRC being the Duties and Responsibilities of Vice Secretary-General, particularly clauses,
>
> (i) 8.3.2
>
> (ii) 8.3.5
>
> (iii) 8.36.7
>
> (iv) 8.3.9

(v) 8.3.13

Count 2

Contravention of Chapter 3 of the SRC Constitution being the objectives of the Council, particularly clauses

(i) 3.2

(ii) 3.10

Count 3

Contravention of Chapter 4 of the Constitution being Establishment of SRC particularly clause 4.2

Count 4

Contravention of Chapter 5 Section 5.1 of the SRC Constitution being the Functions of the Council, particularly clauses

(i) 5.1.2

(ii) 5.1.3

Count 5

Contravention of Chapter 5 Section 5.2 of the SRC Constitution being the Powers of the Council, particularly clauses

(i) 5.2.3

(ii) 5.2.4

(iii) 5.2.5

Count 6

Contravention of Chapter 12 of the SRC Constitution being Finances, particularly clauses

(i) 12.1

(ii) 12.6.1

Count 7

Contravention of Article B of the SRC Constitution of the SRC being Transition, particularly clauses

(i) 1.7.1

(ii) 1.7.2

Count 8

Contravention of Article c of the SRC Constitution being SRC Meetings and Mass Meetings, particularly clauses

(i) 1.1.1

(ii) 1.1.2

Count 9

Contravention of Article E of the SRC Constitution being the Code of Conduct of the Council particularly clauses

(i) 1.1

(ii) 1.2

(iii) 1.5

(iv) 1.7

(v) 1.10

[11] As appears on the face of all the charges, they are devoid of particulars; they are absolutely meaningless. What it means is that the Applicants went into the hearing not knowing the cases they were to answer. Clearly, they probably went there unprepared.

[12] The hearing proceeded on the 18th February 2016. According to the Applicants, they became aware for the first time at the hearing that they were being charged with alleged misappropriation of S.R.C funds in the amount of E25, 000-00. This, of course, relates to their days in the previous S.R.C.

[13] At paragraph 10.2 of the founding affidavit the deponent outlines the basis of the Application for review as follows:-

10.2.1 - the charges disclosed no offence.

10.2.2 - the sentencing was not based on any predetermined offences and punishment in the rules and regulations of the university.

10.2.3 - We had not violated any of the rules and regulations of the University hence there was no need for us to be summoned for a disciplinary hearing by the administration of the university.

10.2.4 - We were charged using the Student Body or SRC Constitution which is merely a draft working document since it has not been adopted by the Students' Body ----

10.2.5 - We were given short notice of the hearing contrary to article 5.11.2 of the University's High Flyer Manual which requires at least 7 days' notice.

10.2.6 - We were not afforded representation as required by article 5.11.2 of the University's High Flyer Manual.

Paragraph 10.2.7 is a repetition of the contents of paragraph 10.2.4 above; hence I am not reproducing it.

[14] Applicants further aver that on the 4th March they received communication of the verdict and sentence. They were suspended for one semester, effectively the last semester of their study at Limkokwing. In the case of the First Applicant the suspension was suspended on condition that he paid E3, 125-00, being his pro rata liability in respect of the amount of E25, 000-00 which was allegedly misappropriated by the S.R.C. of which they were members, as well as to submit **"an audited report for the expenditure of the second semester to the disciplinary committee."** The Second Applicant's sentence was **"suspension for a semester, that he submits minutes of the meetings that were held by the S.R.C ----"** , and some other conditions that were also applicable to the First Applicant.

[15] From the Applicant's papers it is not clear what difference, if any, was there between the Applicants' respective penalties, other than that the First Applicant was additionally required to produce audited statements whereas the Second Applicant was required to produce minutes of S.R.C. meetings. This difference, I surmise, would probably have to do with their respective portfolios when they served in the S.R.C. There is reference to annexures **'BS2'** and **'MV2'** which I have not been able to find. These annexures would have made things clearer. I nonetheless proceed on the basis that the sentences were

the same in both cases, more especially because the Applicants have not raised an issue in this respect.

THE DISCIPLINARY HEARING

[16] The minutes show the following:-

16.1 the cases were heard on the 18th and 19th February 2016.

16.2 both Applicants pleaded not guilty to all the charges.

16.3 the Applicants had intended to represent each other but the committee disallowed that, hence they were unrepresented.

16.4 a number of issues relating to S.R.C. business were raised, including why the S.R.C. had engaged a lawyer, and why the lawyer was paid E25.000-00.

[17] According to the minutes, the Disciplinary Committee was aware that the E25, 000-00 which became an issue at the hearing was used to pay legal fees for services rendered. I quote the minutes – unfortunately the paragraphs are not numbered.

> ***"He was asked why the E25, 000-00 was paid to the lawyer. He said they paid this amount to the lawyer because the S.R.C. account was frozen by SSD and students' events were***

suspended. He was asked if SSD was involved when the lawyer was hired, he said no, SSD was not involved."

[18] From the issues that the Committee raised in the meeting and their lack of relevance to what turned out to be the main issue (the E25, 000-00) at the hearing, it does appear that the Second Respondent had an abundance of beef against the Applicants, arising from the Applicants' involvement in the students' affairs as S.R.C, members. This, I daresay, is the likely reason why they were required to produce student body minutes and to submit audited financial accounts.

[19] The minutes show that when an enquiry was made regarding the payments of legal fees of E25, 000-00 the Applicants gave a reason, which suggests among other things that the particular attorney "was chosen because they wanted quality as he was representing the outgoing CJ." Given the verdict, the Applicants' explanation was obviously rejected by the Committee. During the hearing I enquired from the respective attorneys if the Applicants were given the reasons for rejecting their explanation that the E25, 000-00 was paid to an attorney in respect of fees. Both sides were in agreement that from the available documents this appeared not to have happened. Although this was raised by the court, it is my view that in review

proceedings there is nothing wrong with that, and I can point out that I regard it as bad for the Respondents' case.

[20] To the credit of the Chairperson, I see that an opportunity was given for mitigation, but Mciniseli Vilakati, the Second Applicant, appears to have said something in aggravation when he said he was once expelled from school for misconduct.

THE LAW

[21] Authorities repeatedly state that the grounds for review are not a closed list. See for instance the case of **TQM TEXTILE (PTY) LTD vs. CMAC ARBITRATOR SANELE MAVIMBELA N.O. AND ANOTHER** (unreported), **CIVIL CASE NO. 987/15**, at paragraph 9. They include ultra vires, unreasonableness by the decision maker, irrelevant considerations, bias, not giving consideration to relevant matter, failure to comply with procedural requirements, mala fide, failure of audi alteram partem, or any irregularity which causes failure of justice. See also the judgment of **OTA J. in DUMISA ZWANE vs. JUDGE OF THE INDUSTRIAL COURT AND 8 OTHERS (1108) 2014 [2014/383]** at paragraph 16.

[22] At the conclusion of legal submissions I made an ex tempore order in which I granted the Application. This was due, in part, to the indisputable urgency of the matter, since the Applicants were being left behind in lessons or whatever. The other reason is that it seemed to me that a written judgment on the facts before me would add no value to jurisprudence. I have since written judgment upon the request of one of the parties.

[23] **THE CHARGES**

23.1 On this aspect the less said the better. However, discourse requires that I should comment on it meaningfully. As seen at paragraph (10) of this judgment the so-called charges are nothing more than a rendition of various clauses of the S.R.C. Constitution which were alleged to have been violated. All nine counts are fashioned in the same way, as if crafted by someone who was hypnotized. There is absolutely no attempt to give particulars that would enable the Applicants to know what case to answer. The obvious result is that the Applicants went to the hearing not knowing what case to answer, and they did get a surprise.

23.2 The failure to furnish relevant particulars in respect of a charge or charges is, in my view, a gross irregularity. It is a serious procedural failure.

23.3 Disciplinary charges are quasi-criminal, and there are certain procedural requirements that have to be compiled with. They include that the charges must be sufficiently informative.

See: NUPSW 1994 ILJ 129 (LAC)

24.4 The Applicants have alleged that the charges do not disclose an offence. In criminal law such a charge is objectionable and the charge liable to be quashed.

See: LANSDOWN AND CAMPELL, SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE VOL. V (1982) at page 399.

23.5 Similarly, a charge that does not contain sufficient particulars of any matter alleged is objectionable.

[24] This application stands to be granted on the above ground alone, and the matter could end there.

[25] The Respondents have argued that the Applicants, by proceeding with the hearing despite the deficiency in respect of the '**meaningless'** charges, thereby waived their right to object and are estopped from relying upon this on review. This argument is casuistic; it overlooks the fact that review often happens ex post facto the decision, and its purpose is precisely to raise issues that occurred during the decision – making. In any event, the Applicants pleaded not guilty and are entitled to raise in review all that, upon advice, they realize was procedurally wrong at the hearing. The Respondents have referred me to some authrities on estoppel. I have perused it and still come to the conclusion that estoppel does not apply in this case. For one thing I do not see how the Respondents acted to their own prejudice as a result of whatever representation is alleged to have been made by the Applicants at the hearing.

[26] **SHORT NOTICE**

26.1 Earlier on in the judgment I observed that the Applicants were effectively given two days' notice, between the 15th February and 18th February 2016. This is despite a provision in the University's High Flyer Manual which, at article 5.11.2, stipulates a minimum of seven days' notice. This is at page 29 of the Book of pleadings. The High Flyer Manual is said to be a document that

is handed to students upon admission at the institution, which gives an overview of what students are required to know as they enter the institution.

26.2 The document is made, produced and distributed by the institution. So clearly, the Respondents failed to comply with their own procedural requirement. It is my view that short notice is an irregularity which, unless cured by a postponement, could have the effect of hampering the accused persons in their preparations. It may not have been raised at the hearing, but in review it can be raised and it has been raised.

27. **NO EXPLANATION FOR REJECTING THE ACCUSED'S EXPLANATION ON THE USE OF E25, 000-00.**

27.1 The failure or omission by the Chairperson to give the Applicants a reason or reasons why their explanation was not accepted can only point in one direction, that it was not given due consideration – i.e. the chairperson did not apply her mind to it. This, in turn, could suggest that the decision was arbitrary and or capricious. In this context I must re-visit the timing of the hearing. It was timed for right at the beginning of the semester. It is difficult to think that the conclusion was not foregone – i.e. the suspension of the Applicants on the semester in question, which was the final one in their three years of training. One

would expect institutions of learning to avoid very disruptive decisions such as this, which have the potential to shatter the dream of a learner who may not even have resources to re-start. Except, of course, in extreme circumstances where failure to expel or suspend would create an intolerable state of affairs or allow such state of affairs to continue. The present situation is not one such situation. Clearly, there are certainly less disruptive ways to punish the Applicants if there had been sound basis for punishing them.

CONCLUSION

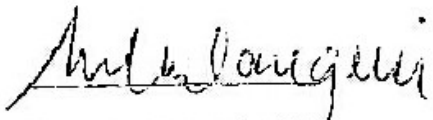
[28] For me the unavoidable conclusion is that the hearing of the Applicant's disciplinary matter was fraught with irregularities, some of them gross. The manner and timing of the process has an element of high-handedness which may even suggest that the conclusion was foregone.

[29] It is for the above reasons that I granted the Application upon the following terms –

29.1 The decision of the First Respondent in terms of which Applicants were suspended is hereby set aside.

29.2 Second Respondent is hereby ordered and directed to forthwith facilitate the registration of the Applicants.

29.3 Second Respondent to pay costs of suit.



T.M. MLANGENI

JUDGE OF THE HIGH COURT

FOR THE APPLICANTS: MR. M. NKAMBULE

FOR THE RESPONDENTS: MR. B. GAMEDZE