

IN THE HIGH COURT OF ZAMBIA
HOLDEN AT NDOLA

2010/HN/103

(Civil Jurisdiction)

BETWEEN:

DANIEL NYIRENDA
PLAINTIFF

AND:

THE UNIVERSITY OF ZAMBIA COUNCIL
DEFENDANT

CORAM: SIAVWAPA J.

FOR THE PLAINTIFF: IN PERSON

FOR THE DEFENDANT: L. M. NGOMA (Mrs.) LEGAL COUNSEL

J U D G M E N T

AUTHORITIES REFERRED TO:

A. CASES

1. Christopher L. Mundia V Attorney General (1986)
ZR 40

2. In Re Pergamon Press Limited (1971) Ch. 388

B. LEGISLATION

The University Act No. 11 of 1999

By writ of summons and statement of claim dated 22nd March 2010, the Plaintiff's claim is for the following;

- i) A declaration that the decisions of the Defendant communicated to the Plaintiff dated 23rd February 2007 and 6th July 2009 are null and void
- ii) An order to compel the Defendant to release the Plaintiff's second semester results and award the degree
- iii) Damages for economic loss of use of degree
- iv) Damages for loss of carrier prospects and economic anguish
- v) Costs and interest incidental to this action
- vi) Any other remedy the court may deem just.

The Plaintiff's evidence was that in 2006, he attended a counselling session at which he was advised of the hearing date for the offence of '**obtaining money by false pretences**' preferred against him. On 5th February 2007, he was issued with an examination slip authorizing him to write his final semester examinations which he did. When he went to check for the results the following month, he was advised by the school that the Dean of Students had written a memo to the effect that he had been expelled and should be barred from writing the examinations or if already written, the results should be nullified. The Dean further informed him that she could not bar him from writing the examinations because the memo reached her late.

On making further inquiries with the Dean of students' office and the minutes, he discovered that the reason the Board recommended his expulsion was that he had failed to attend the hearing despite there being no testimony by anyone that he had committed the alleged offence. He then appealed to the Vice

Chancellor who upheld the expulsion. On further appeal to the University Council, the same was upheld.

He further said that upon threatening legal action, the University Council decided to review the matter in June 2008 and resolved to send it back to the Senate. The Senate heard the matter in July 2009 and resolved that legal opinion be sought. He went on to state that the Senate's power to nullify results was restricted to instances of fraudulently obtained results. On checking the minutes of the Senate and the letter dated 27th July 2009, he found no evidence that legal opinion had been sought as resolved by the meeting.

The Plaintiff went on to attack the Senate for deciding to nullify his results on the basis of the letter from the Dean of Students without carrying out its own inquiry into the allegations. He contended that the letter from the Dean of Students was illegal for purporting to issue instructions to nullify the results as the said power resided in the Senate on account of fraud.

He contended that he was expelled after he had completed writing his examinations and as such, the expulsion could not act in retrospect to affect the examination results.

As for the 2005 rules made pursuant to the University Act No. 11 of 1999, he contended that the same were null and void for lack of the Minister's approval as per the requirement of section 49 of the Act.

In cross-examination he said that he could have used the results that were withheld to apply for a job although he had not provided any proof that he had been denied a job as a result of the three withheld results. He maintained that he wrote his last examination before his expulsion although he could not recall the date of his last examination. He however, admitted that he had written three examinations prior to 23rd February 2007 the date of the letter from the Dean of Students addressed to him and exhibited at page 12 of the Defendant's bundle of documents.

He said that the Senate did not adequately consider the nullification of his results because he had not been given an opportunity to be heard. He however, conceded that on expulsion one ceases to be a student and examinations written after the expulsion cannot be validated by the Senate. He said he was not aware of the hearing before the Students' Board as he was busy with examinations but could not remember whether or not he was writing an examination on 20th February 2007.

He maintained that due process was not followed because the regulations were null and void and that nobody gave evidence that he had committed fraud as the case was not heard. He contended that his expulsion letter was back dated as he was not barred from writing the examinations.

In its defence, the Defendant called the Registrar of the University of Zambia, Dr. Alvert N. Ng'andu, who also serves as secretary to both the Senate and the University Council.

His evidence was that he became aware of the Plaintiff's circumstances through correspondence he received from the Dean of Students relating to the charge and later the decision to have the Plaintiff expelled from the University. He stated that up to that point he had not played any role in the matter as the student disciplinary process was a preserve of the office of the Dean of Students. He said that once the decision to expel the Plaintiff was made, it was the duty of the deputy registrar, for academic affairs, who reports to him, to ensure that any examinations not taken by the Plaintiff were not taken.

Once the Plaintiff appealed to the University Council, then, his role was to ensure that the appeal was processed and presented to the executive committee of the Council which, he did accordingly and the appeal was heard. He said to his recollection, the matter before the Council was the Plaintiff's expulsion but that his office later received communication from the Plaintiff's advocates at the time, appealing for the release of the Plaintiff's results. He stated that legal advice was sought and the same was given to the effect that the results of any examination taken by the Plaintiff before 23rd February 2007 should be released to him and the three results were accordingly released to the Plaintiff.

According to Dr. Ng'andu, any examinations taken after 23rd February 2007 were taken inappropriately as the Plaintiff was no longer a bona fide student. Further, he said that the decision was taken administratively after proper legal advice and that the only issue for consideration before the Senate was whether or not the

Plaintiff's results should be upheld. He opined therefore, that the Senate could not consider the Plaintiff's expulsion as the same was not before it.

Thereafter, Dr. Ng'andu went to great lengths to explain the process relating to the administration of examinations up to the time they are published leading to the issuance of the transcript of results to the eligible students. He said that it was at the time that the Senate committee was considering the results that the information relating to the Plaintiff's expulsion was received and the results were accordingly nullified. He explained that the University Act provided for appeals against the decisions of the Senate to lie to the University Council but that the Plaintiff did not appeal the Senate's decision to nullify his results to the Council.

As regards the Plaintiff's results, Dr. Ng'andu said that the three results for the semester which were released to the Plaintiff, in relation to the programme he was pursuing, were not sufficient for the award of the degree. He further said that from the records, he was satisfied that due process was followed and that the decisions made against the Plaintiff were valid. Further, he submitted that since the degree was not awarded, the Plaintiff could not have used it and as such he could not have suffered any damage from a document which had never been awarded to him.

In cross-examination he said that his understanding was that the date of a document or letter was the effective date unless a specific date other than the date of the document was stated. He

said that the Dean of the Plaintiff's school and the Academic Office were to ensure that the Plaintiff was barred from writing examinations. He however, could not say whether or not his office had failed to implement the instructions and neither could he say why the other offices also failed in that regard but he presumed that it could have been that the letter was received late.

As regards the non hearing of the Plaintiff by the Senate when considering the nullification of the Plaintiff's results, Dr. Ng'andu said that it was the practice in Universities worldwide not to hear students on matters relating to results and specifically that the University of Zambia did not entertain re-marking once the Senate had decided the results.

In re-examination he said that the expulsion was effective from 23rd February 2007 and any academic activity the plaintiff engaged in beyond that date was invalid.

At the close of the case, both parties indicated their desire to file written submissions and I am grateful for their timely filing of their submissions.

The gist of the Plaintiff's submissions is that his expulsion from the University was communicated to him after he had completed writing his examinations and that the University had no disciplinary procedure as the Minister had not promulgated any regulations under Act No 11 of 1999. It was his further submission that the Senate acted unlawfully as its power to deprive a student of an award of a degree was restricted to cases of fraud but that

no act of fraud was established against him. He further submitted that the senate acted in contravention of section 23(3) of the Act when it failed to carry out an independent inquiry into the allegations against him and that it was therefore, in breach of the rules of natural justice,

On the other hand, Mrs. Ngoma submitted, on behalf of the Defendant, to the effect that the Student Board was empowered to proceed in the absence of the Plaintiff pursuant to regulation 27(27) of the General Rules and Regulations of 2005 since he had adequate notice of the hearing but refused to accept the invitation to the hearing. She submitted that the Defendant had fulfilled the audi alterum partem rule of the rules of natural justice. She referred to **Re Pergamon Press limited** and the case of **Christopher Mundia V Attorney General** for that position.

As for the Senate's power to nullify examination results, she submitted that the nullification was based on the Plaintiff's expulsion which had extinguished his status of student and not for misconduct.

I would start by stating that for everything that has been laid before me in evidence, the Plaintiff must prove on a balance of probability that either his expulsion was unlawful and or, that it was effected after he had completed writing all his semester examinations in order to succeed. If the Plaintiff was properly expelled before writing the two courses whose results were nullified by the Senate, then he cannot succeed in his quest to

have the two results re-instated and released to him. It also means that all the subsequent reliefs sought cannot be granted. If on the other hand the expulsion was lawful but effective only after he had written all his semester examinations, then he must succeed in substantially all his claims relating to the nullification of the results whether or not the Defendant was in breach of the rules of natural justice.

Section 37(1) of Act No. 11 of 1999 provides as follows;

“The Deans, Directors, the Librarian and Dean of Students shall exercise disciplinary control over students in public universities in schools, institutions, bureau, departments, the library and similar bodies and halls of residence respectively.”

Pursuant to the above provision, the office of the Dean of Students issued the General Rules and Regulations as revised in November 2005 whose preamble states as follows;

“The Rules and Regulations are intended for all students registered in the University of Zambia, whether full time or part time. All students charged with an offence under these Rules and Regulations shall appear before the Student Board of Discipline for a hearing. In conformity with the provisions of the University Act, the Dean of Students shall exercise disciplinary control over all students registered into the University.”

The Act vests exclusive disciplinary control over students in the Deans and others but in particular, the Dean of Students. The Rules and Regulations referred to above create offences establish a Student Board of Discipline and provide penalties. Pursuant to the provisions of the Act, the Dean of Students, by memo dated 27th October, 2006, charged the Plaintiff for breach of Regulation 22 and by copy of the said memo, the Student Board of Discipline was requested to hear the Plaintiff's case.

I note from his evidence, as already stated earlier in this judgment, that the Plaintiff does not plead ignorance of the hearing date of the allegations against him before the Student Board of Discipline which was communicated to him at the counselling session he attended. The only excuse he advances for his failure to attend the hearing is that he was busy with the examinations but failed to state whether he was writing an examination on the date and time the hearing was set.

His failure to attend the hearing was therefore, deliberate bringing his conduct within the scope of Regulation 27 which makes it an offence for a student to fail to attend before the Student Board of Discipline. I accordingly find no fault on the part of the Board when it decided to proceed to determine the Plaintiff's case in absentia as provided under Regulation 27 (penalties). I am further satisfied that the rules of natural justice were fully complied with at this stage of the proceedings as the Plaintiff was given an opportunity to be heard which he spurned.

The Plaintiff though advances an argument that according to the minutes of the Student Board of Discipline, nobody led evidence against him as alleged and as such there was no basis upon which the Board found him guilty of contravening Regulation 22. After considering the minutes referred to, I form the view that they are but a summary of the proceedings of the meeting rather than a full account of the deliberations thereof. That notwithstanding, I am unable to agree with the Plaintiff's argument because, I believe that the Board had received information regarding the

allegations against him upon which, taking all circumstances into consideration, it was able to make the decision that it did. It is not always a strict requirement that administrative bodies should call witnesses to testify against an accused person. It might be that they already have prima facie evidence against the accused and the hearing is merely intended to give the accused an opportunity to state his side of the story to enable them to weigh it against the information already in their possession and make a decision.

In such a case, I do not think there is anything that precludes the disciplinary body or authority, from determining the matter if the accused decides not to avail it with his own story. In this case, the Student Board of Discipline considered the Plaintiff's case on the basis of the information it had and came to the conclusion that the Plaintiff had committed the offence as alleged and in addition, the offence under regulation 27 under penalties, for which they needed no witness. I would accordingly dismiss that argument as well.

The next question for my consideration is whether or not the Regulations under which the Plaintiff was charged are null and void for want of the Minister's approval. The Plaintiff has forcefully argued that pursuant to section 49 of the Act, only the Minister is empowered to make Regulations and that to his knowledge, the Minister has never made any Regulations pursuant to that provision. He submitted therefore, that any disciplinary action undertaken under any procedures not made by the Minister is null

and void. For ease of reference, section 49 is reproduced hereunder.

“The Minister may, by statutory instrument, prescribe anything which may be prescribed under this Act and in respect of which no other prescribing authority is specified, and may in like manner make regulations for the better carrying out of the provisions of this Act.”

Upon its proper construction, I do not find anything in the said provision that prohibits the making of Rules and Regulations by relevant authorities for application to their specific areas of responsibility. What the provision does however, is to grant the Minister power to prescribe by statutory instrument anything under the Act which is not assigned to any other authority by the Act and to make regulations accordingly. I do not think it was the intention of the Legislature to vest in the Minister, powers to make rules and regulations governing the internal discipline of the students which are better left to the authority responsible for the students' welfare in this case, the Dean of Students. It makes better legislative sense, in my view, that the powers vested in the Minister by the said provision, would be those that would be of general application to universities, both public and private, while the rest would be for the specific Universities to deal with.

I therefore, have no difficulty in finding that the Rules and Regulations promulgated by the Dean of Students as revised in November 2005 are effective and that the Plaintiff was properly charged under the said Rules and Regulations.

I now revert to the process by which the Plaintiff was dismissed as outlined in the evidence. I note that following the recommendation by the Student Board of Discipline that the Plaintiff be expelled from the University, the Dean of Students notified the Plaintiff accordingly in writing and by the same minute advised him of his right of appeal to the Vice Chancellor in line with the proviso to section 37(1) of the Act. He accordingly exercised the right of appeal to the Vice chancellor who dismissed the appeal. The Plaintiff further exercised his right of appeal under sub section (3) to the University Council which, through its executive committee, upheld the expulsion thereby exhausting the administrative channel in relation to the expulsion. The only recourse that the Plaintiff had at this stage was legal action.

There however, was the issue of the nullification of the Plaintiff's results which was corollary to his expulsion which the Council referred back to the Senate's Examinations Committee for determination. At its 42nd meeting held on 3rd July 2009, the Senate considered the issue and according to paragraph 12.1 of the minutes as recorded at page 6, the matter put before the Senate by way of appeal for its consideration, was whether or not the Plaintiff's results should stand. This is in line with the Council's directive that the issue of the nullification of the Plaintiff's results be resubmitted to the Senate for determination. Since the ladder of appeals had been exhausted with regard to the expulsion, the same could not have been before the Senate at this stage. The

Senate upheld the nullification pending legal opinion being sought by the Registrar.

According to Dr. Ng'andu, he accordingly sought and obtained legal opinion to the effect that the Defendant should release the results of the examinations which the Plaintiff wrote before the date of expulsion. He accordingly released three of Plaintiff's results for the examinations he wrote prior to his expulsion.

So having found that the Plaintiff's expulsion was in accordance with the law, it follows that he ceased to be a bona fide student of the University of Zambia effective the date of his expulsion. The Defendant is accordingly on firm ground to argue that anything done by the Plaintiff in connection with student status after the expulsion lacked legitimacy as all the privileges, rights and entitlements accruing to a student of the University of Zambia came to an end. Subsequently, any examinations that he wrote after his expulsion are null and void.

The only argument remaining is whether the effective date of the expulsion is the date of notification thereof or the date the decision was made as reflected in the letter communicating the decision. Although the Plaintiff has cited the two letters namely, the one communicating his expulsion dated 23rd February 2007 and the one communicating the nullification of the results dated 27th July 2009 as being null and void, it is only the former that I will consider.

I note that the letter of expulsion is addressed to the Plaintiff and dated 23rd February 2007. Unfortunately, neither side could state when the Plaintiff wrote his last examination. Secondly, the fact that the Plaintiff was able to write all his examinations, even in the face of the request to the Dean of the Plaintiff's school and the Academic Office to bar the Plaintiff from writing the examinations, tips the balance in favour of the Plaintiff that the letter was only received by the Dean and the Academic Office after the Plaintiff had completed writing his examinations.

In her memo to the Registrar, forwarding the Plaintiff's result transcript, the Dean of the School of Agricultural Sciences, states that; "**He wrote all the five courses but were nullified because he was expelled before processing the exams.**" This statement would be understood to mean that the Plaintiff had written all the five courses but he got expelled before the process leading to the publication of the results was completed. If this were the case, then the Plaintiff's results would not be affected by the expulsion as he would have written all the examinations while enjoying the status of student. This might also explain why the Dean could do nothing about the expulsion letter as it would have come too late.

But assuming that it was just the delivery of the letter to the Dean that delayed, surely, one would reasonably expect that the Academic Office would have picked up its copy and enforced the request made to bar the Plaintiff from writing the examinations. When asked, why neither office could enforce the request, Dr. Ng'andu could only assume that the letter may have got to the

Dean's office late. As for the Academic Office, whose Deputy Registrar reports to his office, he could offer no explanation.

The closest indicator of how the Plaintiff wrote his examinations is the memo from the Assistant Dean (UG) in the Scholl of Agricultural Sciences addressed to the Acting Deputy Registrar Academic Affairs. This memo lists the three courses whose results were subsequently released to the Plaintiff indicating the dates on which the same were written. I have looked at the intervals between the dates of the courses and deduce that a minimum of two clear days was allowed between the courses. That would mean that having written a course on 21st February 2007, it is unlikely that he would have written the last two courses the following day on 22nd February 2007, to beat the date of expulsion, 23rd February 2007.

I would therefore, conclude that the Plaintiff wrote the last two courses on or after the date of expulsion. The fact that the same was not immediately communicated to him or no action was taken to prevent him from writing the two courses by those who should have done so does not affect the fact that he was effectively expelled on 23rd February 2007.

From my findings above, it follows that the other remedies sought by the Plaintiff relating to the withholding of his two results are unsustainable. Save for the three results which were released later, it is my finding that the Plaintiff has failed to show that any

damage was occasioned to him before they were released. The onus was always on him to show that he had suffered damage.

On the whole, the whole of this action must fail and I accordingly dismiss it. I order that each party shall bear their own costs for the action.

DATED THE 6TH DAY OF APRIL 2011

J.M. SIAVWAPA
JUDGE