IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 443/2016

In the matter between

MUZI MNISI	**Applicant**
and	
THE CHAIRPERSON, LIMKOKWING UNIVERSITY OF CREATIVE TECHNOLOGY DISCIPLINARY COMMITTEE	**1st Respondent**
LIMKOKWING UNIVERSITY OF CREATIVE TECHNOLOGY	**2nd Respondent**

Neutral citation:	*Muzi Mnisi v The Chairperson, Limkokwing University of Creative Technology Disciplinary Committee and Another* (443/2016) [2016] SZHC 61 (24 March 2016)
Coram:	**MAMBA J**
Heard:	**11 March, 2016**
Granted:	**24 March, 2016**

[1] Civil Law – Application for review of an administrative decision. Case for review and grounds thereof to be made out in the founding affidavit. Court has no authority or power to fashion or make out case for the applicant apart from that pleaded by him as that is the case the respondents are called upon to meet.

[2] Civil Law and Procedure – Applicant contending that Student Representative Council Constitution not binding because he is not aware that it was adopted. This is not enough proof that it was not adopted. Applicant has the burden to establish that the Constitution was never adopted.

[3] Civil Law – doctrine of estoppel. Where party has used a document for his own benefit or advantage and making others to believe that document is lawful and binding, he is estopped from asserting the contrary where action is taken against him.

[1] This is an application for Review. It was brought under a certificate of urgency. The applicant prays *inter alia* for the following orders:

> '3. Reviewing and setting aside the decision of the 1st respondent contained in a letter dated the 3rd March 2016.
>
> 4. Directing and compelling the 2nd Respondent to register the applicant as a student for the current semester.
>
> 5. Directing that the decision of the 1st respondent referred to in prayer 3 above be substituted by decision of the Honourable Court declaring that the 1st respondent has no legal authority to discipline the applicant in terms of the Student Representative Council Constitution.'

[2] The respondents are described in the founding affidavit as follows:

> '3.1 The 1st respondent is the Chairman, Limkokwing University of Creative Technology Disciplinary Committee cited in her capacity as such and in compliance with the provisions of section 53(1) of the above Honourable Court's Rules.

3.2 The 2nd respondent is Limkokwing University of Creative Technology a corporate body registered in accordance with laws of the Kingdom of Swaziland, having its head office and principal place of business at Sidwashini, Hhohho District, Swaziland cited herein for both convenience and as an interested party which appoints the 1st respondent.'

The applicant is a student and is enrolled at the 2nd respondent. He is a former president of the Student Representative Council at the 2nd respondent. He was suspended from such position by a decision of the 1st respondent dated 3rd March 2016. This decision followed or was consequent upon a disciplinary hearing against the applicant which was conducted on 18 and 19 February 2016. It is this hearing and decision that the applicant seeks to have reviewed and set aside.

[3] Apart from being suspended from his position aforesaid, the applicant was ordered to pay a sum 'of E3 125.00 … being part contribution towards the unaccounted for E25,000.00' student monies. He was also suspended from all activities of the second respondent, for one semester. (The letter communicating these sanctions to the applicant has been annexed herein as Annexure MM3 at page 23 of the Book of Pleadings).

[4] I set out below verbatim the charges that were levelled against the applicant;

‘**Annexure 1**

You are charged with the following:

Count 1

Contravention of Chapter 8 of the LUCT SRC Constitution being the Duties and Responsibilities of the office of the President particularly clauses

(i) 8.1.2

(ii) 8.1.6

(iii) 8.1.8

Count 2

Contravention of Chapter 3 being the objectives of the Council, particularly clauses

(i) 3.2

(ii) 3.10

Count 3

Contravention of Chapter 4 of the Constitution being Establishment of SRC, particularly clause 4.2

Count 4

Contravention of Chapter 5 Section 5.1 of the SRC Constitution being the functions of the Council, particularly clauses

(i) 5.1.2

(ii) 5.1.3

Count 5

Contravention of Chapters 5 Section 5.2 of the SRC Constitution being the Powers of the Council, particularly clauses

(i) 5.2.3

(ii) 5.2.4

(iii) 5.2.5

Count 6

Contravention of Chapter 12 of the SRC Constitution being Finances, particularly clauses

(i) 12.1

(ii) 12.6.1

Count 7

Contravention of Article B of the SRC Constitution of the SRC being Transition, particularly clauses

(i) 1.7.1

(ii) 1.7.2

Count 8

Contravention of Article c of the SRC Constitution being SRC Meetings and Mass Meetings, particularly clauses

(i) 1.1.1

(ii) 1.1.2

Count 9

Contravention of Article E of the SRC Constitution being the Code of Conduct of the Council particularly clauses

(i) 1.1

(ii) 1.2

(iii) 1.5

(iv) 1.7

(v) 1.10'

[5] I must observe from the outset that these charges are unacceptably too vague. They mean absolutely nothing to me. When the matter came before me on 9 March 2016, I pointed this out to both Counsel. I, however, emphasized to them that I was not prejudging the issues involved in this application. This was the case, I pointed out, because the respondent had not filed their opposing or answering affidavits. Again, when the matter came up for argument two days later, I sought Counsel's opinions thereon. Mr. Sibandze, Counsel for the respondents submitted that the vagueness or adequacy of the charges preferred against or faced by the applicant at the disciplinary hearing was not in issue. He submitted that this was not the case by the applicant, which the respondent had been called upon to meet in these review proceedings. He

pointed out that for the court to require the respondents to answer the charge of vagueness of the charges would be tantamount to the court creating or inventing a new case for the applicant and this is impermissible. I agree.

[6] In *University of Swaziland v Queeneth Ncobile Dlamini (75/2013) [2014] SZSC 36 [30 May 2014]* the Supreme Court stated as follows at para 15 to 17:

> '…In my opinion Counsel for the Appellant was right when he complained in the first ground of Appeal that:
>
> > "The learned Judge in the court a quo erred in finding that the respondent was entitled to relief on the basis of 'legitimate expectation' in circumstances where the court ought, instead, to have found that the respondent had not pleaded her case on the basis of an alleged legitimate expectation, and this was not the case that the appellant was called upon to meet."
>
> [16] … It is clear to me that the learned Judge misunderstood the appellant's complaint. The case of the appellant was that on the merits as pleaded the Judge had substituted a case based on "legitimate expectation" for the respondent whereas her

case was that on the facts pleaded, she was entitled as of right to the orders she prayed for.

[17] It is a fundamental rule of law that a Court should not mero motu substitute a case different from the one pleaded by a party and then proceed to give judgment on the substituted case. See *Commissioner of Correctional Services v Ntsetselelo Hlatshwako Court of Appeal No. 67/09;* paragraph 7. See also to the same effect, *Umbane Ltd v Sofi Dlamini and 3 others, Court of Appeal No. 13/2013*.'

[7] The true basis or grounds of the applicant's case are stated by him as follows:

'9.

The Student Representative Council Constitution is a draft working document. It is not binding on the student, Student Representative Council or the Respondents. …

10.

In terms of chapter 2 paragraph 2.3:

The Constitution of the Student Representative Council will have no legal force and effect unless such Constitution and Amendments thereto are approved by Council.

11.

The Constitution was not approved by Council and is thus of no legal force and effect. I am the outgoing president of the 2nd Respondent's student representative council. Had the Constitution been approved I would have known as I would have presided over the student Council meeting.

12.

In the premise the respondent cannot use the Constitution in the manner it has done. And it is my humble prayer that the decision of the 1st respondent contained in the letter of the 3rd March 2016 be reviewed and set aside. The respondent has no power to discipline me based on the Student Representative Council Constitution.

13.

It is submitted that the decision of the 1st respondent is tainted with illegality, in that its alleged source has no legal force and effect. It is further submitted that the respondent failed to exercise her powers in accordance with the tenets of the law and principles of natural justice. …

14.

By fixing strict adherence to non-existent source of authority and incorrect legal principles, the respondent committed a reviewable

> error of law …. The respondent ought to have found that it is not empowered to discipline me in terms of the Student Representative Constitution.'

[8] From the above, it is plain to me and indeed the respondents, that the case for the applicant is that he could not have been charged with a violation of the Student Representative Council Constitution because the said Constitution was never adopted and is thus not binding on him or the students as provided in paragraph 2.3 of Chapter 2 thereof. This is further clarified and emphasized by the applicant in paragraph 7 of his Founding affidavit where he states that:

> 'On the 18th February 2016 I appeared before the 1st respondent. I refused to plead on the ground that the charges are based on the Student Representative Council Constitution which has no legal force.' (The underlining has been supplied by me).

So, that was the only complaint by the applicant before the disciplinary board and that is the complaint by him before this Court. I now proceed to examine this complaint.

[9] In response to the charges by the applicant, the respondents have submitted that the relevant Constitution was tabled and certain amendments thereto made in 2011. At the time, the applicant was not a

student at the 2nd respondent. By this fact alone, he is not in a position to know whether the Constitution was adopted or not. In any event, the said Constitution has been used and relied upon by the parties concerned since 2011. The respondents further point out that the applicant has himself during his tenure as President of the Student Representative Council used this Constitution to discipline some of his fellow students. An example is given (at page 58 of the Book of Pleadings) where he suspended the then Treasurer of the Student Representative Council from office. In that letter of suspension he said he was acting in terms of the powers bestowed upon him in Chapter 11 section 11.2 of the Student Representative Council Constitution. The respondents aver that the applicant cannot, under the circumstances turn around and argue that the Constitution is not binding on him and the student body. He is estopped from so arguing.

[10] I do not think that the issue of estoppel should detain this Court further or burden this judgment. The applicant has, in my judgment failed to show or allege sufficient facts that the said Constitution was never adopted and thus not binding on him or any of the students of the second respondent. The principle or threshold that he has to meet in order to succeed is that he must positively allege and establish that the Constitution was never adopted and thus not binding. He who alleges must prove that which he

alleges. It is not enough, in my view, just to assert that if the Constitution was adopted, the applicant would have known. In simple terms, that is requiring the respondents to prove that the Constitution was indeed adopted. The applicant may not do so in such a situation where he has the burden of proving his own assertions or case. In any event, he has not denied that the Constitution was tabled and amended in 2011 when he was not a student at the University. But more importantly, the Constitution has been used by the institution and the student over the years to govern the affairs of the student at the second respondent. No one, over these years, has ever doubted its binding nature.

[11] Lastly, and without deciding the issue as it is not necessary for me to do so, the fact that the students and the university have consistently used the Student Representative Council Constitution over the years, without doubting or questioning its binding nature or force, would itself make a strong case for adoption or ratification.

[12] For the above reasons, the applicant has failed to establish that the charges against him were framed under a non-binding document or law. Consequently, the application is dismissed with costs.

MAMBA J

For the Applicant: Mr. S. Mnisi

For the Respondents: Mr. M. Sibandze