

CEVERN HUNGWE
versus
BINDURA UNIVERSITY OF SCIENCE EDUCATION
and
THE REGISTRAR

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 27 September & 5 October 2016

Urgent Chamber Application

A. T. Tavenhave, for the applicant
T. Moyo, for the respondents

ZHOU J: This case deals with a matter that has previously been dealt with by this court in a case that is clearly in point if not on all fours with the instant matter. The issue is whether a university or any other institution of learning for that matter, which has admitted a person to a programme of study for which the person does not have the minimum qualifications stated in the advertisement of the degree concerned can unilaterally withdraw the admission of the student. In the case of *Danai H. Mabuto v Women's University in Africa & Ors* HH 698 – 15, this court held that such a withdrawal of the student's place would be unlawful. Notwithstanding the fact that reference was made to the above case and reliance was placed upon it by the applicant in oral argument, the respondents' counsel refrained from addressing me on why a different conclusion must be reached in this case. The omission was decidedly structured.

The applicant *in casu* responded to an advertisement for the Master of Science Education Degree (Geography) which the first respondent was offering on a Block Release basis. He holds a Bachelor of Education Degree in Geography from the Midlands State University as well as a Diploma in Education of the University of Zimbabwe which he obtained following a course of study at Hillside Teachers' College which is an associate college of that University. The advertisement published by the first respondent stipulated, among other requirements, that: "All candidates who apply for degree programmes should have the specified 'A' level subjects and at least 5 'O' level subjects including English Language and Mathematics." The applicant has not

passed 'O' level Mathematics, as he has a Grade "E". He, however, submitted his application. In the application form which he completed the applicant stated his 'O' level results accurately, including the Grade "E" in Mathematics. The application form was accompanied by photocopies of his academic and degree certificates. The 'O' level certificate reflects his results. Notwithstanding the above facts, the first respondent by letter dated 16 August 2016 offered the applicant a place to study for the Master of Science Education Degree (Geography). The letter gave the applicant a student registration number B1647219, and advised him that a place had been reserved for him in the degree programme. He was required to pay the fees in full into the first respondent's bank account the details of which are clearly provided in the offer letter. The fees were to be paid before the commencement of the semester.

The applicant duly paid the fees as required by the respondents and presented himself at the university on the opening day. He attended lectures. At the same time he was undertaking the registration formalities required by the university. It was during that process of registration that he was advised that he could not be registered as he did not have Ordinary level Mathematics which was a requirement for admission to the degree programme which he had been offered. The offer of the place was therefore being withdrawn. The applicant is due to write examinations in November 2016.

The applicant approached his legal practitioners who wrote to the respondents on 6 September 2016 protesting the withdrawal of his place and demanding an explanation for the decision. The letter was delivered to the respondents on 12 September 2016. On the same date the respondents responded to that letter. In the response the respondents stated that the applicant had been "provisionally admitted" to the degree programme "pending production of requisite qualifying original certificates as per our advertisement". The letter further stated that the applicant was subsequently disqualified and deregistered after it had been noted that he had not passed 'O' level Mathematics. The reference to a 'provisional' admission is clearly not supported by the offer letter. Further, the letter did not incorporate the requirements stated in the advertisement as terms or conditions of the contract in terms of which the applicant was being offered the place. The submission by the respondents that the offer was provisional until the applicant produced the original certificates is not supportable. The respondents already had photostat copies of those certificates which had the results. The only reason to ask the students

to produce the original certificates would be to enable the university to verify the authenticity of the copies submitted and the results contained therein. The respondents would not expect that the original 'O' level certificate of the applicant would have a pass in Mathematics when a photocopy thereof reflected a Grade "E".

Mr *Moyo* for the respondents submitted that admission to the degree programme was subject to the provisions of Clause 3.1 (a) of the regulations attached to the opposing papers marked "TFR 3". Those regulations clearly do not apply to graduate or post-graduate degree programmes like the Master of Science Education. They are stated as: "General Academic Regulations for **Certificates, Diplomas and Undergraduate Degrees** of Bindura University of Science Education". In any event, the offer letter makes no reference to those or any other regulations as the basis upon which the applicant had been offered the place of study.

The respondent also sought to rely on the last paragraph of the offer letter to sustain the argument that the offer was only provisional and that the university could withdraw the offer if the applicant had not passed 'O' level Mathematics. That paragraph states the following:

"Finally, I would like you to note that the offer of a place does not mean you have been given admission to the University. The offer is made without prejudice to the rights that the University may have to withdraw or cancel the offer in the event of you or the University being unable to meet the conditions of the offer."

The conditions of the offer can only be those which are contained in the letter, such as the payment of fees or the failure to produce original certificates and the other documents stated in the offer letter. The offer cannot be made subject to conditions which do not form the basis of the offer itself or have no application to the degree programme. The respondents are clearly mistaken in thinking that they can simply withdraw the offer which has already been accepted. The contract was not just concluded but also consummated by the payment of fees. That is the reason why the respondents allowed the applicant to attend lectures.

The attempt to cancel the offer without affording the applicant the opportunity to make representations contravenes not just the provisions of s 68 (1) and (2) of the Constitution of Zimbabwe and s 3(1) of the Administrative Justice Act [*Chapter 10:28*] in that the decision was not reasonable and "both substantively and procedurally fair"; it also contravenes the principle of natural justice known as the *audi alteram partem* rule. See *Danai H. Mabuto v Women's University in Africa and Others (supra)* at pp. 2; 5. It is clear that the wording of the

Constitution is such that administrative conduct can be impugned, among other grounds, on the ground that it is not reasonable. That is a marked departure from the common law requirement of “gross unreasonableness”, as opposed to mere unreasonableness, as the ground which would justify review of an administrative decision. The content of the reasonableness standard is one that may be ascertained through a circumstance-based inquiry into factors such as the nature of the decision, the identity and expertise of the person or authority making the decision, the factors relevant to the decision, the reasons proffered for the decision, the precise nature of the competing considerations and the effect of the conduct of the authority on the life and well-being of the affected person, the applicant in the present case. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490(CC), para 48; Iain Currie & Johan de Waal, *The Bill of Rights Handbook 5th Ed.*, pp. 676 - 677. The unreasonableness of the respondents’ conduct arises from the fact that they seek to rely on a fact that was within their knowledge (the fact that the applicant had not passed Mathematics) when they offered him the place to justify withdrawal of the place after the applicant has paid the full fees and attended some lectures. The decision is substantively unfair in that the respondents seek to rely on their conduct to unilaterally withdraw the applicant from the university. Whether that conduct was due to an oversight or some other explanation is irrelevant as the applicant placed all the relevant information for consideration by the respondents. The procedural unfairness arises from the contravention of the *audi alteram partem* rule, as the decision to withdraw the applicant from the University was taken without giving him a right to be heard.

The draft order claims costs under the interim relief section. That is inappropriate as the question of costs should be determined on the return date. I have also had to correct the draft order in certain respects. I repeat the point which I have made previously that the parties need to apply their mind when formulating the draft orders in terms of which they seek relief.

In the circumstances, the relief sought is hereby granted in terms of the draft provisional order as amended.

Tavenhave & Machingauta, applicant’s legal practitioners
Tamuka Moyo Attorneys, respondents’ legal practitioners