MUMBUNA WAMUNEO MWISIYA v THE COUNCIL OF THE UNIVERSITY OF ZAMBIA (1981) Z.R. 247 (H.C.)

HIGH COURT
G.B. MUWO, J.
21ST AUGUST, 1981
(1981/HP/48)

Flynote

Civil procedure - Certiorari - Order of - Whether can issue against University senate on refusal to award degree to student.

Civil procedure - Legal Proceedings - University senate - Whether can sue and be sued in court of law- University of Zambia Act, No. 17 of 1979, s. 15 (2) construed.

Civil procedure - Jurisdiction - High Court- Whether has jurisdiction on matters decided by University senate - University of Zambia Act, No. 17 of 1979, s. 16 (2) construed.

Statutes - Construction - "Sue and be sued" - Meaning of under University of Zambia Act, No. 17 of 1979, s. 15 (2).

Headnote

The University Senate Graduate Committee refused to award a Master of Laws Degree to the applicant and directed him to re-write his dissertation. He applied for an order of *certiorari* and declaration for the court to remove the matter in its jurisdiction and quash this decision. The application was made under a repealed University of Zambia Act to which counsel for the respondent made an objection. Another objection was that the High Court did not have jurisdiction to entertain the matter as the senate and the Chancellor had complete power to the exclusion of the courts of law. The application was made under the University of Zambia Act, Cap. 233 which was repealed and replaced by the University of Zambia Act, No. 17 of 1979.

Held:

(i) Although the application was made under a repealed Act, the new one and the old are substantially identical with a few changes in the numbering of sections deleting some and adding new or enlarging the old sections. What the application intended to achieve was embodied in the old Act as well as the new Act.

(ii) The words "*to sue and be sued*" in s. 15 (2) of the University of Zambia Act, No. 17 of 1979 mean to sue and be sued in a court of law and not any other inferior tribunal.

(iii) The High Court for Zambia has jurisdiction to hear and determine cases of this nature.

Cases cited:

(1) R v Electricity Commissioners Ex parte London Electricity Joint Committee Co, [1923] (Reprint) All ER 150.

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(2) Thorne v University of London, [1966] 2 All E.R. 338.

(3) Reg v Aston University Senate Ex parte Roffey & Anor. (1969) 2 Q.B.D. 539

(4) Glynn v Keele University, [1971] 1 W.L.R. 487.

Legislation referred to:
University of Zambia Act, No. 17 of 1979, a 15 (2).

For the applicant: Sikatana, Veritas Chambers.
For the respondent: J. Jeary, D.H. Kemp & Co.

Judgment

MUWO, J.: On 24th February, 1981, I made a decision that:

(1) The applicant be granted leave to apply for an order of *certiorari* and declaration out of time; and
(2) That the applicant cause a notice of motion to be issued within seven days from the 24th February, 1981.

On 24th February, 1981, the applicant's advocate filed the notice of motion as was ordered by the court. On the 30th March exactly seven clays from the date of my order, proceedings for the notice of motion for a prerogative order sought commenced.

Opening the case for the respondent, Mr Jeary raised a preliminary legal print that this Court has no jurisdiction in respect of this application; alternatively that this Court ought to decline to exercise any jurisdiction at all. In support of his submission, Mr Jeary referred to Section 14 of the University of Zambia Act, Cap. 233 which he said was repealed on 22 June, 1979 and replaced by Act No. 17 University of Zambia Act, 1979.

Mr Jeary argued that the applicant's (correct channel) would be to apply to the Chancellor of UNZA who in fact is the President of this Republic in terms of the Act and not in this court. He invited this Court to take cognisance of the Act that section 24 of the Act sets out the functions and powers of the Senate of the University of Zambia and put emphasis on sub-ss. (1) and (2) (e) of section 24 of the Act. Counsel went further to submit that Parliament in its wisdom vested the authority in the Council of the University and that the Senate was charged with the duty to teach and examine the "professionals". One other important point Mr Jeary has made is that in the exercise of my discretion whether or not to make an order of certiorari to remove to this court from the Senate the decision to award the Degree of Masters of Laws, in respect of the applicant, I should decide whether the Senate of the University of Zambia is an "inferior" tribunal as defined in Halsbury's Laws of England 4th Edn. ol. 1 page 147. Counsel then made reference to the case of *R. v Electricity Commission* (1). Referring to the application for a declaration, Mr. Jeary submitted that this was a discretional matter where the court can grant or refuse the declaration sought. He concluded by asking this Court to strike out paragraphs 5 to 9 of the applicant's affidavit as being frivolous and vexatious.

Mr Sikatana's reply was lengthy though the issue was quite a narrow one at this stage. The issue being whether or not this court has jurisdiction to determine a matter which can properly be decided by the Senate of the University of Zambia as argued by Mr Jeary. Nevertheless, note has been taken

of some of his essential points such as the interpretation of section 14 of Cap. 233 of the University of Zambia Act, and the supplementary legislation which would give complete power to the Senate Councils, or indeed the Chancellor, over a matter now being argued to the exclusion of the courts of law in the land. Mr Sikatana drew a distinction between the present case and that of *Thorne v University of London* (2). In this case Mr Sikatana argued that his client knew his results showed he was successful but the University of Zambia Council had ruled against him when in fact all that remained was to formalise the results. Counsel said the reason for bringing this matter before this court was not done as a sport but to ask the court to determine the question of the applicant's legal right to have what is properly due to him, after satisfying the requirements of the University. Mr Sikatana dismissed Mr Jeary's submission that his client's remedy would be sought from the Chancellor of UNZA as being contrary to the spirit of the Act which does not compel the Chancellor to appoint a board of inquiry in matters of this kind. Counsel concluded by saying the matter has come out from the hands of an inferior tribunal, the Council of the University of Zambia to the High Court for final determination to make or decline to make a declaratory order, because there is no Act of Parliament which has taken away the inherent powers of this court to determine any dispute under the existing laws.

I agree with Mr Jeary that the University of Zambia Act Cap. 233 was repealed and replaced by University of Zambia Act No. 17 of 1979. Accordingly the notice of motion lodged by the applicant was filed under a repealed Act. Nevertheless, reading the repealed Act and the new one it can be seen that the two are substantially identical with a few changes in the numbering of sections deleting some and adding new or enlarging on the old sections. For instance section 13 in the old Act is now section 14 in the new Act, and 14 in the old Act is now section 15 in the new Act. It is quite true therefore, that the applicant's advocates had not done their homework to ascertain whether they were proceeding with the matter under a law or statute in current use.

It is my view that in spite of the advocates for the applicant referring to a repealed Act what they intend to achieve now can be found in section 15 of Act No. 17 of 1979 which replaced section 14 of the old Act without changing the wording of the section.

Sub-s. (2) of section 15 of Act No. 17 of 1979 which was taken from Sub-s. (2) of section 14 of the old Act is important in the determination of the issue whether this Court has jurisdiction or not to entertain this matter. Sub-s. (2) of section 15 of Act No. 17 of 1979 (taking the relevant portion only) reads:

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> "(2) The Council shall be a body corporate to be letdown as the Council of the University of Zambia with perpetual succession and a common seal, with power to sue and to be sued in its corporate name, to enter into contracts, to give guarantees . . ."

The important words in this subsection for the purpose of determining jurisdiction are "to sue and to be sued." The word "Sue" in the Advanced Learners Dictionary published by Oxford University is defined as making a legal claim against a person for damages, for money in compensation for loss or injury in a law court. The only reasonable construction I can put on the words "To sue and to be sued" in relation to the University of Zambia under the Act is to sue or to be sued in a court of law

and not in any other tribunal. If the Legislature had intended to exclude the established courts of law in favour of a special tribunal I have no doubt that intention would have been made manifestly clear in the Act itself. Sub-s. (2) I have referred to above goes further by saying the Council will "do all such acts and things as bodies corporate may by law do and as are incidental or appertain to a body corporate". What are the words "by law" doing in this section? Certainly not powers of the Council exercised by the Senate under section 24 of the Act. I construe the words "by law" as meaning by law as administered by courts of law in the Republic. Whatever tribunals the Council has established under its domestic administration those are obviously inferior to the High Court.

I find it now convenient to make brief references to the first two cases referred to under head (c) of this judgment. In both these cases the question was whether the principle of "natural justice" had been violated or not; or whether the authority concerned had considered it at all.

In *R. v Aston University case* (3) Donaldson, J., said at page 552 and I quote:

> "In my judgment it is not right to treat the principle of audi alteram partem as something divorced from the concept of natural justice, although it will certainly not apply in every case in which there is a right to natural justice. Where however, it does apply, it is an integral part of natural justice and may indeed lie at its heart."

And at page 557F the learned judge went on to say:

> "This in my new clearly indicates that the decision whether a student failing such a referred examination should re-sit the whole examination or withdraw from the course is in the sole discretion of 40 the examiners and no higher or other body. If this be right the question is whether the examiners before deciding to require the applicants to withdraw from the course, should have afforded them the opportunity to explain or intimate their failure either orally or in writing."

In *Glynn v Keele University* (4) Pennycuick, V.C., had this to say at page 495:

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> "I have found considerable difficulty in making up my mind as to which side of the line those powers fall. When the Vice Chancellor exercises those powers should he, be regarded as acting in a quasi-judicial capacity, or should he be regarded as acting merely in a magisterial capacity?... I do not think it would be right to treat those powers as merely matters of internal discipline. Having reached that conclusion I must next decide whether in exercising his powers ... the Vice Chancellor complied with the requirements of natural justice. I regret that I must answer that question without hesitation in the negative."

In the three cases I have referred to above I have deliberately omitted to set out the facts of each case for the simple reason that what is relevant in them are the enshrined principles of "natural justice" and "audi alteram partem". However in the two remaining cases i.e. *R v Electricity Commissioners* (1) and *Thorne v University of London* (2) the principle involved (it seems) is one

concerning natural justice. In case (1) the Lord Justices of Appeal, laid down the law applicable to the prerogative writs of prohibition and certiorari as follows:

> "Prohibition and certiorari will lie to prevent a body which cannot be described as a court in any ordinary sense acting in excess of its legal jurisdiction if it has legal authority to determine questions affecting the rights of subjects and in so doing must act judicially. Prohibition will lie as soon as it is established that such a body is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to be brought up and quashed on certiorari. A proceeding is capable of being in judicial proceeding subject to prohibition or *certiorari* although the final decision reached therein is embodied in an order which cannot come into operation until it has been approved, with or without modification, by each House of Parliament. In such circumstances the grant of prohibition or certiorari to prevent excess of jurisdiction by the body making the order is not a usurpation of the functions of parliament."

In the Thorne case (2) the plaintiff in an action claiming damages for negligently misjudging his examination papers for the Intermediate and Finals LLB, and for a *mandamus* commanding the defendant, the University of London, to award him the grade at "least justified," it was held by the Court of Appeal that the High Court had no jurisdiction to hear complaints by a member of London University or by a person seeking a degree from the University, because those matters are within the exclusive jurisdiction of the "Visitor" of the University.

These two later cases are precisely the ones on which Mr Jeary bases his argument that this Court has no jurisdiction over the present case. I agree with him so far as those decisions are concerned on the facts. The present case however is distinguishable from these two cases in that in case (1) the appeal was allowed as to prohibition and in case (2) the applications was dismissed for want of jurisdiction by the High Court on an application on notice by a candidate for a writ of *mandamus*.

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In the case now under consideration the candidate, Mr Mwisiya, is seeking redress by way of *certiorari* for this Court to remove the matter into its jurisdiction for the purpose of quashing the decision of the Senate Graduate Committee dated 23rd April, 1980, where it was ordered that "Mumbuna Wamuneo Mwisiya rewrite his master of Laws Dissertation before the 30th December, 1980, before being granted the said degree". It is on this basis that the applicant wishes this Court to declare that it has in the first place the jurisdiction to entertain the matter and secondly to declare that it is in the best interest of administration of justice to afford him opportunity to call witnesses to support his allegations against certain academic professors on the staff of the Council of the University of Zambia.

On a complete reading of the University of Zambia Act I have no regret to hold very strongly that the High Court for Zambia has jurisdiction to hear and determine the type of case now before me. I have already put an interpretation on the meaning of the words "to sue and to be sued" in section 15 (2) of the University of Zambia Act, that these words mean to sue and to be sued in a court of law and not in any other inferior tribunal. I am, therefore, declaring that I have jurisdiction to hear this matter by notice of motion and determine the same in accordance with the courts inherent powers

under the law. Consequently, following this decision, I direct that a hearing date be set down and notices of hearing be issued and directed to all parties concerned and witnesses they desire to gall.

Order accordingly

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