

HAMILTON MUPANDENYAMA & 92 OTHERS  
versus  
HIGHER EDUCATION EXAMINATION COUNCIL  
and  
KWEKWE POLYTECHNIC

HIGH COURT OF ZIMBABWE  
CHINAMORA J  
HARARE, 30 October 2019 & 4 December 2019

### **Opposed application**

*O Kondongwe*, for the applicant  
*L T Muradzikwa*, for the first respondent

CHINAMORA J: The ninety three (93) applicants, who are students of Kwekwe Polytechnic, have approached this court seeking the following relief:

“IT IS HEREBY ORDERED THAT:

1. The Respondent be and is hereby directed to release the Applicants’ [Higher National Examinations Council] Hexco National Certificate examination results in Electrical and Automotive Engineering within 48 hours of this order.
2. The Respondent be and is hereby interdicted from making the Applicants re-write the Hexco national certificate examinations in Electrical and Automotive Engineering.
3. The Respondents are to pay costs of suit on a legal practitioner and client scale”.

This application has been brought in terms of s 4 (1) of the *Administrative Justice Act [Chapter 10:28]* which authorizes any person who is aggrieved by the failure of an administrative authority to comply with section *three* to make an application for relief to this court. The section provides:

#### **“4 Relief against administrative authorities**

- (1) Subject to this Act and any other law, any person who is aggrieved by the failure of an administrative authority to comply with section *three* may apply to the High Court for relief.
- (2) Upon an application being made to it in terms of subsection (1), the High Court may, as may be appropriate—
  - (a) confirm or set aside the decision concerned;
  - (b) refer the matter back to the administrative authority concerned for consideration or reconsideration;

- (c) direct the administrative authority to take administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;
  - (d) direct the administrative authority to supply reasons for its administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;
  - (e) give such directions as the High Court may consider necessary or desirable to achieve compliance by the administrative authority with section *three*.
- (3) Directions given in terms of subsection (2) may include directions as to the manner or procedure which the administrative authority should adopt in arriving at its decision and directions to ensure compliance by the administrative authority with the relevant law or empowering provision”.

The applicants, who are final year students at Kwekwe Polytechnic, asserted that the respondents unjustifiably withheld the results for the final year Hexco national certificate examinations that they wrote in March-April 2019. They stated that the results were withheld on the suspicion that the examination paper in Electrical and Automotive Engineering was leaked, resulting in unauthorised access to it by some students. On 23 April 2019, some of the applicants were called to the school to be interviewed by investigators tasked by Hexco to investigate the leakage, and were advised that all students would be informed of the outcome of the investigations. The applicants stated that, on 4 June 2019, the second respondent began sending text messages to some of the applicants advising that, following its investigations, the examination paper in Electrical Engineering and Automotive Engineering would be re-written. They stated that most of the affected students did not receive the text messages. The applicants also asserted that the conduct of the respondents in withholding the results infringes section 3 of the *Administrative Justice Act* and section 68 of the *Constitution*. The case they pleaded in their founding affidavit can be captured as follows:

- (a) The decision to withhold the results and to require the applicants to rewrite the same examination is illegal and not proportionate, in that all the other results which have nothing to do with the alleged leakage have been withheld unjustifiably.
- (b) Withholding the results of Kwekwe Polytechnic in circumstances where the paper in question had been written by polytechnics across the country shows lack of fairness.
- (c) The decision was also unfair in that it was not based on an investigation and findings which established foul play by the applicants. They assert that as the decision was based on unproven allegations it was substantively unfair.

- (d) In addition, the applicants assert that they were not given an opportunity to be heard thus breaching the rules of natural justice and section 68 of the *Constitution*. The applicants contend that, the respondents relied on information, reports and examination scripts without affording them an opportunity to comment on these documents before a decision was made.
- (e) The respondent did not give the applicants reasons for the decision contrary to section 3 of the *Administrative Justice Act*.
- (f) The right of the applicants to education was violated.

The respondents opposed the application. In their opposing affidavits, they admitted that a sample of students were interviewed as part of the investigation. The respondents provided a list with student names and mobile numbers as proof that messages had been texted to the students on 4 June 2019. They also contended that the withholding of results is justifiable as it would be illegal to do so as the examination had leaked. The respondents asserted that the action they had taken was fair as the students would re-sit the examination at no extra cost. They insisted that reasons for the decision had been given on collection of results. As the basis of the suspicion that the examination had leaked, the respondents said that Kwekwe Poltechnic “*had abnormally high marks*” compared to other regions and “*current trends of performance*”. To back up the claim of cheating, the respondents filed two investigation reports of the suspected illegal access to examination materials, Annexures “B” and “C” to their opposing affidavit. In the first report is an analysis in relation to the *Diesel Plant Fitting* paper, the relevant parts of which read as follows:

“Candidate 0419006N00252, the answers given for questions 3.7 and 9 were similar to those in the marking guide in both procedure and format.  
Candidate 0519006N250, the answers for questions 7 and 9 were exactly similar to the marking guide in both format and procedure.  
Candidate 0418006N00104, used wrong working but managed to get correct answers as given in the marking guide for questions 1d, 2 and 7.  
Candidates 0419006N00228, 0418006N00112, 0419006N00249 had work showing no relationship between the working and the final answer for questions 3 and 7”.

Also in the first report, in relation to the *Motor Mechanics* paper, the following finding is made:

“Candidate 0417006D0084 produced correct answers from the wrong working in the form of a force diagram on question 5 and full marks were awarded”

In relation to Auto-Electrics, similar findings were made as follows:

“Candidate 041900N00004 produced correct answers for question 3 but using the wrong working and full marks were awarded.  
Candidate 0419006D00019 marks were awarded for a wrong force diagram/wrong working and full marks were awarded”.

The report concluded that 6% of the candidates responded to the given questions using the format and presentation given in the marking guide, and that the pass rate was unusually high for numerical subjects. It went on to recommend that all candidates who sat for the Engineering Science Paper (346/13/S09) in the March/April 2019 examination have their results nullified.

The second report in relation to *Electrical Engineering [No. 321/13/CR/0]*, states as follows:

Total number of candidature – **85**  
Number of candidates with responses similar in format,  
presentation and phraseology to the marking guide – **7**  
Percentage – **8%**

In relation to *Electronic Communication Systems [No. 323/13/CR/0]*, appears the following:

Total number of candidature – **36**  
Number of candidates with responses similar in format,  
presentation and phraseology to the marking guide – **10**  
Percentage – **28%**

I now turn to Computer Systems Engineering [322/13/CR/O], the following is noted:

Total candidature – **14**  
Number of candidates responses similar in format,  
presentation and phraseology to marking guide – **4**  
Percentage – **29%**

Then in relation to *Instrumentation and Control Systems [No. 337/13/CR/O]*, the report states:

Total candidature – **57**  
Number of candidates with responses similar in format,  
presentation and phraseology to marking guide – **6**  
Percentage – **11%**

Under the heading “**Conclusion**”, the report concludes:

“8.1 14% of the candidates had responses similar in format, presentation and phraseology to what is given in the marking guide...This strongly suggests that the candidates had access to marking guide and/or similar source prior to or during the examination session.  
8.2 Question 10 (a) that concerns SCR analysis is not in the NC Electronics syllabus and would generally expect candidates not to fare so well. However, it was well answered by most candidates and in a manner similar in format, presentation and phraseology to the

marking guide. This shows prior access to the marking guide and/or similar source of the examination system.

8.3 There was illegal access to examination material, particularly, the examination guide which resulted in the compromise of the examination system”.

Arising from the above findings and conclusions, the following recommendation appears:

“Results of the *Electronics* paper number 321/13/505 sat for by candidates at Kwekwe Polytechnic on 2 April 2019 be set aside and a new question paper administered to all candidates who sat for the examination on the day”.

The respondents also produced minutes of an examinations ratification meeting held on 16 April 2019 which shows that some candidates (014900610020 and 11160001100355) found with materials similar to marking guides in the *Industrial Management* examination were disqualified. Similarly disqualified were candidates 0419006N00230 and 0419006N00262 for cheating in the *Diesel Plant Fitting* examination, as well as candidate 0419001L00113 who was caught with notes in the *Principles of Economics* examination.

The issues I have to determine were agreed by the parties as the following: (a) was the respondents’ decision to withhold the national certificate examination results in Electrical Engineering and Automotive Engineering is illegal; (b) was there proportionality in the respondents’ decision; and (c) was the respondents decision substantially and procedurally fair. Any decision to withhold or examination results has serious ramifications on the affected candidates and should be taken with due compliance with the relevant law. In fact such a decision should not be exercised arbitrarily.

The law on the subject is set out in Section 68 of the *Constitution* and Sections 3 and 5 of the *Administrative Justice Act*, as well as the common law. Starting with the constitutional imperative, Section 68 provides as follows:

- “(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”.

On its part, the *Administrative Justice Act* buttresses the constitutional imperative by requiring administrative authorities to act lawfully, reasonably and in a fair manner. The relevant provision, Section 3, reads as follows:

### **“3 Duty of administrative authority**

- (1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall—
- (a) act lawfully, reasonably and in a fair manner; and
  - (b) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and
  - (c) where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned.”

What is evident from the law is that, for administrative conduct to be lawful it requires adherence to the maxim *audi alteram partem*, which entails that a person facing an allegation which will result in a decision being made (or action taken) that might affect his rights and interests is given an opportunity to explain himself. (See *U-Tow Trailers (Pvt) Ltd v City of Harare and Another* 2009 (2) ZLR 259 (H) 267F-G; 268 A-B). Patel JA succinctly explained what constitutes acting in a fair manner in *Attorney-General v Leopold Mudisi & Ors* SC 48/15, in the following terms:

“The obligation to act in a fair manner is further expanded in s 3 (2) of the [Administrative Justice] Act to require the giving of “adequate notice of the nature and purpose of the proposed action” and “a reasonable opportunity to make adequate representations” as well as “adequate notice of any right of review or appeal where applicable”.

Crucially, s 68 of the *Constitution* incorporates the need for reasonableness and proportionality in administrative conduct. A fundamental plank of proportionality is ensuring that the desired goal of an administrative decision is achieved by the use of a method which is least drastic or oppressive to achieve it. (See *S v Makwanyane* 1995 (3) SA 391 (CC). In other words, an administrative body must not deploy more heavy-handed means than are necessary to achieve its objective by idiomatically using a sledge hammer to kill a fly. The right to be given reasons for a decision is also imported into Section 68, the rationale of which gained judicial support in *S v Maimba* HH 293-14, which decided that unless reasons are given it is improbable, if not difficult, to determine how the ultimate decision was reached.

It is against the factual background and position of the law outlined above that I examine whether the respondents acted lawfully, reasonably and in a fair manner when they made the decision to withhold the national certificate examination results in Electrical and Automotive Engineering. The applicants contended that the decision was substantively unfair as it was based

on unfounded allegations of examination malpractice. I start by turning back to the respondents' investigation and the findings and conclusion they reached. In respect of the first report, errors were identified attributable to either inadvertence or incompetence by examiners which may have contributed to the high pass rate. Quite clearly, the issue of giving students full marks for wrong workings or for using wrong diagrams has nothing to do with cheating by students. The examiners should have picked that up and failed the concerned candidates. No apportionment is made in the report of the respective percentages attributable to examination malpractice and errors by examiners. In the circumstances, it was unreasonable and unfair to treat the unusually high pass rate as the product of cheating by students. More importantly, it is also evident from the first report that the offending students were identified and should have been dealt with by way of disqualification. Indeed, the minutes of the examination ratification meeting shows that culprits who were caught cheating during the examination were isolated for disqualification. This was a more reasonable, fair and proportionate approach instead of withholding the results of students who had nothing to do with any examination malfeasance.

In relation to the second report, I identified four papers which were written by the applicants in order to determine whether the decision that was reached is reasonable and proportionate. It is evident that of the four subjects, only the results of the *Electronics Paper [No. 321/13/S05]* were targeted for setting aside. This is not consistent with the investigation report findings and conclusion. A balanced approach would have meant that all examination papers where unsavory examination behaviour was implicated would have met equal treatment. No rational justification was given for the differential treatment with the rest of the papers. Such a decision fails to meet the reasonableness and rationality test. In this regard, Section 5 (k) of the *Administrative Justice Act* enjoins me to consider whether there is any evidence or other material which provides a reasonable or rational foundation to justify the action taken. I am unable to find any justification from the papers before me. More astonishing is the conclusion in relation to Question 10 (a) which was not in the national certificate syllabus. The investigation report did not say whether the students who correctly answered that question were interviewed as the interviews were conducted on the basis of a sample. If so, the report is silent on the explanation they gave for the correct answers. It appears that candidates were penalized for the simple reason that they were expected to fail, without taking into account the possibility that they had confounded expectations for reasons other than cheating, e.g. preparing well for the examinations. Significantly, as with the

first report candidates suspected of cheating were identified, and the respondents' decision should have been confined to those students, who should have been dealt with through either disqualification or withholding their results. The dragnet approach adopted makes the decision unlawful, unreasonable and unfair.

I now turn to examine whether the applicants were given the right to be heard before a decision impinging on their rights, interests and legitimate expectations was made. By their own admission, the respondents used a sample of candidates for interviews. The criteria for sampling was not explained. The construction of Section 68 admits of no ambiguity that "every person" has a right to reasonable, fair and administrative conduct. The use of a sample effectively means that the students invited or picked up for interviews were acting as proxies for those students who were left out, yet the interviewees had no brief on how to answer questions that affected their colleagues. The unfairness is obvious because student A is called to answer questions from investigators, yet on the basis of answers he gives a decision is taken which affects student B. That can hardly have been what Section 68 contemplated, given that each student would have given responses that related to their own peculiar circumstances. In fact, the respondents averred that they relied for their decision on reports and examination scripts. The need for each candidate to relate to and explain their own script was obvious. In fact, the issue of question 10 (a) made it imperative for every student to be afforded an opportunity to be heard, as some might have provided answers which excluded foul play. The same applies to answers which were similar in phraseology to the marking guide. It was necessary to hear every student on that, especially in a situation where the subjects involved were numerical or technical, where there is little room for disparity in language in comparison with essay writing subjects, e.g Law or History. At any rate, the applicants (even those who were called by investigators) were not given notice of hearing and given adequate time to prepare, and were not notified of their rights of appeal or review or reasons for the decision.

Finally, despite it being a national examination no justification was given why Kwekwe Polytechnic was the only one whose results were withheld. There was no comparator provided by the respondents to show how other colleges in the same region had performed to demonstrate that Kwekwe Polytechnic had an unusually high pass rate. The respondents did not provide an expert report on the current trends of performance which prompted the suspicion of examination cheating.

I am satisfied that the conduct of the respondents in making the decision to withhold the results for the Electrical and Automotive Engineering paper falls short of the requirements of

Section 68 of the *Constitution* and Section 3 of the *Administrative Justice Act*. The decision to withhold the results was therefore unlawful, unreasonable, unfair and disproportionate, since the respondents could have disqualified or withheld the results of the candidates who were identified in the investigation reports as having committed examination malpractices. Indeed, the minutes of the examination ratification meeting held on 16 April 2019 reveal that such an approach was taken in some instances. No basis has been demonstrated for the blanket withholding of results for the Electrical and Automotive Engineering papers. The singling out of these subjects and leaving others where possible examination illegalities had been identified by the investigation report, without giving reasons, smacks of capricious decision making.

Regarding costs, while my view is that the opposition to this application was without merit, in the exercise of my discretion, I will not award costs on an attorney and client scale. The respondents were motivated by a desire to protect the integrity of the examination system, although the manner in which they went about it was clumsy, unreasonable, disproportionate and unfair.

In the result, I make the following order:

1. The Respondents be and are hereby directed to release the Applicants' Higher National Examinations Council National Certificate examination results in Electrical and Automotive Engineering sat in March/April 2019 within 48 hours of service of this order.
2. The Respondents be and are hereby interdicted from making the Applicants re-write the Higher National Examinations Council National Certificate examination in Electrical and Automotive Engineering.
3. The Respondents are to pay costs of suit, jointly and severally, the one paying the other to be absolved.