ALEKSEI BVUTE
versus
MINISTER OF PRIMARY & SECONDARY EDUCATION
and
SECRETARY FOR PRIMARY & SECONDARY EDUCATION
and
ACTING PROVINCIAL EDUCATION DIRECTOR FOR MANICALAND
and
FORGIVENESS CHAWARERWA (N.O.)
and
MUTAMBARA HIGH SCHOOL

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 8 & 15 September 2014

Urgent chamber application

S. Hofisi, for the applicant
T.O. Dodo, for the respondents

MAFUSIRE J: This was an urgent chamber application. The founding papers were shoddy. Among other things, the certificate of urgency did not quite explain why the matter was said to be urgent. Both that and the affidavits by the applicant and his father were replete with grammatical and spelling errors. The founding affidavit in particular lacked chronology. It was difficult to make out the sequence of events. The relief sought in the draft provisional order was incompetent.

The application was opposed. However, none of the respondents had filed opposing papers by the time of the hearing. They said the application had been served on them late. This was true. The application had been filed on 4 September 2014, a Friday. Having noted the situation of the applicant and the nature of the grievance, I had, in spite of the state of the papers, arranged an urgent set down. I heard the matter on the following Monday, 8 September 2014. I reserved judgment and indicated that I would try and deliver the judgment on the following Thursday, 11 September 2014. Meanwhile I granted the applicant's application to amend the draft order. I also granted blanket permission to any of the parties, if they so wished, to file any further documents for consideration by me before I made up my

mind. The applicant filed an amended draft provisional order and some heads of argument. None of the respondents filed anything.

Briefly the situation was this. The applicant had been a form four student at Mutambara High School, the 5th respondent (hereafter referred to as "***the school***"). He had first been suspended. Subsequently he had been expelled on the ground that he had masterminded and incited a strike that had occurred at the school sometime in June 2014 and that he had vandalised school property.

The urgent chamber application was effectively to reverse the decision of the school and to install the applicant back into the classroom. This was on the basis that the school had not followed the rules and regulations governing the expulsion or "exclusion" of students from schools. Those rules and regulations are statutory instrument 362 of 1998 (Education (Disciplinary Powers) Regulations, 1998), (hereafter referred to as "***SI 362/98***"), and statutory instrument 363 of 1998 (Education (Enrolment and Exclusion) Regulations, 1998) (hereafter referred to as "***SI 363/98***").

SI 362/98 governs "expulsions". SI 363/98 governs "exclusions". In its expulsion letter the school used the word "exclusion". It relied on some government circular identified as Policy Circular No. P. 35 of 1998. The applicant argued that the school was not supposed to "exclude" him in terms of SI 363/98 because in terms of it, exclusion of a student from a school should be on the basis that the student has been found to be "ineducable" following proper medical advice, and that this had not been the case in his situation. It was also argued that circular P. 35 of 1998 was not law and was therefore of no force or effect. The circular was not produced.

It was also argued on behalf of the applicant that, contrary to the provisions of s 8(1) of SI 362/98 which permit a school to suspend a pupil for misconduct of a serious nature for a period not exceeding seven days to allow for investigations, the school had suspended the applicant for sixteen days.

The applicant's main argument though was that in expelling him the school had violated the rules of natural justice and s 69 (2) of the Constitution, in that not only had it failed to accord him a fair and public hearing, but also that he was expelled on grounds which were materially different from those set out in the suspension letter. It was argued that, from the suspension letter, the applicant had been suspended for:

"***… vandalising school property i.e. school gates; stoning the deputy Head's house; breaking Hostel and dining window panes"*** and ***"engaging in hostile behaviour to the school authorities***".

Yet from the expulsion ("exclusion") letter the applicant had been expelled for:
"***… mastermind[ing] the strike on 29/06/2014 and vandaliz[ing] school property***", and also that he had "***… incited students to stone the D/H's house and destroyed lights and window panes. He also destroyed school gates***".

From the founding papers, applicant's version, in my own words, and as I understood it, was this. On the day in question, some school guard had broken up an apparently harmless argument between the applicant and his friends. As he had run away he had been overpowered by another guard. This other guard had assaulted him and taken him to the boarding master. The boarding master had proceeded to beat him up with a broomstick. After that the boarding master had ordered him to go and make a report of what had happened to the school authorities. However, the applicant had declined for fear of jeopardising the school guard's employment! It was during the time the applicant was with the boarding master that some students had chased one of the school guards out of the school hostels or dormitories. Applicant had not been part of that crowd. It was also during that time that the other students had engaged in violent behaviour, destroying school property in the process.

The applicant's chronology was very difficult to follow. What I could make out though was that following the disturbances of the day, lessons had been suspended on the following day, 30 June 2014. On 1 July 2014 applicant had been asked to submit a report to the police. He did. One of the school teachers had been present as he wrote down his report. The applicant was then given police authority to be examined in hospital.

On 5 July 2014 there was what the applicant called a "roll call" at the school. Every student was interviewed by some school teachers and a minister or priest. On 7 July 2014 he was served with the letter of suspension. Among other things, he would not attend school until 23 July 2014. That was a period of sixteen days.

Applicant said he returned to the school with his father on 23 July 2014 thinking that that would be the date for the disciplinary hearing. Instead, he was served with the letter of "exclusion". The letter was dated 16 July 2014. The applicant appealed to the second respondent. However, efforts by his legal practitioners to get some documents from the

second respondent to use in the appeal hearing, the date of which was still to be given, had failed.

The applicant's father filed a supporting affidavit. It largely concerned itself with the communication to him by the school authorities when the applicant had been suspended, and the fruitless efforts made by the fourth respondent, the headmaster of the school, to assist in finding the applicant an alternative place at another school.

On that basis the applicant sought a provisional order in the following terms:

"**TERMS OF FINAL ORDER**

i. Exclusion under Circular No. P 35 of 1999 be and is hereby set aside.
ii. Costs shall be in the cause

INTERIM RELIEF SOUGHT

1. Pending the resolution of this matter by the 2nd Respondent it is ordered that:
   (i) The Respondents be and are hereby compelled to allow Applicant to enter upon the 5th Respondent School for purposes of education until the 2nd Respondent determines the matter.

2. The Respondents are hereby interdicted from in any way negatively interfere (sic) with the Applicant's education, more particularly in that the Respondent (sic) be and are hereby barred from:
   a) Separating Applicant from his classmates.
   b) Otherwise prohibiting Applicant from using the 5th Respondent (sic) hostels where he was residing prior to his exclusion.
   c) In any other way discriminating against Applicant pending the determination of the appeal by the 2nd Respondent.

3. 4th and 5th Respondents to bear cost (sic) of suit."

The amended draft provisional order read as follows:

"**TERMS OF FINAL ORDER**

That you show cause to this Honourable Court why a final order should not be made in the following terms;

i. The exclusion made by 4th Respondent should not be set aside for non-compliance with SI 362 and 362 (sic) of 1998 and in the event that the court finds it was due under the authority of a law.

INTERIM RELIEF SOUGHT

1. Pending the resolution of this matter by the 2nd Respondent it is ordered that:
   (i) The respondents be and are hereby ordered to allow Applicant to enter upon the 5th Respondent School for purposes of education until the 2nd Respondent determines the matter.

2. The Respondents are hereby interdicted from in any way negatively interfere (sic) with the Applicant's education, more particular (sic) in that the Respondent be and are hereby barred from:
   a) Restraining Applicant from attending lessons and enjoying other amenities at school just like any other student.

3. 4th and 5th Respondents to bear the cost (sic) of suit."

The respondents opposed the relief sought on the ground that the applicant had been accorded a fair hearing. Mr *Dodo*, for the respondents, extensively relied on the case of *Chataira* v *Zimbabwe Electricity Supply Authority* 2001 (1) ZLR 30, and the other cases cited therein. *Chataira's* case concerned a dismissed employee. It was held that it is not necessary that *viva voce* evidence be led at a disciplinary hearing into allegations of misconduct against an employee. The court also held that the employee must be shown any statements or documentary evidence that is produced at the hearing, but that he cannot insist that the persons who made the statements be called for cross-examination.

The respondents' case was that the applicant had been given an opportunity to present his side of the story on more than one occasion; before the police where one of the school teachers had been present, and during the "roll call". It was not a requirement of the rules of natural justice that there be a formal hearing in all cases or that witnesses be made available for cross-examination.

The respondents conceded that the suspension for sixteen days, instead of seven, was an error, but said that the error was harmless. The respondents also conceded that the reference to "exclusion" in the expulsion letter was a mistake and said that the applicant had been expelled in terms of SI 362/98. They argued that after suspending the applicant the school had carried out investigations which included receiving witnesses' statements. Two copies of statements by some female students were produced during the hearing. They were dated 5 July 2014, i.e. two days before the date of suspension. They basically adverted to the occurrence of the strike at the school on the day in question, and the presence of the applicant amongst the group of students engaged in violent behaviour at the girls' hostels.

The respondents argued that the school had reached the decision to expel the applicant on 15 July 2014 which decision had been communicated to the applicant on 23 July 2014.

Finally, the respondents argued that the reasons for the expulsion had been the same as those for the suspension and that there was no question of the applicant having been expelled for reasons different from those for which he had been suspended. They said the

basic ground for suspension and expulsion of the applicant was misconduct of a serious nature as contemplated by s 8(1) of SI 362/98, in that he had been guilty of violent behaviour and destruction of school property.

The applicant harped on whether the applicant had been "expelled" in terms of SI 362/98 or "excluded" in terms of SI 363/98. Mr *Hofisi*, for the applicant, submitted that the letter of expulsion referred to "exclusion" and that therefore the school had acted wrongly because, among other things, the applicant had not been shown to be ineducable, and that there had been no medical evidence to back that up.

Evidently, "expulsion" or "exclusion" was, in this case, a matter of semantics. The reality of the matter was that the applicant was expelled. The use of the wrong term or form in the letter of expulsion does not detract from the substance of the action taken. "Exclusion" in terms of SI 363/98 refers to exclusion or removal of a pupil enrolled at a government school by the secretary for education for reasons relating to incorrect information in the pupil's application; the proximity of the pupil or its parents to another government school established after the date of enrolment and providing the same instruction as that for the pupil's standard or grade, or where the pupil is found to be ineducable following a medical examination.

Of course, none of those applied to this case. The fifth respondent was not a government school. The applicant had not been removed by the secretary for education. The reasons for his removal had nothing to do with any incorrect information, or otherwise, on his enrolment form, or the proximity of his place of stay to another government school. He was not found to be ineducable. Undoubtedly, the school meant to expel in terms of SI 362/98. So the only question is whether or not the school followed the law.

SI 362/98 does not provide the actual procedure or mechanics of expelling a student who is guilty of misconduct of a serious nature. Section 8 reads as follows:

"*Suspension and expulsion*

8. (1) The head of a Government or non-Government school may, if he deems it desirable, suspend a pupil who is suspected of misconduct of a serious nature, for a period not exceeding seven days, while the matter is investigated.

(2) If, in the opinion of the head of a Government or non-Government school, a pupil at that school has been guilty of misconduct of a serious nature which merits his expulsion, the head may expel such pupil.

(3) Where the head has decided to expel a pupil in terms of section (1), he shall give the parent or pupil notice, in writing, of the date when expulsion is to take effect, and shall state the reasons for his decision to expel the pupil.

(4) A parent to whom notice has been given in terms of subsection (2) may, within fourteen days of the notice, appeal in writing to the Secretary, whose decision shall be final.

(5) The head of a Government or non-Government school who expels a pupil in terms of this section shall forthwith forward a report to the Secretary, setting out the full circumstances and his reasons for expelling that pupil."

In my view, a school that wishes to expel a pupil in accordance with SI 362/98 must follow the rules of natural justice. One of those rules is the *audi alteram partem* (hereafter referred to as "**the *partem* rule**").

The *partem* rule holds that a man shall not be condemned without being given a chance to be heard in his own defence. The rule is so basic to jurisprudence. In *Dube* v *Chairman, Public Service Commission & Anor* 1990 (2) ZLR 181 (H), EBRAHIM J said the rule is often termed a rule of natural justice. In *Taylor* v *Minister of Education & Anor* 1996 (2) ZLR 772 (S), GUBBAY CJ stated, at p 780A – B:

> "The maxim *audi alteram partem* represents a flexible tenet of natural justice that has resounded through the ages. One is reminded that even God sought and heard Adam's defence before banishing him from the Garden of Eden. Yet the proper limits are not precisely defined."

Earlier on, in the case of *Metsola* v *Chairman, Public Service Commission & Anor* 9189 (3) ZLR 147 (S), the same learned judge, then a judge of appeal, had expressed himself on the same point as follows[1]:

> "The *audi* maxim is not a rule of fixed content, but varies with circumstances. In its fullest extent, it may include the right to be apprised of the information and reasons underlying the impending decision; to disclosure of material documents; to a public hearing and, at that hearing, to appear with legal representation and to examine and cross-examine witnesses. … … The criterion, as I have noted, is one of fundamental fairness and for that reason the principles of natural justice are always flexible. Thus, the 'right to be heard' in appropriate circumstances may be confined to the submission of written representations."

In the *Chataira* case, *supra*, SMITH J stated as follows[2]:

[1] At p 154

> "Domestic tribunals are entitled to follow their own procedures and are not bound by the ordinary rules of evidence, as long as their procedures do not conflict with the rules of natural justice."

The *partem* rule implores public officials, judicial and quasi-judicial officers, and really, anyone entrusted with the power to make decisions, or the power to take action affecting others adversely, to exercise such powers fairly. In the case of *Kanonhuwa* v *Cotton Co of Zimbabwe* 1998 (1) ZLR 68 (H), as with *Chataira, supra*, the rule was extended to the realm of private contracts between a private individual and a private entity. In all cases, fairness is the overriding consideration.

In my view, the *partem* rule has now found expression in the statutes. It now forms one of the fundamental human rights and freedoms in the current Constitution of Zimbabwe. Section 69 of the Constitution reads:

> "**69 Right to a fair hearing**
>
> (1) ……
>
> (2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.
>
> (3) Every person has the right of access to the courts, or to some other tribunal or forum establish by law for resolution of any dispute.
>
> (4) ……"

Section 68 of the Constitution provides for the right to administrative justice. It says every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair. Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct is entitled to be given promptly and in writing the reasons for such conduct. The section then behoves Parliament to enact legislation to give effect to these rights.

Even though the Administrative Justice Act, [*Cap 10:28*], predates the current Constitution, in my view, it is one such Act of Parliament that seeks to give effect to the rights and freedoms enshrined in the Constitution on the *partem* rule and its extension, the 'legitimate expectation' doctrine.

---

[2] At p 32A - B

Mr *Hofisi* argued that cases like *Chataira* and others that were decided before the advent of the current Constitution have to be read subject to the Constitution because the rights and freedoms enshrined therein are now justiciable at a constitutional level. That may be so. However, it seems to me that the content and practical application of the *partem* rule and the legitimate expectation doctrine, as expressed in the Constitution and the Administrative Justice Act, are no different from the way the courts have consistently treated them in the past.

In my view, the *partem* rule and the legitimate expectation doctrine are products of judicial activism that was meant to fill up a lacuna in the law; see the reference to the 1988 American Journal of Comparative Law (by Prof Robert E Riggs) in the case of *Administrator, Transvaal and Ors* v *Traub and Ors* 1989 (4) SA 731.

In England, in the 19960s, LORD DENNING MR, in the case of *Schmidt and Anor* v *Secretary of State for Home Affairs* [1969] 1 All ER 904 (CA), at p 909, coined the legitimate expectation doctrine as follows:

> "… an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say."

In South Africa, in the 1980s, the doctrine was adopted in *Traub's* case above. CORBETT CJ, after an examination of the authorities in England, Australia, New Zealand and elsewhere, said at p 760:

> "The question which remains is whether or not our law should move in the direction taken by English law and give recognition to the doctrine of legitimate expectation, or some similar principle. The first footsteps in this direction have already been taken in certain Provincial Divisions (see the case quoted above). Should this Court give its *imprimatur* to this movement; or should it stop the movement in its tracks?"

Later on, at p 761D, the learned chief justice answered the question as follows:

"In my opinion, there is a similar need in this country."

In Zimbabwe, in the 1990s, the doctrine was adopted in the case of *Health Professions Council* v *McGowan* 1994 (2) ZLR 392 (S) and subsequent others such as *Taylor, supra,* and *Kanonhuwa, supra*. In *McGowan's* case GUBBAY CJ stated as follows at p 334:

> "In short, the legitimate expectation doctrine, as enunciated in *Traub*, simply extended the principle of natural justice beyond the established concept that a person was not entitled

> to a hearing unless he could show that some existing right of his had been infringed by the quasi-judicial body… Fairness is the overriding factor in deciding whether a person may claim a legitimate entitlement to be heard…".

See also *Affretair (Pvt) Ltd & Anor* v *MK Airlines (Pvt) Ltd 1996* (2) ZLR 15 (S), per McNALLY JA, at p 21C - D.

As observed by the Supreme Court in *Taylor's* case above, the *partem* rule, and its extension, the legitimate expectation doctrine, are flexible tenets. Their proper limits are not precisely defined. In my view, the advent of the new Constitution and the Administrative Justice Act has not altered the position. In my view, a formal charge that is followed by a formal hearing, culminating in a formal verdict and a formal penalty, are not always absolute pre-requisites. The exigencies of the matter should determine the situation. In *Taylor's* case, the court made the following remark at p 778A – B:

> "I did not understand Mr *Nherere* to suggest that in this sort of case there was need for a hearing in any formal sense, that is, an oral hearing. All that was required and sought by the appellant was simply an opportunity to submit written representations; to be able to put his side of the story with regards to the transfer affecting him."

At page 784 in *Taylor's* case the learned chief justice went on to say:"

> "PICKERING AJ was at pains to stress that fairness is the true guide to the circumstances in which a public official is required to afford a hearing. It is this concept, he said, that operates as a limiting factor to ensure that the legitimate expectation doctrine does not stray beyond its proper bounds. I am in respectful agreement that it is helpful to look at the situation from the stand point of fairness and reasonableness."

In the present case, I have been at pains to understand when exactly, or even roughly, it may be said that the applicant was accorded some opportunity to defend himself to the charges that were levelled against him and in respect of which he was eventually expelled. It seems that the first time that he was asked to submit a report was on 1 July 2014. But neither party explained what it is he was to submit a report on. I can only surmise that it was on the disturbances that had occurred at the school two days before. What was common cause though was that the request for the applicant to submit a report had come from the police. One of the school teachers only happened to have been present when the applicant was writing his report. Mr *Hofisi* said the police were investing the crime aspect arising from the disturbances and that this should not be mixed up with the civil investigations required in respect of the disciplinary aspect of the matter.

I do not accept that the request by the police to the applicant on 1 July 2014 to submit a report, and what happened thereafter, measured up to the *partem* rule or the legitimate expectation doctrine. It was not the disciplinary authority that asked for the report. Furthermore, the request was not made for the purposes of carrying out civil investigations into the disturbances. It was to investigate a possible crime. At that stage the applicant had not yet been charged with any wrong.

The applicant was then served with a letter of suspension on 7 July 2014. The period of suspension was sixteen days, and not seven days as required by SI 362/98. I do not accept Mr *Dodo's* contention that the lengthy period of suspension was a harmless oversight. Every citizen of Zimbabwe has a right to education in terms of s 75 of the Constitution. Therefore, any law or conduct that may be in conflict with this Constitutional right has to be trimmed to conform, set aside or struck down altogether. In my view, the letter of suspension was invalid for want of compliance with the law.

If the letter of suspension served on the applicant by the school was invalid, it follows that the investigations that followed, if any, hung on nothing. In my view, the import of s 8(1) of SI 362/98 is that you suspend in order to investigate. Therefore, you can't put anything on nothing and expect it to stay there. It will collapse: see *McFoy* v *United Africa Co. Lt* [1961] 3 All ER 1169 (PC) at p 11721.

But in case I am wrong that the letter of suspension served on the applicant was invalid, it seems to me that the whole so-called disciplinary process by the school failed to measure up to the basic tenets of the *partem* rule or the legitimate expectation doctrine. Fairness is the overriding consideration in any such process.

In my view, there was no modicum of fairness in the whole process. Here are my reasons. It seems that the first time that the applicant got to know that the school was pinning on him the responsibility for ***some*** aspects of the disturbances of 29 June 2014 was when he had been served with the letter of suspension on 7 July 2014. I say "***some***" aspects of the disturbances because, whichever way one construes it, and contrary to the respondents' contention, that letter did not tell the applicant that he was being suspected of inciting and masterminding the strike as was stated in the expulsion letter. The suspension letter accused him of vandalizing certain items of school property that were specified therein. It also accused him of engaging in hostile behaviour towards the school authorities.

In my view, whilst destruction of school property by a single individual is bad enough, it is potentially far more disastrous if carried out by a whole student body or a group

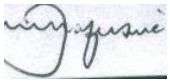
of them. Thus, it is quite a serious accusation to say the applicant incited and masterminded the strike. I was not told the extent of the damage in the present case. But it seemed common cause that it was considerable. If it was damage suffered at the hands of many, it was unfair to pin it all on the applicant alone and expel him for that reason without hearing his side of the story. Therefore, I consider that, to a significant extent, the applicant was expelled for reasons that he had not been suspended for or charged with. That was a violation of the *partem* rule and the legitimate expectation doctrine.

The applicant was suspended on 7 July 2014. He would not attend school until 23 July 2014. I believe his legitimate expectation must have been that on that date he would either resume classes or face trial, i.e. the disciplinary hearing. Instead, he came back on the day only to be served with the letter of expulsion. As said already, that letter contained more serious accusations than the letter of suspension. The applicant says when he arrived at the school he had been called for some "deliberations" with some teachers, whom he named, during which he had been asked to submit another report. He did not explain what these "deliberations" were or what the report was on. Mr *Dodo* said that those "deliberations" constituted the disciplinary hearing. But that cannot be. The respondent had already taken the decision to expel the applicant on 15 July 2014. That is what Mr *Dodo* himself said. Furthermore, the letter of expulsion itself was dated 16 July 2014. Undoubtedly, the school had made a decision already. Therefore, the applicant's right to be heard was violated on this basis as well.

I am satisfied that the applicant has established a *prima facie* case. The appropriate relief should be one enabling him to attend classes in the normal manner pending the proper investigation by the school of the alleged case against him, and, if necessary, the proper conduct of a disciplinary process. The applicant's appeal before the second respondent was said to be pending. But if the purported disciplinary process was fatally flawed, it means that the purported expulsion was invalid. In that event the appeal process was hanging on nothing. I award no costs because the applicant's case was badly presented. Furthermore, the relief granted in terms hereof, is only of a temporary nature. It is as follows:

> Pending the proper conduct of investigations by the fifth respondent into the disturbances that occurred at the fifth respondent school in or about June 2014 and July 2014, and pending the conduct of any disciplinary processes, if any, arising out of such disturbances, the third, fourth and fifth respondents shall forthwith allow and permit the applicant to resume normal classes, lessons or tuition, boarding and any or all normal school activities and all normal life at, or with, the fifth respondent. There shall be no order as to costs.

15 September 2014



V. Nyemba & Associates, applicant's legal practitioners
Civil Division of the Attorney – General's Office, respondents' legal practitioners