

DANAI H MABUTO  
versus  
WOMEN'S UNIVERSITY IN AFRICA  
and  
HOPE SADZA N.O  
and  
N. CHIEZA N.O

HIGH COURT OF ZIMBABWE  
MATHONSIJ  
HARARE, 6 August 2015

### **Urgent Application**

*S Hofisi*, for the applicant  
*TG Ndoro*, for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents

MATHONSIJ: The remarks of Makarau JP (as she then was) in *U-Tow Trailers (Pvt) Ltd v City of Harare and Another* 2009 (2) ZLR 259 (H) 267 F-G; 268 A-B about the effects of the introduction of the Administrative Justice Act [*Chapter 10:28*] resonate with the problem presented by this case. The learned Judge President remarked;

“That the promulgation of the Act brings in an era in administrative law in this jurisdiction cannot be disputed. It can no longer be business as usual for all administrative authorities, as there has been a seismic shift in this branch of the law. The shift that has occurred is, in my view, profound as it brings under the judicial microscope all decisions of administrative authorities save where the provisions of s 3 (3) of the Act, apply. On the basis of the foregoing, I find that the decision by the first respondent summarily to terminate the lease agreement between itself and the applicant was an administrative action carried out by an administrative authority, empowered to do so by the lease agreement between the parties. The Act applies to that decision. The Act provides that an administrative authority which has the responsibility or power to take any administrative action which may adversely affect a right, interest or legitimate expectation of any person shall, *inter alia*, act reasonably and in a fair manner. The Act proceeds to define what a fair manner, for the purposes of the Act, entails and this includes adequate notice of the nature and purpose of the proposed action and a reasonable opportunity to make adequate representations, in my view, an embodiment of the *audi alteram partem* rule.”

In fact s 2 of that Act gives a very wide definition of an administrative authority. It provides,

“‘administrative authority’ means any person who is –

- (a) an officer, employee, member, committee, council, or board of the State or a local authority or parastatal; or
- (b) a committee, or board appointed by or in terms of any enactment; or
- (c) a Minister or Deputy Minister of the State; or
- (d) any other person or body authorised by any enactment to exercise any administrative power or duty.”

Since the pronouncement in *U-Tow Trailers (Pvt) Ltd v City of Harare and Another*, (*supra*) was made, administrative law has evolved even more significantly in that the concept of administrative justice has now received constitutional recognition. Section 68 of the constitution which is contained in the Declaration of Rights [*Chapter 4*] provides:

- “(1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.
- (2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.
- (3) -----”

The concept of administrative justice includes the requirement that official power affecting individuals must be exercised fairly in that official decisions should be arrived at fairly, that is, impartially in fact and appearance giving the affected person an opportunity to be heard: *Telecel Zimbabwe (Pvt)Ltd v Postal and Telecommunications Regulatory Authority of Zimbabwe and Others* HH 446/15. It is the embodiment of the *audi alteram partem* rule.

The applicant enrolled as a Masters in Science (Development Studies) student with the first respondent in January 2015. The University gave her an admission letter on 21 January 2015. She paid part of her tuition fees on 23 February 2015, she having paid \$400-00 of the requisite \$1 100-00. She later made a “fees payment plan” which was authorised or approved by the Finance Director of the University on 4 June 2015. Earlier on she had been given a student ID Number W150362.

Having enrolled for the March 2015 intake of the University the applicant was allowed to attend lectures fully between March and June 2015 and to write her course work assignments scoring very impressive marks ranging between 66% and 84% in the 4 courses she was learning. The applicant was scheduled to sit for her examinations commencing on 8 June 2015 but 2 days before that date, she was stopped dead in her tracks by the University.

The third respondent, who is the Deputy Registrar – Academic of the first respondent advised the applicant that she could not write her examinations because she had been enrolled in error, and advised her to write a letter to the second respondent, the Vice Chancellor if she wanted an official reason for that decision.

Although the applicant promptly wrote the require letter to the Vice Chancellor on 9 June 2015, pleading her case, there was no formal response from the respondents until 31 July 2015, almost 2 months later, when she received the letter from the second respondent dated 23 July 2015. The letter stated that her case had been deliberated upon fully by the senate, that she had applied for the degree programme when she did not have “a good first degree”, that she was given an admission letter on 21 January 2015, that she paid part of her fees on 23 February 2015 at the bursar’s office but had not followed procedure in that she had not paid the full fees of \$1 100-00 by 20 February 2015 as required, that she did not register as a student during the registration period although she attended lectures and as such:

“The senate’s stance is that you cannot continue with the programme with the Women’s University in Africa.”

Complaining that the decision was taken without according her an opportunity to be heard or make representations, that she was not given prompt and written reasons for that administrative conduct and that she had a legitimate expectation to be allowed to sit for her examinations and to continue with her studies after being admitted the way she was, the applicant now seeks a provisional order in the following:

“TERMS OF FINAL ORDER (SOUGHT)

(That you show cause to this Honourable Court why a final order should not be made in the following terms-)

- (i) Respondents’ decision to withdraw the applicant’s candidature be and is hereby set aside.
- (ii) Costs shall be in the cause

INTERIM RELIEF (GRANTED)

(Pending determination of this matter, the applicant is granted the following relief -)

1. Pending the proper resolution of this matter by the respondent(s) it is ordered that
  - (i) The respondent(s) be and (are) hereby compelled to allow the applicant access to the first respondent’s premises and resources for purposes of education until due process has been followed.
2. The first respondent is hereby interdicted from in any way, negatively interfering with

the applicant's education, more particularly in that the (first) respondent be and is hereby:

- (a) Directed to allow (the) applicant to write examinations for the purpose of the Master of Science degree in Development Studies during the period from 4<sup>th</sup> August 2015 (*sic*) when students are writing supplementary examinations.
- (b) Barred in any other way from discriminating against (the) applicant before following proper and due process in withdrawing (the) applicant's candidature.

3. The respondent shall bear the costs of suit.”

Mr *Ndoro* who appeared for the respondents allowed Professor Nherera from the University to address me on the reasons for the exclusion of the applicant. Professor Nherera in essence confirmed all that the applicant said in her founding affidavit, adding that although the applicant was offered a place in the “offer letter” dated 21 January 2015 which was accepted by signing at the bottom as required thereby completing a contract, she was still required to register as a student but did not do so. He accepted that the University has the habit of allowing students who have not registered to attend lectures because of the harsh economic environment. In doing so, they would be hoping that the student would be able to raise the fees in due cause. He went on to say that even at the late stage of examinations, the University would have allowed the applicant to register as a student to enable her to obtain the biometric registration identification required for entry in the examination, if she qualified.

Mr *Ndoro*, then submitted that the respondents had not accord the applicant a fair hearing because she was not a registered student and was therefore not entitled to a fair hearing. This is disturbing indeed because Mr *Ndoro* conceded that by accepting the offer as she did the applicant had entered into a binding contract with the first respondent.

No matter what the respondents say, there can be no dispute that they admitted the applicant to the University to study for her chosen degree programme. They went on to accept part of her fees and to approve a payment plan in respect of the balance. They gave her a student number before allowing her to attend lectures throughout the period preceding the examinations, which is between March and June 2015. She was allowed to write her course work and was awarded good marks for it. She was simply treated as a student of the university thereby raising in her the expectation that she would not only continue with her programme but also to sit for her examinations.

In terms of s 3 (1) of the Administrative Justice Act [*Chapter 10:28*]an administrative

authority which has the responsibility or power to take any administrative action affecting the rights, interest or legitimate expectations of any person shall act lawfully, reasonably and in a fair manner, within a reasonable period and where it has taken action, supply written reasons within a reasonable period after being requested to supply them. It therefore cannot be disputed that the provision of the Act incorporates the traditional rules of natural justice including the rule that a party should be heard before a decision adversely affecting its rights is taken, the *audi alteram partem* rule.

In the present case, having raised the expectations of the applicant, the respondents went on to trample on her rights. She was withdrawn on the eve of examinations without any formal reasons. When she sought audience, the University Senate went on to deliberate on her case in breach of the *audi alteram partem* rule, and to arrive at a decision adverse to her that notwithstanding. Even then, she was denied prompt written reasons. In fact when the reasons came almost 2 months later other students had written their examinations which presumably had been marked because those who were not successful had a second bite at the cherry in supplementary examinations set for 4 August 2015, just a few days after reasons were given.

There is therefore no doubt in my mind that the respondents have acted in violation of the law to the prejudice of the applicant who, in terms of s 75 of the constitution, has a fundamental right to “further education”. It is for that reason that the court must step in to promote the ideal of justice. As Morris Raphael Cohen put it in *Reasons and Law* at pp 111 – 112 (quoted with approval in *Cabs v Chirocherwa* 2001 (2) ZLR 452(H) 455 A – C);

“The problem of justice is that of cleansing the social order of its black spots. This is an endless as well as a difficult task because all we do is constantly befoul by our inevitable errors and folly. But life would be unbearable without the effort at purification. We must remember that whatever our ideal of substantial justice, it is obviously incomplete unless it includes the ways of bringing it about ..... Furthermore, there can be no just order unless there is also what I have called ‘formal’ justice, i.e. a general determination on the part of those who deal with the law to live up to its spirit, to carry out not only its literal provisions but the ideal inherent in it. Doubtless, the law will never, so long as it is administered by human beings, be free from arbitrary will and brute force. Nevertheless, it cannot function in an organized society without some national effort at justice as an ideal harmony.”

Surely it cannot possibly be fair or just to lead a student down the garden path, to admit her into university and take her fees, to allow her into lecture rooms and administer and mark assignments. When the time comes to reap what she sow in examinations, to then prevent her from sitting for those examinations and kick her out. It is not only unjust and brazen in its effect, it is also a black spot in civilized social order. If the first respondent had

made a mistake in admitting the applicant in the first place, it was too late at that stage to recant that decision. In fact it was easier to accept the error, swallow it and move on. Doing otherwise unduly upset the social order to the prejudice of the applicant.

In the result, I grant the provisional order as amended.

*Zimbabwe Lawyers for Human Rights*, applicant's legal practitioners  
*Ziumbe & Partners*, respondent's legal practitioners