

IN THE HIGH COURT OF SWAZILAND

CASE NO.2238/04

TIVAMIKE BUDOLUBH NDUNA MAZIYA

APPLICANT

AND

THE SENATE OF THE UNIVERSITY OF SWAZILAND 1ST RESPONDENT
THE UNIVERSITY OF SWAZILAND 2ND RESPONDENT

CORAM
FOR APPLICANT
RESPONDENT

K.P. NKAMBULE -J
MR. A. LUKHELE
MR. M. MAGAGULA

ORDER ON REVIEW 21/10/04

The applicant in these proceedings seeks an order in the following terms:

1. Reviewing and setting aside the decision of the first respondent whereby it refused to reschedule and afford the applicant an opportunity to write the subject namely Legal Systems and Legal Methods (L101) during supplementary examinations.

2. Directing the second respondent to set an examination for the applicant of the subject, Legal Systems and Legal Methods, and afford him an opportunity to write such examination and for him to receive results for such subject before the University of Swaziland opens for the new academic year that starts on the 19th day of August, 2004.

3. Failing compliance with paragraph 2) above, directing and ordering the respondents to admit the applicant to his second year of study in the degree of Bachelor of Laws.

4. Costs of application.

The respondent is the University of Swaziland, an institution of higher learning established in terms of the University Act No. 2 of 1983 and Regulations promulgated thereunder. The applicant is a registered student enrolled for a Bachelor of Laws degree. He is a Christian and a devout member of the Seventh Day Adventist Church.

THE BACKGROUND OF THE MATTER:

The issue giving rise to this application is the failure of the applicant to sit for one of the papers of his programme that was written on Saturday the 1st of May, 2004. As the 1st of May 2004 fell on Saturday and according to the Seventh Day Adventist Church, Saturday is regarded as the Sabbath day and as such holy. For this reason no work of any nature is undertaken on Saturday which, according to the scripture, more particularly the Ten Commandments, is regarded as a day of prayer.

The applicant then made a request to the respondents to reschedule the examination that was set for the 1st day of May 2004. The respondent

refused to reschedule the examination. On the 1st of May 2004 the applicant was unable to write the paper scheduled for the 1st May, 2004.

The applicant passed all other subjects save for the paper he did not write on 1st May 2004. He then failed his first year and is now repeating the whole year of study.

It is therefore the respondent's refusal to reschedule the examination and to afford the applicant a chance to write the paper on another day other than a Saturday that is now being challenged.

Respondents contend that the application is now academic, as the orders can no longer be enforced since the academic year is now well under way. Further, that setting an examination for the applicant would take a considerable amount of time as the examination should be marked and further confirmed by an external examiner. They further state that as the academic year is well under way, the applicant cannot be reasonably expected to cover the ground already covered by other students.

Regarding prayer 3, that the applicant should proceed to the next year of study, respondent says such an order cannot possibly be enforced. This is because any student who proceeds to the following year must have passed. According to the respondent applicant failed the course Legal Systems and Legal Methods. In the premises it is incomprehensible that a student who failed his examination will be allowed to proceed to the following year.

The absence of a student from an examination is governed by Regulation 011.07 of the University calendar which provides as follows:

"011.07. ABSENCE FROM AN EXAMINATION

5. *If a candidate fails to attend for an examination for no good reason, special papers will not be set and the candidate will be deemed to have failed. Misreading of the timetable is no excuse.*

6. *In the case of absence from an examination through ill-health the candidate (or someone acting on his or her behalf) must submit a relevant medical certificate to the examinations officer within seven working days. In order to be counted as relevant a medical certificate must relate to the period of examination or the preceding weeks of the examination or both. Evidence of illness will not normally be taken into account unless substantiated by a valid medical certificate.*

11.09 In the case of absence from an examination due to serious causes (other than the candidate's own ill health), the candidate (or someone acting on her/his behalf) must submit to the examinations office:

7. *evidence of the cause, when possible, and*

8. *a written explanation of the absence within seven working days after the examination has taken place".*

From the above regulation the University is given a discretion to either grant the application (allowing student/applicant to write the examination on another day) or refuse. However, such discretion must be used judiciously. When one looks at this regulation it is clear that

though the regulation makes an example of 'ill health', the discretion is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be decided in the light of its own circumstances.

Turning to the present application and also taking into account the above mentioned regulation, the question to be asked is whether the University in refusing to give applicant a chance to write the said paper was reasonable under circumstances.

The University provides for a solution in the event any student does not write any paper. It states that good reason must accompany an application of this nature. If the student's failure to attend for an examination is not accompanied by a good reason, then special papers will not be set and the candidate will be deemed to have failed that particular subject.

In the instant case the applicant wrote to the respondent requesting to write the examination in another day. The reason he advanced was that the 1st day of May 2004 was a Saturday and as such he was unable to attend for an examination due to his religious belief. The respondent response to this application was not based on the relevant regulation. The respondent stated as follows:

"If it were possible, we would not be scheduling any examination on weekend at all. You will note that examinations are scheduled on Sundays as well. This is for the simple reason that space and time constraints do not allow us the luxury of avoiding scheduling examinations on weekends.

It is therefore unfortunate that you will have to choose between writing the examinations and complying with your Ten Commandments".

From this letter it is clear that the respondent did not put his mind to the applicant's request. If he did, then he looked at irrelevant and collateral issues and not at the provisions of Regulation 011.07 read with 011.09.

The applicant made a genuine request based on his religious belief. The applicant has a right to religious freedom and such right is enshrined in our common law and same should be recognised by the University. It is well and good for the University to set exams on Sundays and Saturdays if the institution finds itself in a position where time and space is of the essence. Such decision however, should be understood to be out of ordinary and should a reasonable request of this nature be made the University should be able to take it serious.

Given the circumstances of this case and in particular the manner the respondent dealt with the application, it is clear that they did not put their minds whether the reason for absence from the examination was a good one or not.

Let us now move to the nature of the relief sought. It is clear that the relief sought is not an appropriate remedy in this case. It was rightly pointed out by Mr. Magagula, respondent's representative that the application is now academic because the orders sought can no longer be enforced since the academic year is now under way, having commenced some time in August.

In the case of Farmers Co-operative Society Vs Berry 1912 AD 343 Innes AJ stated as follows on page 350:

"Prima facie every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, as far as possible, a performance of his undertaking in terms of the contract."

However it has become clear that the court's discretion to grant or refuse an order for specific performance must be exercised judicially, in the light of surrounding factors. This was remarked by Kotze CJ in **Thompson Vs Pullinger** 1894 (1) OR at page 301, as quoted by Innes JA in **Farmers Co-operative Society Vs Berry** (supra);

"The right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt. It is true that courts will exercise a discretion in determining whether or not decrees of specific performance will be made. They will not of course be issued where it is impossible for the defendant to comply with them and there are many cases in which justice between the parties can be fully and conveniently done by an award of damages".

The remedy of specific performance should always be granted or withheld in accordance with legal and public policy. This statement was made by Heifer JA in **Benson Vs S.A. Mutual Life Assurance Society** 1986 (1) SA 776 at 783 D-E.

Under circumstances and in particular the stage at which the academic year has advanced it is the opinion of this court that an order for specific

performance would create hardship for the respondent. An award of damages would be most appropriate under circumstances.

Applicant to file papers so that evidence may be led to prove damages.

Regarding costs; due to the highhandedness in the handling of this matter by the respondent, punitive costs at attorney/client scale are entered against respondents.

A handwritten signature in black ink, appearing to be 'K. S. L.', written in a cursive style.

JUDGE