THE HIGH COURT OF SWAZILAND

SIIMA LEONA MUSHALA

1st Applicant

PATIENCE BONISIWE VILANE

2nd Applicant

And

THE VICE CHANCELLOR OF THE UNIVERSITY OF SWAZILAND

Respondent

Civil Case No. 2121/2003

Coram	S.B. MAPHALALA - J
For the Applicant	MR. P. SHILUBANE
For the Respondent	MR. MAGAGULA

JUDGEMENT

(15/10/2003)

Serving before the court is an application brought under a certificate of urgency for an order as follows:

1. Waiving the time limits and the forms of service prescribed by the rules of court and hearing this matter urgently.

2. A rule nisi be and is hereby granted calling upon the Respondent to show cause on a date to be determined by the above Honourable Court why:

2.1. the decision by the Senate of the University of Swaziland dated 19th June 2003 in terms of which the Applicants failed and were discontinued from pursuing a Master Degree in Environmental Sciences at the University of Swaziland should not be reviewed, set aside and/or corrected.

3. That the order in paragraph 2.1 above operates with immediate effect as an interim order pending the return date.

4. Calling upon the Respondent to dispatch within 14 days of receipt of this notice of motion, the record such proceedings sought to be corrected, reviewed and/or set aside with reasons as she by law if required to make and to notify Applicants that he has done so.

5. Costs of the application.

6. Alternative relief.

The founding affidavit of both Applicants is filed thereto.

The affidavit reveals that both Applicants were students at the University of Swaziland having enrolled during October 2002, for a Master's Degree in Environmental Science. The Respondent is the Vice Chancellor of the University of Swaziland who is sued herein in her capacity as Chairperson of the Senate of University of Swaziland, (Kwaluseni, Swaziland)

During October 2002 both Applicants enrolled for a Master's Degree in Environmental Science with the University of Swaziland. On the 19th June 2003, they received their results which were approved by the Senate of the University at a meeting held on the 18th June 2003, with the result "fail and discontinue".

They immediately filed an appeal against the results in a letter directed to the Registrar dated the 3rd July 2003, (annexure "SCM3").

The letter reads in extenso as follows:

Box 5323 Manzini

3 July 2003 The Registrar

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University of Swaziland Kwaluseni

Dear Sir/Madam

RE: APPEAL AGAINST THE FAIL AND DISCONTINUE VERDICT

We, the undersigned (Patience Vilane and Siima Mushala) are students in the MSc (Environmental Resource Management) Programme. We hereby forward our appeal against the Senate verdict of fail and discontinue as recently communicated to us. Although the basis for such a verdict is not clear to us, we suspect that it has to do with the course ERM 604 Environmental Law for which we obtained an E grade. The basis of our appeal is on the ground that:

1. The University failed to fulfil its obligation in terms of offering the Course ERM 604 Environment Law. This is a first semester course supposed to be offered for 14 weeks covering 3 lecture hours and two weekly 3-hour practicals. This was not the case because the course was squeezed in the second semester causing congestion and increased pressure on the students load. The course itself was compact (it was done in four weeks) and at the same time students were not given adequate time for consultations because the professor was not readily available as she was coming from Pretoria. This proved difficult, as we had no previous background information on this course, as it is not science based.

2. There is no regulation in either the 2002/2003 University Calendar or the Faulty of Science Handbook, which stipulates that a student can be discontinued from the Programmed. Since the said documents fail to explicitly detail what would be the aftermath of failing a course, it is felt that the decision thus arrived at is not only grossly unfair but also falls outside the scope of the regulations governing the course. We wonder how the verdict of fail and discontinue was reached when it is not indicated in the University Calendar.

3. The examination timetable was very congested and this brought to our attention on the final draft. A request for a re-scheduling was turned down. This proved to be very difficult for Masters Students to prepare adequately for the examinations having to write every single day of the first week of the examinations, especially because lecturers had to continue during the study break due to the congestion caused by ERM 604 (Environment Law).

Consideration should be given to the fact that students are not to blame entirely but also the many inadequacies in the course delivery. The fact that the programme started late and the curriculum was not

fully covered affected the performance of the students, therefore the verdict (fail and discontinue) puts blame on students only without due consideration of extenuating circumstances under which the course was offered.

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The students therefore feel that they should be given a chance to repeat the course under normal circumstances - full instructions by full time professor, as it has affected not only performance but also overall future with entire year wasted unjustly.

Yours Sincerely

(Signed) P. Vilane

(Signed) S. Mushala

There was no response to their appeal and on the 10th August 2003, they sent a reminder to the Respondent through the Registrar of the University. The letter is attached to the founding papers as annexure "SLM4".

The Respondent through the office of the Registrar on the 13th August 2003, directed letters to the Applicants individually as follows:

"Dear Ms.....

We received your letters dated the 3rd July and 10th August, respectively.

Your appeal against your results was presented to a Senate meeting held on 9th July 2003.

The Senate took into consideration the fact that there are no supplementary examination in the faculty of post graduate studies. Invoking regulation 010.01, the Senate has over the years, and even in your case, interpreted the absence of supplementary examination to mean there cannot be repeating students in the faculty of post graduate studies.

Your appeal was therefore dismissed.

Yours sincerely,

(Signed)

S.S. Vilakati Registrar.

The letters are filed as annexures "CM1" and "CM2" for 1st Applicant and 2nd Applicant, respectively.

Presently the Applicants are requesting the court to review the Senate's decision on the ground that in deciding that they have failed and should be discontinued the Senate failed to apply its mind to the matter and failed to apply the examination

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regulations of the University applicable to Master's Degrees which do not provide that a student who fails his first year of study should be discontinued.

In the result they submit that the Senate committed a gross irregularity in this regard.
In opposition the Respondent has filed an answering affidavit of the Vice Chancellor Mr. Cisko Magagula. The application is opposed on a number of grounds.

The Applicant's arguments.

The Applicants are challenging the initial decision to fail and discontinue applicants and the failure by the Senate to give them a hearing at the appeal stage, when they had a legitimate expectation to be heard. Firstly, the initial decision to fail and discontinue Applicants are not supported by any reason (i.e. no reasons are referred to in the minutes of Senate). It has been held that if there is prima facie evidence of an illegality, the absence of reasons was likely to add considerate weight to the Applicants' case. The court was referred to the case of Pretoria North Town Council vs V.A. Electric Ice Cream 1953 (3) S.A. 1 (A).

The second leg of the Applicants' case is that the Applicants had a contractual relationship with the University which and that it failed to carry out its contractual obligations with them as detailed in their letter of appeal annexed to their founding affidavit dated 3rd July 2003. In casu it is argued, the Respondent had failed to act fairly and reasonably. To buttress this point the court was referred to the case of Zwelibanzi vs University of Transkei 1995 (1) S.A. 407. Failure to do so, entitles this court to set aside the decision to fail and discontinue the Applicants as was the case of Zwelibanzi's case where the decision to fail applicant was set aside because the University had lost one of the Applicant's tests papers and the court applied the audi alteram partem rule to set aside the University's decision to fail the Applicant.

The other leg advanced by the Applicants' case is that the University applied irrelevant regulations. In any event, the Respondent admits in its answering affidavits that there is no specific applicable regulation in this matter.

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In the result, the University acted arbitrarily and capriciously in deciding to fail the Applicants and discontinue them for continuing with their studies. The court's attention was drawn to the case of North West Townships Limited vs The Administrator of the Transvaal 1976 (4) S.A. (T) at 10 A.
The Respondent's submissions.

The gravamen of the Respondent's case is that for the Applicant to have a cause of action in the present case, for the relief sought, must show that there was a clear right, which has been violated. In support of this proposition Mr. Magagula for the Respondent cited the case of Sipho Mngadi vs Principal Secretary, Ministry of Public Service and Information and others Civil Case No. 16/2001 at page 5 (unreported).

Alternatively, it is argued that there was a legitimate expectation arising from a violation of the rule and/or from practice commonly accepted at the University with regards to post graduate studies, that in the event the students fails, he is allowed to repeat. On the question of a commonly accepted practice creating a legitimate expectation the court was referred to the dictum in the judgment of Sapire CJ (as he then was) in Zwelakhe Nkambule vs Sthembiso Dlamini and others Civil Case No. 202/2000 (unreported).

Mr. Magagula contended that whether the Applicants have a legitimateexpectation depends on whether there was a right or interest which has been unduly violated by the Respondent. He cited the celebrated South African case of Administrator Transvaal and others vs Traub and others 1989 (4) S.A. 731 (A) at 748.

It is further argued that the Respondent is in terms of Section 17 (1) of the University Act No. 2 of 1983, the academic authority of the University, empowered to control and direct the teaching, research, examinations and the award of degrees and diplomas. In its capacity as such, the Senate is in terms of statute 20 of the University statutes, entitled to make regulations regarding, inter alia, examinations and the award of degrees.

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The Senate has enacted various regulations governing both graduate and under graduate degrees. The

preamble to the general academic regulations vest in Senate the power to alter, replace and cancel any of the academic regulations and state that it is the final authority for interpretation of these regulations.

In casu, it is common cause that there is no specific regulation providing for a student to repeat once he has failed the course nor is there one providing for discontinuance of students if they fail the Master's programmes. It is further commonly accepted practice that all students who fails a Master's programme are not allowed to repeat but are discontinued. It is argued therefore that in the absence of a regulation providing for students to repeat once they fail, it is inconceivable how the Applicants would have had a legitimate expectation. The Applicants were given a fair hearing prior to their appeal being considered. The written letters of appeal and the subsequent hearing were sufficient to enable the Respondent to decide the matter. To this end the court was referred to the case of Sandile Khoza and others vs The Vice Chancellor, University of Swaziland and another Civil Case No. 1454/1992 (unreported).

Finally it was contended for the Respondent that the decision to discontinue the Applicants is a matter that is linked to policy considerations like the maintenance of standards as well as the quality of degrees awarded for the post graduate programmes. It is not a matter in which a court can substitute its decision for that of the administrative tribunal. This involves a balance between protecting an individual from decisions unfairly arrived at and avoiding undue judicial interference in the administration of affairs by public authorities. Whether a student is allowed to repeat or not is a matter of policy and regulations as promulgated by the appropriate authority, being the Senate.

The court's analysis and conclusions thereon.

It is not in dispute that the Applicants failed a course. The Applicants are disputing the Senate decision to discontinue them from the programme.

In order to succeed in the application for review, the Applicants must have common grounds for review.

Herbstein et al, The Civil Practice of the Supreme Court of South Africa (4th ED) at page 929 lists the following grounds for review:

a) Absence of jurisdiction on the part of the court.

b) Interest in the cause, bias, malice or corruption on the part of the presiding officer.

c) Gross irregularity in the proceedings; and

d) The admission of inadmissible or incompetent evidence, or the rejection of admissible or competent evidence.

In the present case the Applicants have alleged that the Respondents did not apply their mind and/or that there was a gross irregularity in the manner the Respondent acted.

The Applicants to have a cause of action in the present case, for the relief sought, must show that there was a clear right, which has been violated (see Sipho Mngad's case supra). Alternatively that there was a legitimate expectation arising from a violation of the rule and/or from practice commonly accepted at the University with regards to post graduate studies, that in the event the student fail, he is allowed to repeat.

In the present case, it is not clear whether the Applicants are alleging that they have a legitimate expectation that the decision by the public authority will be favourable or whether they are relying on the second leg of the principle that, at least before an adverse decision is taken, the Applicants will be given a fair hearing.

Corbett CJ in the Traub case supra at page 758 (D in fin E) puts it this way, and I quote:

"The legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such a person without prior consultation or prior hearing, and at other

times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken. As Prof Riggs puts it in the article of which I have referred at 404:

"The doctrine of legitimate expectation is construed broadly to protect both substantive and procedural expectation. In practice the two forms of expectation may be interrelated and even tend to merge. Thus, the person concern may have a legitimate expectation that the decision by the public authority will be favourable, or at least that before an adverse decision it taken he will be given a fair hearing".

In casu it is common cause that there is no specific regulation providing for a student to repeat once he has failed the course nor is there one providing for discontinuance of students if they fail the Master's programme. It is a commonly accepted practice that all students who fail a Master's programme are not allowed to repeat but are discontinued. In the absence of a regulation providing for students to repeat once they fail, it is inconceivable how the Applicants would have had a legitimate expectation. The Applicants bear the onus to prove that the Senate's decision was in contravention of the regulations. In the present case, in my mind, all the Applicants have done is to try and prove that in the negative by alleging that the University did not have the power to fail and discontinue them. Yet the important question is whether the University breached any provisions of the academic regulations by failing and discontinuing them from the programme. Therefore the Applicants cannot claim to have had legitimate expectation to be allowed to repeat in the absence of a regulation stating students in post graduate studies are entitled to repeat courses they failed.

In this regard I agree with the submissions made by Mr. Magagula though not expressly stated, that a student may not repeat a course. The fact that there is no provision for a supplementary exams implies that a student cannot be permitted to continue with the programme if he fails the course. This is more so if one has regard to the policy factors of maintaining standards and quality.

According to Section 17 (1) of the University Act No. 2 of 1983, the academic authority of the University is vested on Senate to control and direct the teaching, research examination and the award of degrees and diplomas. In its capacity as such, the Senate is in terms of statute 20 of the University, entitled to make regulations

regarding inter alia, examinations and the award of degrees. The Senate in its capacity as the academic authority of the University is responsible for enacting regulations for eligibility of person for admission to course, their continuance in such courses and for the standard of proficiency to be attained in each examination for a degree of the University.

The Senate enacts academic regulations on the recommendation of the relevant department and in so doing considers various policy factors such as the quality of the degrees to be awarded as well. The Senate sets standards that have to be attained prior to a person being awarded a degree, including whether students are permitted to repeat or are discontinued if they fail a course.

It would appear to me that Mr. Magagula is correct that the Senate's power to interpret regulations is exercised against the background of policy factors having regard to express and implied provisions of the regulations. It appears that under graduate diploma and certificate programs presented no difficulties for the reason that the regulations are clear that in the event a student fails, he is allowed to supplement a course and if he fails a supplementary examination he repeats the year and is discontinued after failing

twice.

However, it appears that different considerations apply to post graduate studies. In a bid to maintain standards and quality of degrees awarded, the University does not permit supplementary examination and it would be inconceivable that it would allow students to repeat. This practice seems to be applied in other Universities as well depending on the particular programme. In this regard what is said by Euphrasia Kunene the Dean of the Faculty of Post Graduate studies at the University in her supporting affidavit appears to be the position, she deposed as follows:

"3. As Dean of Post Graduate studies, I am the Chairperson of the Faculty Board, which is responsible inter alia, for making recommendations to Senate regarding academic regulations as well as standards of proficiency to be attained by students for eligibility to be awarded a master's degree.

4. The Faculty Board has contributed to the formulation of regulations and policies governing post-graduate studies. Since the master's programmes was introduced, it was envisaged that only student who have a "C" grade in the relevant course would be admitted to the master's programme to ensure that they would handle the academic work well without supplementation or repetition as well as maintain the standards and quality of the degree.

5. In order to maintain standards and quality, the faculty recommended promulgation of Regulation 050.85 which provides that a candidate to be deemed to have been successful in a master's programme, he should have passed separately or all required elements of course work and thesis. In addition to Regulation 050.85, the Regulation 552.41 provides that there shall be no supplementary examination, which impliedly means that any students who fails a course cannot repeat."

In my considered view, having regard to the facts of this matter the Senate applied its mind properly to the Applicants' case and there was nothing irregular about the decision to fail and discontinue the Applicants. The Senate was entitled to decide the matter in the manner it did to maintain standards and the quality of degrees awarded. The fact that no student is allowed to supplement courses implies that any student who fails a course is not permitted to continue with the programme. Regulation 552.41 provides that there shall be supplementary examinations, except as provided for by the thesis.

It will appear to me further, following what was held in the case of Sandile Khoza and others vs The Vice Chancellor, University of Swaziland and another Civil Case No. 1454 of 1992 (per Dunn J) that the Applicants were given a fair hearing prior to their appeal being considered. The written letters of appeal and the subsequent hearing were, in my view, sufficient to enable the Respondent to decide the matter. In the Sandile Khoza case supra Dunn J (as he then was) said: and I quote:

"It is, I think, not desirable that rigid criteria be laid down of what should be considered in a situation where a decision has to be taken on conflicting written reports. It is preferable that each case be decided on its own particular facts and circumstances. There may be cases in

which a party makes admissions in his written report with full knowledge of the complaint against him. A decision might in such circumstances, be made without a formal hearing ensuring the right to cross-examination to decide the truth of the matter.

There may be cases where a complaint is borne out by clear and independent written reports which a party has been made aware of and cannot adequately report to. Here again a decision adverse to such party may be taken without the need for appearance of the parties concerned. On the other hand there will be cases in which the allegations and counter allegations, cry out for a more detailed enquiry in the presence of the parties to establish their truth ...".

It would appear to me, that the first challenge by the Applicants in that the initial decision to fail and discontinue Applicants is not supported by any reasons is without merit in that the Senate at that stage was considering results of many other students besides the Applicants and thus there was no need for reasons. In fact ex facie the minutes no reasons are given for the other students mentioned in the said minutes.

Lastly, I am unable to find that in casu there was any contractual relationship between the parties, I agree in toto with Mr. Magagula in this regard that on the facts before me that the dicta in Zwelibanzi case supra cannot apply. The facts of the two cases are clearly distinguishable from each other.

In the Zwelibanzi case, the Applicant, a third year Economic Sciences student at the Respondent University, had failed her Economic 111 examination. It appeared that she had obtained a year mark of 39% for that subject and her examination mark of 56% was insufficient, when taken with her year mark, to give a pass mark of 49%. Her final mark was 48%. It appeared further, however, that the University had lost or mislaid one of her test papers during the relevant year (an allegation which had not been shown to be false) with the result that she had been awarded a mark of 0% for the test. Her year mark had been detrimentally affected by such zero mark in that test. The Applicant thereupon requested relief in terms of Regulation C2.4 of the faculty regulations which provided that "third - year students who have obtained a mark of 47 - 48% may be given a re-evaluation or oral as soon after results are know as possible". This request was refused.

In the present case the student's work was not missing or misplaced by the University but was found by the University to have been sub-standard thus the verdict "fail and discontinued".
In the result, the application is dismissed with costs.

S.B. MAPHALALA

JUDGE