TIZEL RUTENDO NOLIWE BAMU
and
DENSELE PANASHE NYANGOMBE
and
NESBERT MUNYUKI
and
TANATSWA NIGEL WATYOKA
versus
THE VICE CHANCELLOR, HARARE INSTITUTE OF TECHNOLOGY N.O
and
HARARE INSTITUTE OF TECHNOLOGY

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 13 & 16 May 2022

Urgent Chamber Application

K. *Ncube* for the applicant
P. *Dube* for the respondents

ZHOU J: This is an urgent chamber application for the suspension of the second respondent's decision requiring the applicants to pay thirty – five percent (35%) of their fees exclusively in the currency of the United States of America. The application is opposed by both respondents.

The background facts to the application are as follows: The second respondent is an institution of higher learning offering degrees. The first respondent is the head of the second respondent. All the four applicants are students of the second respondent. Applicants state that on or about 29 April 2022 they were informed by the second respondent `s Accounts office that they were now required to pay 35% of their fees exclusively in the currency of the United States of America and the balance could be paid in the local currency. It is apparent from the respondents' opposing papers that this arrangement for a portion of the students' fees to be payable on United States dollars was introduced following a recommendation by the Fees Revision Committee at its meeting of 10 January 2022 A copy of the minutes of that meeting is attached to the respondents' papers.

Applicants seek the suspension of the new requirement pending the return date on which they are challenging the legality of the decision and are seeking its nullification on essentiality two grounds. The first ground is that the demand for a portion of the fees in the currency of the United States contravenes the provisions of the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) Regulations, 2019 which are contained in S I 212 of 2019, as amended by the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) (Amendment) Regulations 2020 (No.3), S I 185 of 2020. The second ground is that the decision is contrary to the provisions of s (1) (a) of the Administrative Justice Act [*Chapter 10:28*].

The respondents, in addition to contesting the application on the merits, raised objections *in limine* based on the following:

(a) That the matter is not urgent;
(b) That the applicants have no *locus standi;*
(c) That there is non- joinder and misjoinder justifying dismissal of the matter;
(d) That there were domestic *remedies* which the applicants ought to have exhausted before approaching the court, and
(e) That there was non-disclosure of facts which justified dismissal of the application.

The objection to the *locus standi* of the applicants was abandoned during argument. I dismissed the other four objections and advised that my reasons for the dismissal would be given in the final judgment

Urgency

The basis upon which the respondents object to the urgent hearing of the application is that the decision to demand payment of a portion of the fees in United States dollars was made in January 2022, about four months before the application was instituted on 6 May 2022. Respondents also argued that there is no harm to be suffered by the applicants if the application is not heard urgently since they have already written their examinations for the current semester. The objection based on the fact that the decision was made in January 2022 is without merit as the applicants were not notified of the requirement in January. In any case the fact that the committee that revises fees took the decision in January 2022 does not mean that that is when the second respondent adopted the requirement. In fact, it is clear from the unchallenged evidence of the applicants that they were not even formally informed of the requirements. They were only informed by the second respondent through its Accounts office

when they made inquiries on 29 April 2022. Also, the fact that the applicants have written the examinations for the semester does not take away the prejudice which is continuing. The prejudice is the obligation to pay the fees, which obligation is effective retrospectively from January 2022. The grounds on which the urgent hearing of the matter is being contested are therefore not sustainable hence the objection must fail.

Non- Jounder/ Misjounder

No submissions were made regarding misjoinder. On non-joinder, the respondents argue that the Students Representative Council, The chairman of the Fees Revision Committee, the University Council and the Minister of Higher and Tertiary Education ought to have been joined. The Students' Representative Council has no legal interest in the subject- matter of the case, which is the fees. As a body corporate, the students representative body suffers no prejudice and derives no benefits from the suspension or setting aside or upholding of the proposed fees arrangement which would give it a direct and substantial interest in the matter. The mere fact that its President and Vice President sat on the Fees Revision Committee does not give the students body a legal interest in the fees charged by the second respondent since the committee itself is merely a committee of the second respondent which is the entity that charges the fees. The Minister of Higher Education is not an interested party in the dispute over fees, because the second respondent is duly constituted by Act of Parliament with the capacity to sue and be sued in its own name. The respondents have not shown that the Minister was involved in the decision to alter the manner in which the fees are to be paid. The objection based on non- joinder is therefore meritless, and is dismissed.

Domestic remedies

Mr *Dube* for the respondents submitted that the applicants ought to have approached the Fees Revision Committee to revisit its decision or the Students Representative Council to intervene. The Fees Revision Committee would obviously be *functus officio*, having made its decision and submitted it to the second respondent. It is inconceivable how approaching it would make it revisit its recommendation. In any event, the legal or factual basis upon which it was submitted that the Committee and the Students Representative Council are domestic remedies for the purposes of suspending or setting aside the fees charged by the second of respondent was not alleged or established. There is no legal instrument which was referred to which would entitle these two entities to interfere in the dispute over fees. For these reasons, this ground of objection is without merit.

Non-disclosure

The respondents' submission is that the applicants ought to have disclosed that members of the Students Representative Council sat on the Fees Revision Committee which recommended the impugned decision. The presence of two representatives of the Students Representative Council on that committee is not relevant or material to the determination of the application. Further, the applicants received information on the need to pay thirty –five percent of the fees in United State dollars from the Accounts Office. They did not receive that information from the Fees Revision Committee. The alleged non- disclosure is therefore not a valid ground for objecting to the application.

The merits

The applicants want suspension of the decision pending determination of the question of its legality. At this stage what is required is *prima facie* proof of violation of the law in relation to them. Section 3(1) of the Exchange Control (Exclusive use of Zimbabwe Dollar for Domestic Transactions) Regulations, 2019 provides as follows:

> "Subject to section 4, no person who is a party to a domestic transaction shall pay or receive as the price or the value of any consideration payable or receivable in respect of such transaction any currency other than the Zimbabwean dollar."

Subsection (2) provides; *inter alia*, that:

> "In particular (without limiting the scope of subsection (1) no person shall-
> (a) quote, display label, charge, solicit for the payment of, receive or pay the price of any goods, services, fee or commission in any currency other than the Zimbabwe dollar".

The above provisions clearly outlaw the charging or payment of fees and this would include a portion of such fees) in foreign currency. The amendments introduced by s 6 of SI 85 of 2020 only allows a person to pay for goods and services chargeable in Zimbabwe dollars in foreign currency using his or her free funds at the ruling rate on the date of payment. In this case there is no reference to the use of free funds in relation to the fees charged by the second respondent. Thus, on the face if it, the demand for 35% of the fees to be paid in the United States dollar violates the law. Subsection (3) of the same section makes it a criminal offence for any person to contravene subsection (1).

In light of the *prima facie* evidence of the contraventions of the law, the applicants are entitled to the relief sought. Mr *Dube* for the respondent made no submissions in relation to the alleged contravention of the provisions of the Administrative Justice Act, which suggests an implied acceptance of the argument made on behalf of the applicants.

In the result, the provisional order is granted in terms of the draft thereof.

Kossam Ncube and *Partners*, applicant legal practitioner
Dube Manikai and Hwacha, respondent legal practitioner