THE STUDENTS REPRESENTATIVE COUNCIL
OF UNIVERSITY OF ZIMBABWE
and
NARSHON KOHLO
and
PAIDAMOYO MAFUSIRE
and
ETHEL MUSESWA
versus
PAUL MAPFUMO N.O.
and
UNIVERSITY OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 3, 28, 30 November 2022 & 3 May 2023

Opposed Court Application

T Bete, for the applicants
R H Goba, for 1st and 2nd respondents
C Chitekateka, 3rd and 4th respondents

CHITAPI J: This is an application for review brought by the applicants in terms of s 26 of the High Court Act [*Chapter 7:07*] as read with r 62(1) of the High Court Rules SI 202/21. Four grounds of review are stated by the applicants *ex-facie* the application

(i) Gross unreasonableness and irrational (*sic*) in the decision arrived.
(ii) Illegality in the decision arrived
(iii) Breach of the *andi atteram* parten rule
(iv) Breach of constitutional right to education and to human dignity

The decision which the applicants want to be reviewed was in relation to a tuition fee increase made or announced by or on behalf of the second respondent on 9 September, 2022.

The parties appear as cited in the heading to the application and include two further respondents who were joined as third and fourth respondents in circumstances I will explain. The first applicant is a student body with power to sue and be sued. It is elected by current students enrolled at and studying at the second respondent to represent student's interests. The second, third and fourth applicants are current students enrolled and studying at the second respondent.

The first respondent is the sitting Vice Chancellor of the second respondent and as such its chief executive officer. He is cited in his official capacity. The second respondent is a statutory body created by Royal Charter of 1955 and is incorporated in terms of the University of Zimbabwe Act, [*Chapter 25:16*].

When the application was first called the issue of the joinder of the Minister of Higher Education Innovation, Science and Technology Development Professor Fanuel Tagwira and of the Ministry Permanent Secretary Professor Amon Murwira arose for argument. I will not bother to deal with the parties arguments for or against joinder because from the parties affidavits it was clear that Government through the Minister and Ministry concerned had a role to play in the provision of education funding as it gave grants to Universities and other grant funded educational institutions. With the dispute in issue being one revolving around tuition fees increases which the applicants have challenged, the interest of Government cannot be subject of debate. The first and second respondents in any event attached to their opposing affidavit a copy of what is described as the University of Zimbabwe The Fees Ordinance. No 63 Undergraduate Schedule (1 July 2022-31 December 2022).

The first respondent and the Permanent Secretary for the Ministry both set out in the ordinance and the Minister approved the ordinance. The parties signed the ordinance on the same date which was on 6 September, 2022. The applicants challenge the Fees Scales Act out in the ordinance. The Minister and Permanent Secretary therefore played a direct role in the passage of the ordinance. To the extent that I considered on the affidavits that the Minister and Permanent Secretary could provide information that could assist in the resolution of the application, I decided to exercise the court's discretion to order joinder. Counsel for the applicants and first and second respondents agreed that the rules provided for the courts discretion to order joinder.

For completeness the power of the court to order joinder is located in r 32 (12)(b) of the High Court Rules (2021) which provides as follows:

"(12) At any stage of the proceeding in any cause or matter the court may on such terms as it thinks just and either on its own initiative or an application-
(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper necessary party to cease to be a party.
(b) Order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matter in dispute in the cause or matter may be effectually and completely determined and adjudicated upon to be added as a party:
Provided that no person shall be added as a plaintiff without his or the written consent or in such other manner as may be authorizes"

This court must therefore exercise its discretion to order a joinder in the interests of justice and only so where it takes the view on the facts that the joinder will assist in the effective and final determination of all disputed matters before the court. The court must therefore sparingly revert to this rule because, the duty to join all interested parties in a suit still remains that of the applicant or plaintiff as the case maybe. In this regard and in relation to application procedure, r 57 states as follows in relation to court applications.

"57.(1) Subject to this rule , all applications made for whatever purpose in terms of these rules or any other law, other than applications made orally during the course of a hearing, shall be made-
(a) as a court application, that is to all interested parties having a legal interest in the matter
(b) ……."

It is therefore the duty of the applicant to act and serve a court application on all interested parties with a legal interest. It is therefore improper for parties to ask the court to exercise its discretion to order joinder. The court acts on its own resolve and where an applicant has not complied with r 57(1) then the applicant will contend with consequences of non-joinder. *In casu*, the joinder of the Minister and Permanent Secretary was justified as the matters in issue are of national importance involving students who have a right to education given by s 75 of the Constitution section 75 reposes a duty on the state to provide state funded education and further to make education available to every citizen and permanent citizen of Zimbabwe

I considered it necessary to give reasons for the exercise of the court's discretion to order joinder in terms of r 37 (12)(b) of the High Court Rules 2021.

The order which I granted was as follows:

IT IS ORDERED THAT:

1. The proceedings are stayed on the following terms:

2. In terms of Order 32 rule (12(b) of the High Court (2021) the Minister and Secretary for Higher and Tertiary Education Innovation, Science and Technology Development-: respectively Professor Fanuel Tagwira and Professor Amon Murwira are joined as 3rd and 4th respondents in this application.
3. The applicants shall by no later than 4 November 2022 serve the full papers informing the record of proceedings in this application upon 3rd and 4th respondents.
4. The 3rd and 4th respondents if they wish to oppose the application or make any representations on the application shall file their responses by no later than 11th November 2022.
5. The applicants and 1st and 2nd respondents if so advised may respond to the responses of the 3rd and 4th respondents by 15 November, 2022 including the filing of any supplementary heads of argument.
6. The 3rd and 4th respondents if they so desire may so file heads of argument by 18th November, 2022.
7. The hearing of the application will resume on 24 November, 2022 at 10:00am."

The 3rd and 4th respondents despite the terms of the order of the joinder did not comply with it. The court issued a follow up order on 24 November, 2022 whose terms were as follows:

"IT IS ORDERED THAT:

1. The hearing is postponed to 28 November, 2022 at 2:30pm.
2. The legal practitioners for the 3rd and 4th respondent as per order of 3 November , 2022 having failed to comply with time lines to file opposing papers and being in default the 3rd and 4th respondents are ordered to appear before the court on 28 November , 2:30pm, to present argument on the position of the 3rd and 4th respondents.
3. The further indulgence for the legal practitioner to appear arise from the need for the court to get the benefit of the 3rd and 4th respondent' position on this matter of national interest.
4. A copy of this order be served upon the Attorney General personally.
5. The Registrar is directed to arrange with the Sheriff of the Court for immediate service of this order."

It will be noted therefrom that the court then ordered personal appearance before the court of the 3rd and 4th respondents at the next hearing date on 28 November, 2023. On that date the

3rd and 4th respondents had filed affidavits commenting on the application in compliance with the earlier order of 23 November, 2022. The third and fourth respondent's counsel applied for condonation for non-compliance with the aforesaid order. There being no opposition from the other counsel, condonation was granted. The court nonetheless was not amused at the failure by the 3rd and 4th respondents who are expected, given their position of being senior public officials to lead by example and comply with court orders without being prompted by the court to do so on pain of being sanctioned. *In casu,* the court had issued an order suffering them to personally appear before, the court which action would not have been necessary had the third and fourth respondents heeded the first order. As the saying goes, all is well that ends well. The third and fourth respondents did in the end comply and the issue is left at that.

Dealing with the merits of the application, the brief background facts which gave rise to the application were as outlined hereafter. On 9 September, 2022 the second respondent speaking through its Registrar Dr Munyaradzi Madambi gave written notice to all students enrolled at the second respondent of a new fees ordinance for the semester August- December 2022. The notice required students as a pre-requisite to registration to pay a deposit on the new fees equivalent to the previous semester fees by 16 September, 2022 with the balance to be cleared by the 30th September 2022. The payments could be effected in ZWL$ or USD equivalent. The notice stated that students were required to have registered in order to receive tuition and to sit for block examinations. In short, the position taken by the second respondent was that there would be no tuition offered to a student unless the student had paid the deposit and neither could such student write examinations. The second respondent issued another notice dated 12th September, 2022.

In the notice of 12 September, 2022, the second respondent indicated that after consulting stake holders who included students and their sponsors, the deposit equivalent to the previous semesters fees was required to be paid prior to registration whose deadline was 30 September 2022 with payment entitling the student to write Block 1 and 2 examinations commencing on 3 October 2022. The notice of 1 September 2022 needs quoting *ex-tenso.* It read as follows:

> 1. Students are required to pay fees deposit equivalent to last semester's fees and then proceed to register on or before 30 September 2022.
>
>   ONLY registered students will be eligible to sit for Blocks 1 and 2 Examinations commencing on Monday 3 October 2022

2. In effort to balance ease of payment of fees and facilitating the smooth flow of academic business in University, we are offering the following fees payment options:
    2.1 those who pay 100% of their fees by the 31st of October 2022 will enjoy a 12.5% discount.
    2.2 Those who pay 75% of their feed by 31 October will enjoy a 10% discount.
    2.3 Those who pay 50% of their feed by 31 October will enjoy a 5% discount.
3. All outstanding fees balances must have been cleared by 30th of November 2022.
4. Students are encouraged to approach the office of the Dean of Students for information on available financial support options, which include scholarships and the Government-supported "Work-Study Programme."

A striking feature of the notice was that it offered discounts on what it said were" fees payment options." The impact of discounts being offered for what was said to be an early payment date of 31 October, 2022 meant that the second respondent could in fact make do with less than the amounts it had set as the new fees structure or required for the semester in question. To its credit the second respondent offered to give students options on finding options about the availability nor details of the same were not disclosed to the court. From what the court could discern, the notice of 12 September 2022 amended the notice of 9 September 2022 and should have been so described so that the two notices speak to each other. Left as they are, they cause confusion because in some respects they are mutually irreconcilable. The court however read the two as speaking to each other as they related to the same subject matter of increased tuition fees for the semester August- December 2022. The notice of 12 September 2022 is also headed, "August-September 2022 fees, yet in its body it refers to the clearance of fees balances by 30 November, 2022 and the payment of discounted fees by October 2022. The heading "August – September fees" causes confusion because the fees related to in the notice are for the whole semester and not for the August- September period only.

The increased semester fees were passed as ordinance No 63 which related to Undergraduate fees and Ordinance No 64 which related to postgraduate fees. The two ordinances were on 6 September 2022 signed by 1st respondent as Vice Chancellor of the second respondent who recommended the fee schedules to apply with effect from 1 July 2022 to 31 December, 2022. The fourth respondent also signed the new schedules on the same date recommending them to the third respondent who approved the schedules again on the same date. Upon signature of the schedules by the third respondent, the fees schedules became operative.

The first and second respondents were correct to observe in their notice of application that the ordinances were approved by the third respondent and became his act. They also properly observed that the approval of the ordinances followed a paper trail wherein the second respondent and the fourth respondent had to first recommend the new fees schedules before the third respondent could approve or decline to approve them. The first and second respondent were as already noted correct to raise the issue of the non joinder of the third and fourth respondents.

It is however trite than the non joinder or misjoinder of a party does not defeat the *lis* cause or matter. Rule 32(11) of the High Court Rules 2021 provides as follows

> " 32(11) No cause or matter shall be defeated by reason of the misjoinder or non joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter"

See *Masumba & Anor* v *Director Zimsec* HH 969/15; *Svondo* v *Shadwell & Anor* HB 142/18. Subrule (12) then provides as already noted for the court on its own initiative or an application to join or disjoin a party. Subrule (12) has already been dealt with earlier in this judgment. The subrule (12) complements subrule (11) by seeking to ensure that the determination of a cause or matter is not defeated by the technicality of joinder or misjoinder. When the court orders joinder at its initiative, it must be guided by the need to determine the matter completely and effectively. The joinder if ordered is in the nature of the exercise of a judicious discretion informed by the facts and circumstances of each case. Parties must be allowed to challenge any evidence or facts which come about from the joined party. *In casu*, the other parties were given leave to respond to what the third and fourth respondents had to say upon their joinder. The applicants and first and second respondents duly filed further affidavits in answer to the third and fourth respondents opposing affidavits.

The applicants in their attack on the ordinance and seeking its review averred that because the second respondent had been allocated a princely sum of $3.3 billion in the National Budget 2022 approved by Parliament and had further been granted another princely supplementary allocation of $4.6 billion in the supplementary budget by Parliament in September, 2022, the raising of tuition fees by 700% more or less as per the ordinances was grossly unreasonable and irrational. The applicants averred that the primary source of funding for the operations of the second respondent was provided by Government and that an increase of 700% in circumstances where inflation was rated at 197% was unsustainable and irrational. The applicants gave a narrative of the cost of sustenance for a student per semester which added to US$ 2296.00 which when divided by three months which make up a semester, would amount to USD$765.00 per month. The applicants averred that most student were from poor backgrounds and could not afford the new tuition fees charged.

The applicants then averred that the alleged high tuition fees had the effect of violating s 75 of the Constitution which protects the right to education. The applicants also referred to s 27 of the Constitution which mandates the States to take practical measures to promote free and compulsory education up to higher and tertiary level. On this score, it is noted by the court that the right to education is not absolute in that the obligation of the state to provide education is subject to resources available to the State. The State is however required to take reasonable steps to achieve a progressive realization of the right.

That said, it does not appear to the court that it is necessary to answer the issue of whether or not the increase in fees is beyond the reach of students. That enquiry would best be dealt with as a ground of appeal. It seems to the court that the issue becomes one of procedural regularity. If the correct procedure was followed in coming up with the new fees schedule, then the issue of what amount of fees is exorbitant cannot be or is not an issue to be answered on review. The court cannot on review reduce fees or set a threshold of fees which it conceders to be fair.

The High Court's power of review are set out in s 27 of the High Court Act, [*Chapter 7:06*]. The provisions of the section read as follows;

> "27(1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be.
> (a) Absence of jurisdiction on the part of the court, tribunal or authority concerned.
> (b) Interest in cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be.

(c) Gross irregularity in the proceedings or the decision.
(2) Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities."

The court's powers of review were extrapolated by the Supreme Court in the case of *Affetair (Pvt) Ltd* v *MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S) at p 15 per MCNALLY JA, where the learned judge stated, quoting from Barter's Administrative Law;

> "the function of judicial review is to scrutinize the legality of administrative action not to with secure a decision by a judge in place of an administrator. As a general principle, the courts will not attempt to substitute their own discretion for that of the public authority, If an administrative decision is found to be *ultra vires,* the court will usually set it aside and refer the matter back to the authority for a fresh decision. To do otherwise would constitute an unwarranted usurpation of the powers entrusted to the public authority by the legislature. Thus it is said that the ordinary course is to refer back because the court is slow to assume a discretion which has by authority been entrusted to another tribunal or functionary. In exceptional circumstances this principle is departed from. The overriding principle is that of fairness."

There can be no doubt that the above remarks reflect the law as applied by the court in this country see also *Katiyo* v *Standard Chartered Bank Pension Fund* 1994(1) ZLR 225 (H), *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664(S)" p 253F-254E

> In relation to the exception to depart from the rule that proceedings are referred back to the administrative body where the review court has impugned them, the Supreme Court in the case of *Director of Civil Aviation* v *Hall* 1990 (2) ZLR 354 (SC) stated as follows at p 362E-G.
>
> "In my view, there was no justification to run counter to the principle that a court will not normally interfere in the sphere of practical administration. See Baxters Administration Law at P 681 ff. It will only do so where-
> (a) The end result is a foregone conclusion and a referral back would be a waste of time ; or
> (b) Further delay would cause unjustifiable prejudice to the applicant ; or
> (c) The statutory tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again; or
> (d) The court is in as good a position to make the decision itself."

In summation, it is the understanding of this court that where a review of proceedings of an inferior court or tribunal is sought, by the applicant, the grounds of review to which recourse may be sought are as set out in s 27 of the High Court Act. The proviso in subsection 2 to the effect that the grounds set out in subsection 1 of s 27 do not preclude any other law relating to. It review proceedings of an inferior court or tribunal, or authority must be read in context. Where

other ground other than the ones in subsection 1 of s 27 are sought to be relied upon, the specific law must be expressly pleaded as well as the grounds on which a review may be made by this court as provided for in that law. Such law is therefore additional to and not a substitute of the provisions of subsection 1 aforesaid which are the principal grounds on which the applicant may bring a review of proceedings. *In casu*, the view was brought in terms of s 26 as read with s 27 of the High court Act and the applicant is bound to the four grounds set out in s 27(1). See *Gwaradzimba NO* v *Gurta A-G* SC 10/2015.

The court being guided on the cited authority must determine the veracity of the grounds of review starting with what the applicant describes as gross unreasonableness of the decision. If one considers the provisions of s 27(1) of the High Court Act, there is no ground of review described as "gross unreasonableness". Section 27(1)(c) refers to gross irregularity in the proceedings, Generally speaking, gross irregularity has to do with the conduct of proceedings as opposed to the merits of the decision reached by the inferior court, tribunal or administrative authority. The applicant in support of the novel ground of "gross unreasonableness averred in para 56-60 of the founding affidavit. Therein the applicants aver that the second respondent was not justified to increase the tuition fees when the second respondent had been allocated a substantial supplementary allocation of money for its operations in the supplementary budget such amount being enough to cover tuition and accommodate for students. The applicants further alleged that the fee increase amounted to a 700% increase thus rendering the increase" irrational and unreasonable. The applicants lastly averred that they hailed from poor backgrounds and stated in para 60 of the founding affidavits that:

> "60 Further we come from extremely poor backgrounds. We are children of unemployed people, vendors, farmers or teachers and nurses. Our parents cannot afford these fees."

It is a pity that professionals like teachers and nurses are listed in the same genre as vendors. It is an observation made in passing and the comment is made that it is being too liberal with words to bunch the groups of professionals named as having similar predicaments with vendors. In any event, the court does not find merit in the allegations of gross unreasonableness as a review ground. There is no allegation in the paragraphs aforesaid of a gross procedural irregularity having been committed by the first and second respondents in regard to the process of determining the fees increase. In any event the court is of the view there are no allegations made that the plight of the

applicants was advanced as alleged but were but herein or dismissed without cause given. Were this allegation made, it could have been open to the applicants to argue if this was the case, that the second respondent did not consider facts put before it and that such failure rendered the proceedings irregular. See **R** v *Jokonya* 1964 RLR 236. On the other hand, If the allegations had been made that the facts were taken into account but that a wrong decision not supported by those facts was made then the proper procedure would be to appeal and not a review, that is assuming that an appeal is as a remedy available to a dissatisfied party in the circumstances of the proceedings brought on review.

The court was not persuaded that gross unreasonableness in the manner in which it was pleaded, fell within the purview of the grounds of review set out in s 27 of the High Court Act. Even if the court is wrong in so holding the point must still fail because the allegations of gross unreasonableness were just generalized and not related to the content of the proceedings being impugned on review. The first and second respondents correctly described the averments made on para(s) 56-60 of the founding affidavit as emotional averments. The court agrees. Tuition fees in the circumstances of this case must have a rationale to justify them. This rationale is founded on the need to maintain the excellent standards of education which the second respondent is established to churn out. Considerations of poverty of sponsors of students cannot be determining factor in setting out fees structures. This ground of review if one is generous to call it such has in the circumstances of this case no merit.

I observe that in the heads of argument, the applicant referred to the alleged irrationality of the decision of the second respondent under review. Reference was made to the dicta of *LORD DILOCK* in case of *Council of Civil Service Unions* v *Minister for Civil Service* [1985] AC 374 where in the learned judge described an irrational decision as one which is "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it"

I am prepared to draw a parallel between the expressions gross unreasonableness and irrationality because they both involve a thought process and decisions which are so flawed to the point that the decision reached thereby becomes grossly irregular. One can argue then that where the process and decision reached are so irrational and outrageous that they defy logic and common sense, then the proceedings can be said to be grossly irregular. Facts and circumstances of each case will define whether or not a decision or determination is not just irregular but grossly so, the latter being the threshold for interference with the proceedings by the review court. The cases of

Secretary for Transport & Anor v *Makwavarara and Affretair (Pvt) Ltd Anor* v *M K Airlines (Pvt) Ltd* (*supra*) quoted the dicta of LORD DIPLOCK aforesaid with approval. It seems to me though that outside of the argument expounded, the cases cited above to the extent that they list irrationality as a ground of review, must be read as being additional to the grounds set out in s 27 of the High Court Act.

Therefore even going by the case law wherein irrationality is a ground of review, the court is not persuaded without any empirical evidence that the *fees increases* defy logic or accepted moral standards to a point where it could be said that the maker of the decision had taken leave of his /her or its senses and acted so unreasonably that no reasonable person could reach such a decision. The applicants as already discussed simply pleaded indigence, the fact that the increase were 700% of current fees and the fact that the second respondent was state funded and had received an additional allocation from the supplementary budget with the result that the second respondent was sufficiently resourced to operate effectively without effecting a fees increase. These points may sound compelling but they are largely unsupported averments. I would therefore still dismiss the irrationality ground as not having been established on the balance of probabilities. It has not been established that the increased amount is not a fair amount required to run operations of the University. Table A attached to the founding affidavit simply shows percentage increases. The arguments is that they are too high. The issue however should be whether or not the increases represent a reasonable cost of running the faculties listed in the table.

The next ground advanced by the applicant was illegality in the decision reached. The applicant contended that the second respondent made an arbitrary decision to impose the fees increase without complying with the provisions of the University of Zimbabwe Act [*Chapter 25:16*]. The applicants averred that the decision on the setting of fees rested in a triad consisting of the Finance Committee, the Senate and the Council of the second respondent. The three have a complementary role to play in the process. In this regard the Act provides for the triad aforesaid and its functions as follows:

There is Council established under s 11 of the University Act. The provisions of subsection 1 provide that:

> "(1) Subject to its Act and any general direction as to policy given by the Minister, the government and executive authority of the University shall be vested in

(a)------(c)…… and
(d) the President of Students Union who shall be an *ex-officio* member and
(e)……..”

The applicants averred that their President Allan Chipoyi and therefore the first applicant as a student’s body was not party to the setting and approval of the new fees structure. The applicant contended that the other body concerned with the preparation of structures of income and expenditure was the Senate in terms of s 16(9) of the University Act. The subsection reads as follows:

“16 the Senate as the academic authority of the University shall have the following powers and duties-
(a)……. (f)……;
(g) to prepare estimates of expenditure requires to carry the academic work of the University are to submit them to Council
(h)……(n)……..”

Section 15(1) of the University Act reads as follows-

“(1) Subject to this Act, the Senate shall be the academic authority of the University and shall consist of-
(a) - (b)……..
(b) …. students elected annually by the Students Union;
Provided that such students shall not be entitled to attend deliberations of the Senate on matters which are considered by the Chairman of the Senate to be confidential.”

It is noted that it was not contended by either party that the process of preparing estimates of expenditure required to carry out the academic work of the University was adjudged to be a confidential matter for which the student representatives were excluded. In logic and common sense, it could not have been so because the burden to pay the net fees would fall on the students of the University of which the six students referred to in para (c) above would be party. The student’s interest and contribution would be invaluable in the process.

Section 19(2) of the University Act provides for the establishment of the Finance Committee which is appointed by Council. Its duties *inter alia* are to prepare draft estimates of income and expenditure for approval with or without amendments by Council. The estimates may be revised by Council in the course of the financial year to which they relate.

The applicants averred that the decision to effect a fee increase was made outside the Finance Committee, Senate and Council. They contended that the president of the first applicant albeit being a member of council was not involved in the decision to increase the fees. They contended further that the Senate where six students sit did not discuss or approve the fees increases.

The first and second respondents in response denied that the fee increments were illegal. They averred that the second respondent has a Council, Senate and various Committees set up in terms of the Act. They averred that there existed a Fees Revision Management Committee tasked to come up with a recommendation on the review of fees. They averred that the Committee deliberated on the issue with students being involved and that the students aired their views which were taken on board when the new fees structure was decided upon and recommended to the first respondent who after liasing with "chairpersons of Senate and Council and there not being any objections the proposed fees …." the proposals were forwarded to the fourth and third respondents who respectively recommended and approved the new fees structures.

The first and second respondents further averred as follows in para 30.2 of the opposing affidavit:-

> "30.2. Further, and in any event, it is not mandatory that full Senate and Council must meet to approve the fees before they are approved by the Ministry, Senate and Council can always rectify such decisions."

There are difficulties with the contention. Firstly, the first and second respondents did not plead the provision of the law which allow for the imposition of a new fees tariff without the approval of Council given its mandate and then calling upon the Council to rectify the decision later. Secondly, an even greater difficulty with the proposition is that the first and second respondents can always ratify the decisions. However, once the recommendations have been forwarded to the Ministry without Council and Senate approval and they are approved by the Minister, there would be no legal basis for ratification because the Minister's approval results in the proposals becoming an ordinance as happened in this case where ordinances 63 and 64 resulted from the Minister's approvals. It is also my view that because the functions of Council and Senate are laid out in the provisions of the law, ratification of acts already done must be provided for or located in the enactment itself. I was not directed to any provision in the relevant statutes of the

second respondent which provides for ratification of an ordinance made ex *post facto*. There is no substance in the contention of ratification which I find to be ingenious but is unfortunately devoid of legal basis.

Having determined that the settling of fees could not have been a confidential matter necessitating the exclusion of the six students, it is necessary to determine whether the paper trial or process of settling the fees was compliant with the provisions of the University Act. There is no elaborate procedure provided for in the University Act to govern how the process of fees revision must be carried out step by step.

What is beyond reproach however is that the administration bodies of the second respondent namely the Senate and Council and whose compositions include students representatives as discussed participate in deliberations to set up estimates of income and expenditure be it by them sitting or setting up special committees for the the purpose with however the final discussions being theirs. In the determination of the legitimacy or legality of the decisions reached, the applicants aver that there was no consultation and that the governing bodies did not themselves discuss the fees. The applicants averred that no discussion concerning fees could be made without discussion thereof in the Finance Committee, Senate or Council.

The first and second respondent admitted that the Council, Senate and "various other committees were set up in terms of the Act. They averred that as regards fees, a special committee called the "Fees Revision Management Committee which includes students exists and that its mandate is "to discuss and come up with the recommendation on the review of fees." The full response is set out in para 30.1 of the first and second respondents' affidavit and reads as follows:

> "**Ad paragraph 61 – 68**
>
> 30.1 It is denied that the fee increments are illegal. However, it is admitted that the University has the Council, Senate, and various other committees set up in terms of the Act. The fees Revision Management Committee is the special committee mandated to discuss and come up with the recommendation on the review of fees. The committee includes students. The committee met and deliberated on the review. I attach hereto the Minutes of the meeting as Annexure "E". The student representations therein were taken into account in arriving at the recommended fees. The fees recommended by the committee were referred to by the Vice Chancellor who liaised with the respective chairpersons of Senate and Council there not being any objections to the proposed fees. I, in my capacity as the Vice Chancellor, referred the proposal to the Ministry which considered and approved the proposal. This resulted in the fees Ordinances No. 63 and 64. The Ordinances are attached hereto as Annexures "F1" and "F2". Once the fees have been approved by the Ministry, it carries the

> force of law and must be given effect. There is therefore no illegality on my part or that of the University."

The first and second respondents attached minutes of the meeting allegedly held as annexure 'E". The first applicant was represented by the deponent to the first applicant's founding affidavit Mr Masiyiwa. The meeting held on 18 August 2022 was chaired by the second respondent's pro-vice chancellor, Academic, Professor Dyanda. This meeting was not denied by the applicants nor the accuracy of what is recorded therein. The purpose of the meeting was stated to be as set out in para 2 of the Minutes which reads as follows:

> "2. **Purpose of the Meeting**
> 2.1 The meeting was convened to propose fees revision for the Semester beginning 22 August to 9 December 2022.
> 2.2 The fees revision proposals would be sensitive to the need to sustain delivery of service by the institution at breakeven levels and affordability by the clients given the prevailing economic dynamics."

At the end of the meeting's deliberations, recommendations were made to have fees raised by 30% from the previous semester fees. The recommendation was couched as follows:

> "4. **Recommendations**
> 4.1 The meeting recommended that for tuition and ancillary fees, these be reviewed with a 30% increase on the USD denominated fees for the last semester. This would bridge the variance between the fees collected and expenditure during the last semester. This would result in the fees review proposal as follows……."

The minutes contain tables showing last semester's fees juxtaposed against the proposed reviewed fees for undergraduate and postgraduate learnership in the various disciplines offered by the second respondent. It is not necessary to itemize the figures suffice that the variances equate to the 30% of increase with fractions of figures rounded up to the nearest ten or dollar. The meeting discussed other items which are not directly relevant to this application. The minutes were signed by the chairperson on 24 August 2022.

There is a missing link which arises upon considering to whom the recommendation were to be directed to for a decision of their acceptance rejection or variation. In other words to whom was the committees responsible or reporting? The first and second respondents have not addressed the issue. They state as quoted in para 30.1 of the opposing affidavit that the recommendations were referred to the first respondent who in turn "liased with the respective chairpersons of Senate and Council there not being any objections to the proposed fees. I, in my capacity as the Vice

Chancellor, referred the proposal to the Ministry which considered and approved the proposal. It resulted in the fees ordinances number 63 and 64."

The first and second respondent went on to state that it was not mandatory for Council and Senate to meet and approve the fees. This is an issue I have touched on already. My reading of the University Act does not contain any provision to suggest that chairpersons of Senate and Council can lawfully make decisions for the bodies which they chair without the bodies as lawfully constituted making the decisions themselves which the chairperson can then present as the decisions of those bodies. Certainly, corporate governance does not support such manner of governance which may amount to a usurpation of corporate power and locating it in hands of the chairpersons to the exclusion of the bodies which they chair.

By consulting or liasing with the chairpersons as aforesaid, the first and second respondents tacitly accept that the Senate and Council needed to be involved. The first respondent did not aver that after consulting with the chairpersons, aforesaid he assumed that they had in turn called the Senate and Council to consider the recommendation. The first respondent who is part of the Council boldly stated that it was not necessary for Council and Senate to sit over fees a proposition which is strange given the provisions of the University Act which *inter-alia* in s 8 sets out in clear terms that the first respondent acts under the general control of Council. The issue of fixing estimates of income and expenditure are matters central to the operations of the second respondent and it would be strange if it is argued that the Senate and Council would simply rubber stamp or ratify the fixation of income generated as fees, *ex post facto*.

The first and second respondents did not set out any facts to persuade me to accept that Senate and Council participated in the decision making save that the first respondent consulted with chairpersons. Those chairpersons may well have done a round robin consultation before giving the nod. However this cannot be assumed. It can also not be assumed that the special committee was set at the instance of either Senate or Council and whether it had any mandate from these bodies. The issue is not simply that the students were represented in the special committee but it is one of regularity and legal validity of the process. The University Act is very clear that estimates of income and expenditure are a matter on which the Senate and Council exercise power. The third and fourth respondents did not say much on this in their opposing affidavit. They indeed could not have said much. They stated that the fees adjustment proposals were "reasonable and

rationale." However, this was a subsidiary issue. The issue on review would be the regularity and legality of the decision making process to increase the fees. The fourth respondent did not address the issue of the regularity of the process which ended with his approval. Upon a reading of his opposing affidavit, it is clear that he did not apply his mind to the issue of how the process of coming up with the fees schedule which he approved was carried out. If he did and it is hoped that he must have, then, despite the issue being topical or anchoring the review application, he was remiss in not addressing it in opposition. The allegations made in the application were that the process was flawed. The decision sought to be set aside was ultimately his since his approval resulted in the ordinances 63 and 64 under review. The fourth respondent only dealt with the reasonableness of the fees adjustment and stated that the fees were necessary to augment the Government subsidy which was not enough to sustain the operations of the second respondent. He also noted that there were programs available to assist students without resources such as the work for fees programme.

The third and fourth respondents in their failure to deal with the issue of the legality of the process of fixing the revised before the third respondent recommended and the fourth respondent approved the revised fees raised a point *in limine* which was ill advised. They averred that the applicants did not challenge the fourth respondent's power "to approve ordinances." They averred that the applicants were not seeking to set aside the decision of the third and fourth respondents to approve the ordinance. They startlingly averred that because the matter before the court was brought by way of court application, the applicants had to fall or rise on their founding affidavit. I have described the averment as startling because the third and fourth respondents having been joined to the proceedings needed to deal with the application as a whole. The draft order seeks an order that the fees increases effected and announced on 9 September 2022 be set aside. The fees were ultimately set by the ordinances 63 and 64 passed by the fourth respondent. The setting aside of the fees increases necessarily meant the impugning of the ordinances. The third and fourth respondents took the unfortunate position that because the power of the fourth respondent to pass an ordinance was not challenged then the power was of necessity regularly exercised. This cannot be so.

The power to pass the ordinances is not exercised in a vacuum. It is not a matter of just rubber stamping. The third and fourth respondents needed to have satisfied themselves that the

process of fixing the fees had been properly exercised even before addressing the issue of the reasonableness of the amount of the increase. It should have dawned on the third and fourth respondents that once the court finds that the first and second respondents acted irregularly in the process of fixing the fees increase which the first respondents forwarded to the third and fourth respondents who passed them into an ordinance then the approval would be illegal. In this respect the well-known maxim that an illegality begets nothing or begets an illegality comes into play. As stated by GARWE JA (as then he was) in the case of *Folly Cosmistic (Private) Limited and Anor* v *Shingirayi Taponwa N.O. and 5 Ors* SC 300/11 at p 9 of the cyclostyled judgement:

> "Having established that the court had no jurisdiction, the fact that the appellants did not apply for rescission of the default judgement as provided for in the Magistrates Court (Civil Rules) is clearly irrelevant. This is because in the words of *KORSAH JA in Muchakata* v *Netherburn Mine* 1996 (2) ZLR 153 (5) 157 B – C –
>
> > 'If the order was void *ab initio* it was void at all times and for all purposes. It does not matter when and by whom the issue of its validity is raised, nothing can depend on it. As LORD DENNING MR so equisitely put it in *Macfoy* v *United Africa Co Ltd* (1961) 3 All ER 1169 at 1171:
> >
> > > 'If an act is void then it is in law a nullity. It is not only bad but incurably bad…and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.'
>
> To the above remarks by KARWI JA that it does not matter when or by whom the issue of validity is raised, I would add that it matters not how the issue is raised or what procedure is adopted. If it is clear upon a consideration of the circumstances that an act is void, then everything predicated on that act would be equally void."

Taking consideration of the quoted authoritative dicta, the third and fourth respondents were offside in taking too simplistic a view of this important matter by merely alleging that because their power to pass ordinances was not challenged as with the ordinances themselves, there was nothing for them to respond to. It should true been clear to the 3rd and 4th respondents in that to the extent that the ordinances arose or were anchored upon an alleged irregular process, once that process was adjudged to be unlawful. The ordinances would fall away as a matter of law. There would be no need for a declaration of their invalidity to be pronounced or decreed.

In relation to whether the ordinances could stand once the process leading to their passage was shown to be irregular and thus unlawful, GARWE JA's remarks in the same case (*supra*) said at p 10 of the cyclostyled judgment are pertinent. He explained the dicta in the case of *Matanhire* v *BP Shell Marketing Services (Pvt) Ltd* 2005 (1) ZLR 140 (S). In that case the lower court had issued directions in a matter before it which were determined on appeal to have been incompetent. The view was then expressed that because there was no appeal against the judgement itself, such

judgement remained extant as it was not set aside. *In casu*, the third and fourth respondents argument is similar since they argue that the ordinances themselves and their power to make them was not challenged. To this end the Supreme Court, per GARWE JA stated:

> "In my view the court *a quo* was clearly incorrect in its understanding of the effect of the judgement of this court in the *Matanhise* case. In that case CHIDYAUSIKU CJ made it clear that once the court order granted by MAVANGIRA J was found to be patently wrong and irregular, such order was void and nothing could depend on it. Although CHIDYAUSIKU did not declare the order a nullity; that was the effect of his funding."

In the case of *Claudius Chenga* v *Virginia Chakadaya & 3 Ors* SC 7/2013, OMERJEE AJA, at p 7 quoted the dicta LORD DENNING in the *Macfoy* case (*supra*) at p 1172:

> "As was pointed out by LORD DENNING in *Macfoy* v *United* of an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for a court to set it aside. It is automatically null and void without more ado. Though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and in incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse." See *Garrat Trust* v *Creative Credit (Private) Ltd* SC 146/2021.

The act of passing an ordinance is therefore a process and not an event. The regularity of the whole process must be considered by the fourth respondent before he approves an ordinance. He chose to be coy or unrevealing on what steps he took to ensure that the draft ordinance forwarded to him for approval had been regularly reached. Nothing arises from a flawed process in circumstances where the end process depends on other acts or procedures to be followed.

I have already observed that whilst the first and second respondents aver that there is no set procedure for how fees increases must be dealt with, what is clear is that the governing bodies of the second respondent being the Senate and Council are concerned with the issue. The Unvesersity Act provides that, "Government and Executive authority" of the second respondent rests with Council. Even is one was to agree that the first respondent as "chief academic, administrative and disciplinary officer of the University with general responsibility for maintaining and promoting the efficiency, effectiveness and good order of the University" as provided for in s 8 (2) of the University Act, there is nothing to suggest that he can take the decision to raise set fees without reference to the Council and Senate. In any event if the raising of fees which is a process that involves income and expenditure estimates of the second respondent, can be said to be an executive discussion which can be exercised by the executive committee of Council in terms of s 14 of the University Act, this was not suggested to the court and in any event the consulting of

deans and chairpersons of the Senate and Council would not result in an executive committee of council decision as the composition of the same as set out in subs 3 of s 14 show that council did not reach any decision.

The first and second respondent averred that post the announcement of the new fees structure there were consultation involving students where payment options were agreed. Decisions were made to offer discounts for once off payments or increased early payments. It does not appear clear as to whose decision this was. But they meant that the second respondent would be acting outside the ordinance by providing for discounted fees when the maligned ordinances did not provide for that process. The fact that a meeting between the officials of the second responded and the first applicant's executive members was held on 12 September 2022 to discuss negative social media reports on the fees passed, would not validate an impugned fees set up process.

The other issues which the applicants raise of rights to education, to be heard and constitutional rights are in my view not relevant because a decision on the regularity or otherwise of the fees setting process settles the issues. The right to education is not an issue in dispute and needs no debate or a determination. That education is a constitutional right is a matter of course. That there was an abrogation of the right to be heard is not established because the applicants and students were represented and there was nothing in the minutes to suggest that the representative required to consult students further unless the argument is not the minutes or the meeting did not capture correctly the deliberations which went on. Again in view of the position I take that the matter principally turns on the regularity of the fees setting process, the issue of the correctness of minutes or the contentions of the first applicant that the decision reached was without the first applicants input or vote because he needed to consult students and report back become inconsequential.

I am persuaded that the ordinances 63 and 64 were passed consequent to an irregular process. In the University Act, an "ordinance" is in the interpretation section defined as:

> "Ordinance means an ordinance made by Council in terms of subsection 1 of section twenty seven."

The provisions of s 27(1) provide as follows:

> "(1) The council may, with the approval of the Minister and subject to this Act, make ordinances providing for:
> (a) …… (g) ……

(b) the accounts to be kept, the funds to be established and maintained and all matter relating to the regulation of the finances of the University.
(c) …… k ……."

The levying of fees is undoubtedly a matter that relates to the regulation of finances of the University. It is in fact council that passes the ordinances once the Minster approves the ordinance. In this case it was not shown that council in fact sought approval to pass the ordinances. The fees rise recommendations were not even placed before council. The process was flawed and incurably flawed. The fees increases cannot be left to stand.

The remaining issue pertains to costs. Costs are always in discretion of the court. The discretion must be exercised judiciously taking account of all relevant considerations. As stated by MUSHORE J in *Crief Investments (Pvt) Ltd & Anor* v *Grand Home Centre and 4 Ors* HH 12/18 at p 2 of the cyclostyled judgement:

> "The general rule is that costs follow the event, in other words, the successful party is usually awarded costs. The rationale for this principles is that the successful litigant should be indemnified from expenses which he/she incurred by reason of being unjustifiably compelled to either initiate or defend litigation. This rule should only be departed from when good grounds are shown to exist."

The learned judge then referred to he renowned authors *Hebstein and Van Winsen* in the Civil Practice of the High Court and the Supreme Court of South, 5 ed Vol. 2 p 954 where the following is stated:

> "The award of costs in a matter is wholly within the discretion of the Court but this is a judicial discretion and must be exercised on ground upon which a reasonable person could have come to the conclusion arrived at. The law contemplated that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case. The conduct of the parties and other circumstances which may have bearing upon the question of costs and then make such orders as to costs as would be fair and just between the parties……"

In their submission Counsels for the parties did not motivate the question of the award of costs beyond what they prayed for in their affidavits. The applicants prayed for a costs order in the event that their application succeeded. The first and second respondents prayed for the dismissal of the application with costs. The third and fourth respondents prayed for the dismissal of the application with costs.

In the absence of compelling reasons advanced by the respondents to persuade the court to depart from the general rule that costs generally follows the event, I find no basis to depart from the general rule. I however determine that the third and fourth respondents should not be saddled

with a costs order because they became parties by joinder at the instance of the court. The applicant cannot take advantage of the joinder to claim costs against them. A joinder by the court is intended to have the joined party provide necessary information to enable the court to determine the dispute before it. Such joined party may well be referred to as a court's witness. It is inequitable to order costs against such joined party.

As regards the first and second respondents, there is no reason to absolve them of payment of costs. The first respondent and by vicarious liability the second respondent messed up an otherwise easy but important process by not referring the issues of the fees rise to Council and Senate. The submission made that Council and Senate had no ordinance fell flat on its face in the light of the provisions of the University Act as quoted which are clear that it is Council which makes ordinances after approval is given by the Minister or fourth respondent. The ordinances were clearly passed unlawfully as discussed in the judgment.

The court recognizes and accepts that the second respondent has to maintain and improve on its standards as a top rated University in Zimbabwe. The need to revise fees in the face of the difficult economic times which the country is going through is a matter which cannot be avoided. The issue is not about the second respondent having been granted supplementary budgetary support by Government. The issue is the sustenance of the operations of the second respondent as a body corporate. The first respondent was expected to be guided by the University Act which are clear on what powers he has as well as the powers of the Council and Senate. It was quite astonishing that even the issue of payment of the increased fees was reduced to a tuck shop operation where discounts were given to students depending on the percentage of the total fees due if paid by a given date. Since the increased fees were denominated in United States dollars, one asks what then would become of the discounted shortfall. I would have saddled the first respondent to pay costs. I however took the view that throughout the process, the first respondent's motivation was not to further his own interests but those of the second respondent and its students who include applicants. It is still open to the first and second respondents to revisit the issue of fees revision and act in terms of the law. With the applicants and their peers being the beneficiaries of best education which the second respondent seeks to impart but is threatened by financial viability issues, a holistic approach done in terms of the provisions of the law will be of mutual benefit to the applicants and the second respondent.

In consequence of my finding that the process of fixation and approval of fees was flawed and legally untenable I must set aside the increases for irregularity in the process to fix them and consequently the passage of the ordinances 63 and 64 was a nullity. The following order is made:

IT IS ORDERED THAT:

1. The fees increases effected by the second respondent for undergraduate and post graduate programs as more fully set out in ordinances 63 and 64 of the University of Zimbabwe are set aside.
2. The issue of fixing and effecting fees increases is referred back to the first, second, third and fourth respondents to be dealt with in terms of the University Act and the law.
3. The second respondents to pay the costs of the application save for the costs incurred on account of the involvement of the third and fourth respondents upon their joinder by the court.

Biti Law, applicant's legal practitioners
Chihambakwe Mutizwa & Partners, first and second respondents' legal practitioners
Civil Division, third and fourth respondents' legal practitioners