SAKUBVA COMMERCIAL COLLEGE
versus
ZIMBABWE SCHOOL EXAMINATIONS COUNCIL
and
MINISTER OF PRIMARY AND SECONDARY EDUCATION

HIGH COURT OF ZIMBABWE
MUZENDA & SIZIBA JJ
MUTARE, 23 May 2025 & 27 May 2025

OPPOSED APPLICATION FOR REVIEW

Advocate S. *Banda* with Mr *N. Nhambura*, for the applicant
Ms *K.C Rusike*, for the first respondent
No appearance for the second respondent

SIZIBA J**:**

1. An administrative authority that intends to undertake an adverse decision affecting the rights enjoyed by any affected party is legally bound to give proper notice and afford such affected party an opportunity to make representations or be heard before such a decision is taken. This requirement is in terms of the common law rule of natural justice *audi alterum partem rule* and also in terms of our statute law as provided for in s 3 of the Administrative Justice Act [*Chapter 10*:*28*]. As long as due process was not followed, it cannot avail the administrative authority to then come and tell the court that its decision or action was correct or necessary on policy grounds whatsoever.

2. There can, in essence, be no correct, necessary or expedient decision that is made in a manner that violates the law. Such a decision, though perceived to be correct in substance and as of necessity, is vitiated and nullified by its procedural and substantive incorrectness to the extent that it violates due process of the law. A court of law will simply not accept the attitude by administrative authorities that the end justifies the means. The means must justify the end at law. Put differently, a court of law will not be swayed by the perceived guilt of the affected party or the compelling nature of the action or decision taken so as to ignore the requirements of due process where a party

with a legitimate expectation was not heard prior to the administrative action taken. On the other hand, once the affected party is afforded his rights and heard prior to the administrative decision without flouting any procedural rights, it will be a different matter and it may no longer be a subject for review but of appeal whether such decision was correct or not and the courts would hardly find it necessary to interfere with administrative decisions. The fact that due process was not followed in the present matter justifies the success not only of the application for condonation of late noting of the review but also of the application for review itself.

3. The application by the applicant is a composite one for condonation of late filing of a review application as well as for the review itself. The decision sought to be reviewed is the first respondent's revocation or withdrawal of applicant's status as an examination centre. The application for review is premised upon s 4 of the Administrative Justice Act [*Chapter 10*:*28*]. The grounds for review are stated as being four in number but in essence, the applicant is saying in simple terms that it was not notified and afforded an opportunity to be heard first before the first respondent deregistered it as an examination centre and hence the decision by the first respondent was arbitrary and unlawful. The other complaint is that the deregistration was not sanctioned by the provisions of s 35 of the Zimbabwe School Examinations Act [*Chapter 25*:*18*] which ground is more of an appeal than a review. The applicant has prayed to be condoned in its late filing of the review application and that it be granted the relief sought such that the decision of the first respondent could be set aside. At the hearing of the matter, I directed both counsel to address this court on the points *in limine* raised by the first respondent as well as on the merits.

4. It is common cause that the applicant is a registered commercial college with the second respondent in terms of the Education Act and prior to 30 April 2024, it enjoyed the additional status of being a registered examination centre with the first respondent for the past 52 years. The dispute in this matter stems from the way the applicant conducted the October - November 2023 ZIMSEC examinations. It is common cause that one Mr Bruce Mugadhuwi, a teacher who was employed by the applicant, wrote

Mathematics answer scripts for two students and submitted them. There is no allegation that the applicant participated in such a scandal as an institution. The scandal was discovered during the marking process. In March 2024, officials from the first respondent's office visited the applicant accompanied by police officers and the investigations into the malpractice were carried out and they yielded fruition in the arrest of four teachers including the said culprit who confessed to have written the scripts inside a toilet. He pleaded guilty to the crime and he was convicted and dealt with in terms of the law. The applicant as an institution was neither charged nor convicted of any examination malpractice.

5. After the events narrated above, the applicant acted upon the advices from the provincial offers of the first respondent in carrying out corrective measures to ameliorate the situation at its college by dismissing all those who were implicated in the malpractice concerned and then communicated such fact to the first respondent and then continued with its business as usual under the impression that the matter had been resolved. However, on 30 April 2024, the applicant was surprised to receive a letter to the effect that it had been deregistered as an examination centre in terms of s 35 of the Zimbabwe School Examinations Act on the grounds of:
   (a) Engaging inexperienced personnel to run examinations.
   (b) Hiring additional invigilators who do not meet the required qualifications and experience.
   (c) Registering candidates beyond approved capacity.
   (d) Habitual malpractice including impersonation of candidates by staff.
   (e) Compromised security of examinations.

6. I must pose here to say that if at all the applicant's version is to be anything to go by, the above letter was tantamount to a charge sheet which carried along with it a verdict and a sentence, being a 'three in one'. By its letter dated 14 August 2024, the second respondent also confirmed that the applicant had been deregistered as an examination centre in terms of the first respondent's decision. On 6 May 2024, the applicant pleaded with first respondent's provincial representatives through a letter that its status as an examination centre be reviewed and restored as it had carried out some reforms

which included hiring new experienced staff and removing all the bad apples from its system. This letter was not responded to by the respondents.

7. In the opposing papers filed by the first respondent, it would have been comforting to find a response which articulates that the applicant was notified of the intention to withdraw its examination centre status or heard first before such status which it has enjoyed for the past 52 years could be withdrawn. Such a response, however, is non-existent. The respondents' position on the merits was only to tell this court that there was a visit to investigate the malpractice before the letter dated 30 April 2024 was done. In any event, so it is argued, the applicant is admitting the malpractice. It was also argued that the applicant is vicariously liable for the actions of its employee who executed the examination scandal. In my view, this attitude by the respondents is tantamount to the proverbial notion of hiding behind the finger. I say so because there is no evidence before this court to demonstrate that the issue of deregistering the applicant as an examination centre was ever deliberated upon by the parties prior to 30 April 2024 when the drastic decision was communicated to the applicant. This is the only pertinent issue upon which this whole case must stand or fall. If no such prior notice or opportunity was afforded the applicant to make representations on the issue of the intended deregistration of its examination centre status, then it follows that such deregistration was done outside of the legal procedure alluded to earlier on in this judgment and hence such decision cannot stand the test of the law. It is as good as no decision having been taken and it must be set aside. Good policy consideration is no substitute for the requirements of the law. The provisions of s 3(2) of the Administrative Justice Act [*Chapter 10*:*28*] provides as follows:

> *"(2) In order for an administrative action to be taken in a fair manner as required by paragraph (a) of subsection (1), an administrative authority shall give a person referred to in subsection (1)—*
> *(a) adequate notice of the nature and purpose of the proposed action; and*
> *(b) a reasonable opportunity to make adequate representations; and*
> *(c) adequate notice of any right of review or appeal where applicable."*

8. The first respondent is found wanting in its failure to comply with the above statutory requirements and it also failed to observe the *audi alterum partem* rule of natural

justice by not hearing the applicant which had a legitimate expectation to be heard prior to the withdrawal of its examination centre status. See *Guruva* v *Traffic Safety Council of Zimbabwe* SC 30/08. Having come to such conclusion, the question of whether the deregistration of applicant as an examination centre could be legally premised upon s 35 of the Zimbabwe School Examinations Council Act or on another provision of the law becomes superfluous to determine since the very procedure for making such decision was flawed. Ms *Rusike*'s attempt to persuade this court that the delictual law doctrine of vicarious liability was applicable in this case was not successful. I was persuaded to accept Advocate *Banda*'s submission that such doctrine was not applicable to issues of administrative law as in this context.

9. More energy was invested by the first respondent in taking objections of form such as failure by the applicant to index the papers. Such omissions at this stage cannot prejudice anyone as there is already a merged index uploaded on the IECMS portal. The prayer for condonation for this non - compliance by the applicant's counsel was proper and I will condone such non - compliance in the interests of justice. I do not agree that such non – compliance should be fatal to the application to the extent of rendering the application a nullity which cannot be amended or condoned. The reliance by first respondent's counsel on *Matanhire* v *B P Shell Marketing* SC 113/04, *Jensen* v *Acavalos* 1993 (1) ZLR 216 (SC*)* and other similar cases is misleading. The position that a fatally defective Notice of Appeal is a nullity which cannot be condoned or amended cannot be translated and be applied to each and every non-compliance with a peremptory rule. I equally do not find merit in the argument that the founding affidavit of the applicant's Acting Principal is inadmissible hearsay. It is not. He is not disqualified at law to swear to the facts that he professes to be in his personal knowledge and belief true and correct and I do not find anything that he has deposed to have been a lie as the respondents do not deny the material and decisive facts alleged in this case. I therefore do not find merit in the points *in limine* taken by the respondents. The applicant withdrew its points *in limine* prior to the hearing of this matter.

10. Given the fact that the applicant's letter dated 6 May 2024 was not responded to by the respondents and also the fact that failure to hear the applicant before taking a drastic

decision against it was a flagrant violation of the law, I do not find merit in the argument that the seven months delay in filing the present application was unreasonable. Even if one would say such delay was too long, the good prospects of success on applicant's case on the merits does compensate for such period and warrant intervention by this court by way of review. It is trite that strong prospects of success do compensate for the other factors which may not have been explained satisfactorily. The respondents do not suffer any prejudice since they can still follow the proper procedure should they still wish to achieve the same result. It is in the interests of justice that the applicant's case be considered by this court on the merits. I therefore find merit in the application for condonation of late noting of the review application as well.

11. Both parties prayed for costs against each other in anticipation of being victorious against the other side. I do not find reason to depart from the general rule that the costs shall follow the successful party. In the result, I therefore order as follows:
    (a) The points *in limine* raised by the first respondent be and are hereby dismissed.
    (b) The applicant's late noting of the application for review be and is hereby condoned.
    (c) The decision of the first respondent cancelling or withdrawing the applicant's status as an examination centre as expressed in its letter dated 30 April 2024 be and is hereby set aside.
    (d) The first respondent shall bear the applicant's costs of suit.

Muzenda J agrees _____

Mugadza Chinzamba and Partners, applicant's legal practitioners
Zvobgo Attorneys, first respondents' legal practitioners