

IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C OF A (CIV) 8/08

In the matter between:

MATHISETSO BULANE

APPELLANT

And

LEROTHOLI POLYTECHNIC

RESPONDENT

**CORAM: MELUNSKY, JA
 HOWIE, AJA
 MOILOA, AJA**

**Heard : 9 October 2008
Delivered : 17 October 2008**

JUDGMENT

SUMMARY

Education – student failing one subject in Diploma course at technical institution – regulations governing minimum marks for passing commercial Diploma courses – regulations require students to pass examination but also to pass ‘Continuous Assessment’.

Interpretation of regulations – Continuous Assessment to consist of minimum of three tests – four tests written – whether student entitled to consideration of three best marks – whether instructor free to decide which scores to take into account – whether assessment limited to three scores or all four scores.

Held – all four scores had to be considered. On that basis the student still failed.

HOWIE AJA

[1] The appellant, a student for the Diploma in Business Studies in her final year at the respondent institution, was held to have failed the course in Operations Management in the academic year 2006 – 2007. She was required to repeat the course the following year. Aggrieved, she applied in the High Court for an order declaring unlawful the respondent's decision that she repeat the course. She further sought an order declaring that she had passed the course and was entitled to the award of the Diploma.

[2] The High Court (Monpathi J) held that the relevant decisions according to which the appellant had failed and was required to repeat her course were made in the exercise of a discretion which educational institutions have as regards course structuring and the assessment of a student's performance. It was not for the court to intrude in that sphere. The application was dismissed.

[3] The respondent annually publishes a comprehensive guide for students entitled 'Student Handbook'. It is common cause that it is an authoritative document and that the regulations it contains are binding on the respondent and students. The decision of this matter depends on a proper interpretation of one of those regulations under the heading:

'REGULATIONS FOR THE ASSESSMENT OF THE COMMERCIAL DIPLOMA COURSES'.

[4] To pass a year a student must achieve a combined mark of 50% in each subject. A combined mark means a mark based on a 60:40 weighting between the final examination mark in each subject and the mark for Continuous Assessment in that subject, respectively. (Regulation 22.5.3 and 22.5.4).

[5] Continuous Assessment is a process applied during the year (or semester). That topic is dealt with in regulation 22.3. It is appropriate to quote the relevant provisions of the subregulation:

‘22.3.1 The minimum number of tests required per subject will be three (3).

22.3.2 The minimum pass mark for an assessment will be 50% in each subject.

- 22.3.3 The overall average mark for all assessments in each subject must be a minimum of 50% by the end of each term or date predetermined by the School.
- 22.3.4 Except due to malpractice, if the overall average mark for all assessments in each subject is below 50% (but above 40%) a further assessment (the type of which to be determined by the School) will be set in order that the student may improve the mark up to the recommended minimum. If at the second attempt the minimum mark is not achieved then the higher mark of the two attempts will be carried forward.
- 22.3.5 In a situation where a student fails Continuous Assessment in any subject, he/she may be allowed to write the examination. A score from such an examination will not make a student pass the subject, but can improve the transcript.
- 22.3.6 The minimum overall average mark for Continuous Assessment at the end of the year in any one subject must be 50% in order to pass’.

[6] In terms of regulation 22.2.7 a student guilty of malpractice in an ‘in-course assessment’ will be awarded zero.

[7] In the academic year in question the course instructor (who deposed to the opposing affidavit) set five pieces of work to constitute the year's continuous assessment in Operations Management. First, there was what she calls an 'assignment'. Because most of the students copied each other's work she decided to ignore everyone's marks. Then followed, at intervals, three tests. Finally there was a group project.

[8] The appellant was guilty of malpractice in the first test and scored zero. She accepts that as her due. In the second test she scored 32%, in the third 70% and in the group project 69%.

[9] The course instructor, in determining the appellant's Continuous Assessment mark, considered she was obliged to work on only three scores and that it was in her discretion which scores she chose. The appellant accepts that only three scores are to be taken into account but contends that she was entitled to have her three best marks taken into account.

[10] On the course instructor's approach the relevant scores were 0, 70 and 69, the average of which, being below 50%, resulted in the appellant's failing Continuous Assessment.

[11] In the light of regulation 22.3.5 she was allowed to write the final examination in Operations Management. She said in her founding affidavit that in the examination she 'did well'. Before us it was alleged by her counsel, but not admitted by counsel for the respondent, that her examination mark was 65%. Be that all as it may, the subregulation clearly says that passing the examination will not mean passing the subject. Therefore the focus here has to be on the appellant's marks in respect of Continuous Assessment.

[12] On the appellant's contention her average based on her three best marks (32%, 70%, and 69%) was over 50% and she consequently achieved the minimum required by regulation 22.3.6.

[13] I must say that I disagree with the respective approaches of both parties. There is nothing in regulation 22.3 which says, or even implies, that where more than three tests are written the student is entitled to

consideration of the three best scores. (I should add - tests or pieces of work equivalent to tests, such as the group project, which both parties accept fell to be considered and, for that matter, the first assignment which would, I infer, have been considered had there not been large scale malpractice). Nor is there any implied limitation which confines the assessment to three scores at all, whether the three best or any three.

[14] Each student has a right to education. The institution's obligation, which is the converse of that right, is to apply reasonable measures to assess the individual student's ability and progress. If the instructor in a particular subject considers that it is, in fulfilment of that obligation, necessary or appropriate to set more than three tests then all the scores should be considered. The only qualification I envisage is where the instructor sets a further test to compensate for an earlier one which the instructor recognizes was unfairly difficult or which for some other adequate reason warrants its being ignored (as in the case of the first assignment). That brings me to the approach which the instructor in this case explained in the opposing affidavit.

[15] The instructor's affidavit contains the following statements –

‘ . . . I only considered if most students exceeded the average mark in each piece of work and I also considered the general overall performance of students. This kind of exercise is not individualized in the sense that if I decide to use a particular piece of work I do not select the best marks of a student from any piece of work. As long as the overall class performance and the average mark are good I use that piece of work for assessment purpose.

...

(The appellant’s) suggested approach . . . would lead to absurdity and be irrational. I must add that issues relating to which piece of work is to be used for continuous assessment are in our entire discretion as teachers as long as we act rationally.

...

The . . . test where she obtained a zero mark was used because I used the overall performance of the whole body of students and the average mark of the class was fairly good.

...

I do not have to look for individual marks and start picking the best out of the five pieces of work for each student. This would

be irrational and unreasonable and allow a sense of bias. Of course I admit that what I did is not without some weaknesses’.

[16] At the outset it must be emphasised that in the sphere of administrative law it is wrong to speak of an ‘entire discretion’. This was emphasized by the learned Judge *a quo* with reference to *Adelaja Otubanjo v Director of Immigration* C of A (Civ) 35/2005 (unreported, delivered on 11 April 2006) at p.9. (And see, also, *Students Representative Council of the University of Botswana vs The University of Botswana*, Appeal no. CAPP 1/89 (unreported)). The instructor in effect afforded recognition to this principle by referring, almost in the same breath, to the need for action that is rational. Indeed so. If the exercise of a discretion were irrational it could well be reviewable in law.

[17] As to the suggestion that a student is entitled to selection, out of more than three scores, of only the best three, the instructor’s criticism is, in my view, supportable. If more than three tests (to use a term of convenience) are written, and assuming that none should be ignored it would be misleading for all concerned, and unduly favourable to the student, to take only the student’s three best scores. If a piece of work constitutes a fair and reasonable test of ability and progress and the student concerned fares

poorly, that result is just as much a necessary element of a proper assessment of the student's worth as the student's better marks.

[18] Having said that, I consider the instructor's approach to be flawed where she focuses on the general overall class performance at the expense of the individual. The institution's obligation is not to implement a group assessment but an individual assessment of each student. The instructor's approach in this case might tend to invite the question whether she was concerned about how the overall class performance might reflect on her as its instructor. She need have had no fear in that regard if the students were fairly assessed on their own individual performances and all test scores were considered. There is no disadvantage in knowing the truth and an innately poor class will probably achieve poor marks however much the instructor perseveres.

[19] The approach that every test score must be considered is not only consonant with the terms of regulation 22.3 but frees the instructor of the problem of which score to take into account and avoids the misleading selection of only the best.

[20] It follows that on a proper interpretation of its text, read in context, regulation 22.3 requires all tests to be considered in determining a student's Continuous Assessment overall average in a particular subject. At the risk of repetition I emphasize that it would be fair and reasonable to ignore the results of a particular test provided adequate reason exists to disregard that test and provided the scores of the whole class in that test are disregarded.

[21] Applying this interpretation, the appellant's scores were 0, 32, 70 and 69. That is a total of 171 the average of which is just under 43%. She therefore failed Continuous Assessment and the application fell to be dismissed but for reasons different from those of the court *a quo*.

[22] The appellant applied to file additional grounds of appeal. The initial grounds were wide enough, in my view, to encompass what the additional grounds contend for. In any event the appellant was allowed to argue the case on the basis that the additional grounds were filed from the start. The costs of the application must be paid by the appellant.

[23] The Court's order is as follows:

1. The appeal is dismissed with costs.
2. The appellant is to pay the costs of the application to file additional grounds of appeal.

C. T. HOWIE
ACTING JUSTICE OF APPEAL

I agree: **L. S. MELUNSKY**
JUSTICE OF APPEAL

I agree: **T. J. MOILOA**
ACTING JUSTICE OF APPEAL

For the Appellant : Adv. L. A. Mofilikoane
For the Respondent : Adv. Q. Letsika