DOUGLAS NYATHI
and
MOREBLESSING MPOFU
and
KARREN DUBE
and
VEZUMUZI NDLOVU
and
DONWELL DUBE
and
SANI BONIFACE MUTALE
and
KEITH PHIRI
and
SITHOKOZILE MAHOPOLO
and
SIBONOKUHLE NDLOVU
versus
LUPANE STATE UNIVERSITY

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 6 APRIL 2018, 10 APRIL 2018 AND 12 ARPIL 2018

Urgent Chamber Application

T Ndlovu for the applicants
J J Moyo for the respondent

MATHONSI J: When this matter was initially set down for hearing before me on Friday 6 April 2018 Mr *Moyo* who appeared for the respondents sought a postponement of the hearing to enable the parties, first and foremost, to engage each other with a view to resolving the dispute outside court and secondly to enable the respondent, in the event of non-settlement, to prepare for argument. The matter was then postponed by consent to 10 April 2018.

Since then there has been a flurry of correspondence between the parties which was unnecessarily copied to the registrar of this court. What is significant though is that when counsel for the respondent requested a postponement an undertaking was made that the issues

raised by this application would be put on hold and that the date of 8 April 2018 would be disregarded *vis-à-vis* the relocation of the applicants to Lupane directed in the notice of 27 March 2018. Unfortunately that is not what happened and the manner in which the respondent has conducted itself since the last hearing on 6 April 2018 is not only far from satisfactory, smacking as it does of a complete lack of probity but betrays an unpleasant attempt to pull the wool over the court's eye by changing the situation on the ground ahead of the resolution of the dispute by the court.

The applicants, who are lecturers at the respondent's Department of Development Studies approached this court by urgent application which was placed before me on 6 April 2018 seeking the following interim relief against their employer:

> "INTERIM RELIEF GRANTED
> Pending the final determination of this application it is ordered that:
>
> 1. The relocation of the applicants to Lupane Campus set for the 8th of April 2018 be and is hereby suspended and stayed until the finalization of this matter.
> 2. The respondent be and is hereby interdicted from forcing the applicants to relocate to Lupane Campus pending the finalization of this matter."

What caused the applicants to make the application was that the respondent, which had allowed their department to operate from Bulawayo while its main campus in Lupane was under construction, had made two swift but contradictory decisions affecting them in quick succession over a period of exactly five days, as shall soon become apparent hereunder. Those conflicting decisions were communicated to the applicants by memoranda generated by the office of the registrar on 22 and 27 March 2018. The former decision required them and their students to prepare to relocate to the Lupane Campus at the commencement of the second university semester on 23 July 2018 while the latter decision reversed all that and instructed them and the students to relocate on 8 April 2018.

When I acceded to the request for a postponement it was on the understanding that the decision to relocate on 8 April 2018 would be put on hold until the matter was heard and finalized one way or the other. As it now turns out, instead of finding a solution to the dispute, the respondent used the weekend to move the students to Lupane on 8 April 2018 while at the same time purporting to withdraw the memorandum given to both the applicants and their students on 27 March 2018.

In a letter to the applicant's legal practitioners dated 10 April 2018, which Mr *Moyo* for the respondent spoke to during arguments, the respondent sought to justify the relocation of the students thus:

> "The students were a separate group and while affected by the relocation were agreeable to move to the main campus and they have done so. We are unable to appreciate the accusation that we reneged on an undertaking and that the application for a postponement was *mala fide*. The undertaking was made in respect of the applicants and no issue has been made over the fact that they did not relocate to the main campus in Lupane by 8 April 2018. With regard to the merits of the matter and while extremely disappointed with your clients' attitude in the negotiations which to us seemed to suggest a desire not to see the negotiations succeed our client nonetheless stands by the concessions it made namely that it will accept that the decision it made and communication of such decision through its memo of 27 March 2018 was at too short a notice to the applicants and that they were not, prior to the making of that decision invited to make representations. <u>The memo and the instructions contained in it have therefore been abandoned.</u> In view of this concession the reason for the making of the urgent application has been removed and we trust that you will pursue the application no further. Our client is obliged given the concession, to tender your client's wasted costs but on the party and party scale---." The underlining is mine).

The letter goes on to suggest that the applicants should proceed to make representations to the respondent as to the way forward and to suggest that the lecturers would be expected to commute from Bulawayo to Lupane to teach their students until the end of the current semester which is 1 June 2018.

Just what is it then that the respondent was conceding to? The applicants came to court contesting the decision to relocate their workplace to Lupane on 8 April 2018 and to enforce the decision taken by the respondent following negotiations with them to relocate on 23 July 2018. The respondent lulled them into complacency and then moved their students on 8 April 2018 and it now wants to ostensibly negotiate with them as to how they can fix a time table for them to teach in Lupane while commuting from Bulawayo. It is completely preposterous and is the reason why I hold the firm view that the respondent sought a postponement for all the wrong reasons.

Mr *Moyo* submitted that the decision to relocate departments is the administrative prerogative of the respondent which it should be allowed to routinely make without interference from the court. This court should not saddle the University with a court order which takes away

its prerogative to fix a date for relocating its department. I do not agree. As long as this court is still open and still discharging its function as the arbiter of fairness and justice between parties, including the mighty and the powerless, it cannot allow conduct as exhibited by the employer of the applicants in this case to perpetuate. Prerogative or no prerogative, we are talking of the rights of employees which are constitutionally guaranteed which the employer cannot be allowed to tread on rough-shod.

Surely, the respondent could not come to court and ask for a postponement and then go on to shift the students whose location was already the subject of the very application it sought to postpone and then purport to engage the applicants on when and how they should travel to Lupane to teach them. The students and their lecturers are a mixed bag. They cannot be separated without constructive dismissal.

In my view this matter resolves itself on those facts that are common cause. It is common cause that the applicants are employees of the respondent engaged in various capacities but principally as lecturers in the Department of Development Studies. It is common cause that although geographically the respondent University is located in Lupane, a growth point in Matabeleland North about 171km from Bulawayo, its main campus has been under construction resulting in the University setting up camp in Bulawayo.

It is common cause that the department has all along been domiciled in Bulawayo where the applicants are currently based. It is common cause that the University took the conscious decision to move the department to the main campus in Lupane and at some stage that migration was set for "mid semester break second semester in 2018", but by notice issued by the registrar of the respondent on 22 March 2018 that decision was rescinded in consideration of challenges associated with relocation. The notice reads;

> "NOTICE TO ALL DEVELOPMENT STUDIES STUDENTS AND STAFF REGARDING RELOCATION TO THE MAIN CAMPUS
> After considering some challenges regarding provision of resources at the main campus, the Vice Chancellor has decided to further defer the relocation of both students and staff to the main campus to 23 July 2018. All students shall be required to report to the main Campus at the commencement of the First Semester and shall have to pay $200-00 per semester for accommodation on campus.
>
> J. Makunde
> REGISTRAR".

It is common cause that hardly five days later on 27 March 2018 the same registrar issued another notice by way of a memorandum advising the same recipients of a review of the earlier decision. It reads:

> "RELOCATION OF STAFF MEMBERS IN THE DEPARTMENTS OF DEVELOPMENT STUDIES AND EDUCATION FOUNDATIONS
>
> The above subject refers.
> I write to inform you that the Vice-Chancellor's decision to defer relocation of the Departments of Development Studies and Educational Foundations has been reviewed. The relocation of both students and staff shall now be on 8 April 2018. Could you please kindly liaise with Human Resources to assist with travelling arrangements.
> Thank you
>
> J Makunde
> REGISTRAR."

It is common cause that in making all those decisions, including giving the applicants, barely four days' notice to relocate to Lupane (they say they received the memorandum on 4 April 2018 owing to the Easter Holidays), the respondent did not consult the affected individuals neither did it accord them any opportunity to make representations.

Now, in terms of section 68 (1) of the Constitution every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair. It has been stated that ever since the advent of the Administrative Justice Act [Chapter 10:28], which embodies the constitutional rights contained in section 68 of the Constitution in section 3, that it is no longer business as usual for administrative authorities. They have to make decisions which, when they affect the rights, interests or legitimate expectations of others, are lawful, reasonable and fair. See *U-Tow Trailers (Pvt) Ltd* v *City of Harare and Another* 2009 (2) ZLR 259 (H) at 267 F-G; *Mabuto* v *Women's University in Africa and Others* 2015 (2) ZLR 355 (H) at 356 A-C.

It occurs to me that the moment the university authorities announced the decision to defer the migration of the affected departments to 23 July 2018 they created a legitimate expectation, protected by law, that the applicants would not be required to move to Lupane before that date. The authorities could not, by a whim, "review" that decision without consulting the affected

members of staff. Much less could the authorities lawfully do so on such short notice as was given in this case.

The applicants have stated that they all have families which they have to relocate to Lupane as well. They have to secure accommodation at a small village town with scarce accommodation and then incur all the other attendant expenses. All that now has to be done within a period of four days. Clearly therefore apart from the legitimate expectation that relocation will take place in July 2018, the decision to order them to relocate on four days' notice is not only unreasonable but extremely irrational.

As if that was not enough, there is also the aspect of failure to consult the affected individuals or to give them an opportunity to make representations before arriving at that decision in clear violation of the *audi alteram partem* rule. It occurs to me that an employee has got a legitimate expectation that he or she will be consulted before a decision is taken to move them in circumstances such as the present. This is more so in respect of professionals like lecturers who have held their positions for some time. See *Chinyoka and others* v *Sora and Others* HH 195-13 (unreported)

In *Taylor* v *Minister of Education and Another* 1996 (2) ZLR 772 (S), a case dealing with the unilateral transfer of teachers, the Supreme Court stated at 777H, 778A;

> "In general one thinks that professional employees of long standing holding senior posts, would not be transferred without account being paid to their stated personal situations and wishes."

The court went on at 780A-B to state:

> "The maxim *audi alteram partem* expresses a flexible tenet of natural justice that has resounded through the ages. One is reminded that even God sought and heard Adam's defence before banishing him from the Garden of Eden. Yet the proper limits of the principle are not precisely defined. In traditional formulation it prescribes that when a statute empowers a public official or body to give a decision which prejudicially affects a person in his liberty or property or existing rights, he or she has a right to be heard in the ordinary course before a decision is taken."

In that regard, in this case the wishes and personal circumstances of the applicants were relevant and indeed important. They ought to have been taken into consideration by the respondent before the decision to relocate them was taken. See *Guruva* v *Traffic Safety Council of Zimbabwe* 2009 (1) ZLR 58 (S) at 61C. Even though the respondent has purported to

withdraw the relocation order, that is cold comfort to the applicants as long as the students they are employed to teach have relocated. What the respondent has done is to forcibly relocate the applicants as well under the guise of negotiating with them. I am able to see through that charade.

I conclude therefore that a good case has been made for the relief sought including the return of the students to Bulawayo to take their lectures here until the matter is finalized.

In the result, I grant the provisional order in terms of the amended draft order.

Sansole and Senda, applicants' legal practitioners
Calderwood Bryce Hendrie and Partners, respondent's legal practitioners