MABIKA KUDAKWASHE
and
MAKARANGA PROGRESS
and
MASUNDA SYDNEY
and
JOYCE GOMBA
and
TINOTENDA NYAHUMBI
and
NGWENDE KUDAKWASHE
and
KUDZAI GOWE
and
ZULU FIONA
and
CHARLES NHEPERA
and
CHIKOTO GAMUCHIRAI
and
SHERENI MUTIMUSAKWA
and
JAIROS EUSEBIA
and
MUTOWO TAKUDZWA
and
PEDZAI MARUFU
and
FAITH KURIMA
and
BRENDA JAKATA
and
THOMAS MUDZOVANISWA
and
NOMORE TAWANDA DICK
and
KUDAKWASHE KWARAMBA
and
ZANOVI NATHAN
versus
BINDURA UNIVERSITY OF SCIENCE EDUCATION
and
THE REGISTRAR BINDURA UNIVERSITY OF SCIENCE EDUCATION

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 9 October 2017 and 13 November 2017

Opposed Application

R.J Gumbo, for the applicants
Ms V Vera, for the respondents

MANGOTA J: This application is one where the respondent should suffer for its own sins as well as for the sins of its own legal practitioners. Its attitude to its case speaks volumes of its confused state of mind. The dilatory manner in which its legal practitioners handled its side of the application shows nothing but a do not care disposition to their duty towards the court and their client. The legal practitioners decided to, and did actually, sleep whilst they were on duty. Their conduct was, at best, one of indifference and, at the worst, a clearly unquestionable dereliction of duty.

Twenty students of the respondent, an institution of academic excellence if it may be referred to as such, filed an urgent chamber application on 4 December, 2016. They moved the court to compel the respondent to allow them to write their examinations on Monday, 5 December, 2016.

The respondent opposed the application. It filed its opposing papers on 6 December, 2016. It did so through Messrs Tamuka Moyo Attorneys which were, and are, its legal practitioners of record.

The court ruled in favour of the applicants. The interim relief which it granted to them reads:

<u>INTERIM RELIEF GRANTED</u>

1. That pending the return day respondents are hereby ordered to allow the applicants into the examination rooms and to allow them to sit for their respective examinations from 7th December, 2016 to 14th December, 2016.
2. That for those examinations that were written on 5th December 2016 and 6th December 2016 the respondent to make arrangements for the applicants to sit for those examinations.
3. …."

As often occurs in urgent chamber applications, a provisional order is more often than not accompanied by a final order which the parties would move the court to deal with at a later date. The applicants' final draft order reads:

"TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable court why a final order should not be made in the following terms:

1. Respondents be and are hereby ordered to release the results of the said examinations in respect of all the applicants herein in accordance with their regulations.
2. First respondent be and is hereby ordered to pay the costs of this application on an attorney and client scale."

The applicants filed their heads of argument on 1 March, 2017. They did so in anticipation of the return day. They served the same on the respondent's legal practitioners on 1 March 2017.

The respondent should have filed its heads on 15 March, 2017. It did not. It received notice of set down of the application on 4 October, 2017. The application was set down for hearing at 10 am of 9 October, 2017.

If the respondent intended to be heard on the set down date of the application, it could have taken refuge under proviso (ii) of subrule (2a) of r 238 of the High Court Rules, 1971. It could, in the mentioned regard, have filed its heads on the 5th or 6th October, 2017. It, for its own unknown reasons, refrained from taking advantage of the mentioned proviso which remained open to it.

The respondent's legal practitioner, a Ms *Vera*, attended the hearing of the 9th of October, 2017. She acknowledged, at the hearing, that the respondent did not file its heads and was, therefore, barred. She laid the blame on a fellow legal practitioner whom she said was handling the respondent's case and had left the law firm. She, to the displeasure of the court and the applicants, confessed, candidly though, that her law firm had lost track of the case. It was, according to her, only when her law firm received the notice of set down of the application that the firm conducted a diligent search of the file which related to the application and located the same on 5 October 2017. The file, she said, had been taken to the law firm's store-room where closed files were kept. She stated that she did not know how the file, which she acknowledged was active, ended in the store-room. She confessed that, if the set down notice had not come the law firm's way, the law-firm would not have looked for the file. She said she

intended to apply for condonation soon after the hearing of the application. She applied for upliftment of the bar to enable her to apply for condonation.

Ms Vera's submissions were indicative of a clear dereliction of duty which her law firm committed itself to perform for, and on behalf, of the respondent. The conduct of the law firm was inexcusable. The firm, as Ms *Vera* acknowledged, received the applicants' heads in March 2017. It did nothing about its own heads from March 2017 todate. The explanation which she gave was very unsound and weird. It revealed a total disorganization of the law firm which was to champion the respondent's cause.

The applicants who opposed the upliftment of the bar spelt out, correctly so, the known and accepted procedure. The procedure is that a legal practitioner who leaves one law from for the other engages in a hand-over take-over exercise of all files which he is handling before he leaves the law firm. To allege, as Ms *Vera* did, that the file got lost shows nothing but total negligence on the part of the respondent's legal practitioners.

Ms *Vera's* statement which was to the effect that she was applying for upliftment of the bar to enable her to apply for condonation was as meaningless as she stated it. I failed to understand what she was driving home to. The reasons which she gave for having allowed the respondent to be barred remained unacceptable.

An application for upliftment of the bar is not granted for the mere asking. The applicant must advance cogent and convincing reasons for having fallen into the trap of the bar. Where flimsy reasons are proferred, as *in casu*, the bar would most certainly remain unlifted.

The bar which came into effect when the respondent's conduct offended r 238 (2a) of the High Court Rules, 1971 remained operative. That was so because the reasons which the respondent advanced for not filing its heads within the time which the rules of court prescribe were devoid of merit. The respondent, therefore, remained out of court.

In her application for the upliftment of the bar, Ms Vera suffered what I may refer to as a slip of the tongue. She somehow touched upon the merits of the application albeit in a very small measure. Because I wanted to appreciate what she would say on that aspect of the case, I allowed her to proceed along the course which she had taken. That was so because the view which I held of the application was that the provisional order which had been granted to the applicants disposed of their case to a point where the matter could not meaningfully be revisited.

Ms *Vera* submitted that the provisional order allowed the applicants to write their examinations. She moved the court to discharge the provisional order. She stated that the

discharge of the provisional order would pave way for the respondent to compel the applicants to re-write the same examinations which they wrote in December, 2016. The re-writing of the examinations would, according to her, be in compliance with the respondent's regulations.

The long and short of Ms *Vera*'s assertions was that the respondent complied with the court order as a matter of course. It, according to her, intended to compel the applicants to write the examinations which they wrote on its terms. Whatever that was intended to achieve remains anyone's guess.

It is displeasing to note, as the applicants asserted, that the respondent allowed the applicants each of whom had a carry in one or the other course when he/ she was in his/her first year first semester to proceed with that carry to the student's final year of his/her degree programme only to tell him/her when he/she was about to write his/her final examinations that she/she had been deregistered and would not, therefore, be allowed to write his/her examinations for part 4, first semester. *A fortori* when the respondent allowed each applicant to register for his/her 4th year studies and to pay a substantial sum of money which related to his/her tuition, bus fare, medical aid, laboratory costs [for those in the science discipline) and examination fees.

The applicants stated that the respondent allowed each one of them to attend lectures and tutorials with the other students throughout the semester. They said each applicant earned course work marks from class tests, assignments and presentations.

It was indeed a serious measure of high-handedness for the respondent to tell the applicants to return to their homes at the eleventh hour. The applicants, it is evident, had travelled a long road and expended substantial sums of their parents' hard-earned money in pursuit of their academic studies.

Annexure C which the applicants attached to their application is the respondent's 2015-2017 academic regulations. The annexure contains two very important clauses. These are clauses 8.3 and 8.4. The clauses, it is observed, do not spell out any consistency. They require revision and realignment for future use.

The respondent's apparent abrupt decision to bar the applicants from writing their final, or near final, examinations rested on clause 8.3. It reads:

> "8.3. Normally, <u>a student shall not be allowed to proceed from one part to the next without having registered and passed formal examination(s)</u> in courses in the preceding part and having satisfied all the prerequisites for proceeding as may be specified in the Faculty Regulations. <u>No student shall be allowed to proceed from part three to part four</u> without having passed all the required part one courses." [emphasis added].

The contents of the cited clause, it is evident, are peremptory. They admit of no exception. They state in a clear and unambiguous language that only those students who pass formal examinations in courses in the preceding part will proceed to the next part subject to them satisfying all the prerequisites for proceeding to the next part.

Clause 8.4 confers a discretion on the respondent. It reads:

> "8.4 A student who passes sufficiently well in one part in aggregate may be permitted to proceed to a subsequent part carrying a course or courses subject to the provisions in the Faculty Regulations and to timetable feasibility. Tuition fees charged for repeating such carried course(s) shall be calculated on a pro rate based on the prevailing fees."[emphasis added].

The respondent allowed the applicants to carry courses from the first year through to their second and third years and sought to bar them from writing their examinations during the first semester of their fourth year. It received all the fees which related to their fourth year, first semester studies only to tell them to go home when they were about to write their examinations. Its decision in the mentioned regard cannot be supported at law.

The respondent had every opportunity to advise the applicants, earlier than the time it did, to write and successfully complete their carried courses. It could have done so when the applicants were in their second or third year of study. It advanced no reason at all as to why it did not do so then. Its conduct, as analysed in the foregoing paragraphs of this judgment, remains totally unacceptable.

It is trite that when parents send their children to university, the latter would apply their minds to their studies, complete their degree programmes and become useful members of society. In accepting the students, the university, as a fountain of education which prepares the students' minds for the benefit of society, will conduct itself in a clear, fair, transparent and unvindictive manner. It is never the function of such an academic institution as is the status of the respondent to, as it were, wreck the lives of those who register with it in pursuit of knowledge and wisdom as the respondent attempted to do *in casu*.

Communication lies at the centre of university work. Heads of departments, deans of faculties right up to the esteemed office of the vice-chancellor are at all times enjoined to advise, in written form, students who may be adversely affected by the decisions which they intend to take before they implement such. Written notices which are addressed to each of the affected students are more preferable than pinning notices on notice boards as the respondent said it did in the case of the applicants. Where such notices reach their addressees within

sufficient time for the latter to act and does not do so, university authorities would not be found wanting when they proceed to implement the decisions which they take.

The respondent suffered a major setback on the above stated aspect of the case. It could not state in any categorical manner that it addressed any letter to any one of the applicants telling him/her that he/she would not sit his/her examinations unless and until he/she complies with clause 8.3 of its regulations. Its evidence which remained very weak and totally unconvincing was that the directive which it issued on 23 September 2016 was posted on various notice boards in all faculties, student halls and academic halls. It, in the mentioned regard, deprived itself of hard evidence which could tip the scales of justice in its favour.

The above analysed matters show that the applicants' averments remained uncontroverted. The sting which they made against the respondent prevailed much to the embarrassment of the latter. That, coupled with the manner in which the respondent handled its case, persuaded me, as any judge would have done, to consider the applicants' case favourably.

The applicants, in my view, proved their case on a balance of probabilities. The application is, therefore, granted as prayed.

Gumbo & Associates, applicants' legal practitioners
Messrs Tamuka Moyo Attorneys, respondents' legal practitioners