Adda K Angula & Others v The Board for Legal Education & Others, Case No. A 348/2009

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Twenty-four Candidate Legal Practitioners went to the High Court on a matter of urgency on Monday, 12 October 2009. The issue was a notice they had received the day before the students were due to write the Final Legal Practitioners' Qualifying Examinations, barring them from writing examination in those subjects in which they had not duly performed, that is, attended at least 80% of the lectures offered.

On 21 September 2009, the students had been requested to give reasons why they had not duly performed in the specified courses as required by the Regulation 14(4) of the Legal Practitioners Act.[1] The wording of the written request was important:[2]

> It has come to the Board for Legal Education's attention that you have failed to comply with Regulation 14(4) of the Candidate's Legal Practioner's [sic] Regulation and thereby obtaining less than 80% class attendance for each of the following subjects: …
> In the light of the above and in terms of Subregulation (b) the Board hereby invites you to make written submissions indicating your reasons for non-compliance.

The court concluded that the Board had made their decision based on the fact that specified students had not attended classes if they had not signed the attendance register.

This conclusion was supported by the Board's Responding Affidavit when they explained the register's role:[3]

> The Board accepted that the registers were properly kept and that it [sic] correctly reflected class attendance.

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[1] No. 15 of 1995.

[2] (ibid.:6).

[3] (ibid.:30).

The court also found that the attendance register had been given a value that it would not have had if it had been legally mandated – which was not the case.

In other words, the results of facts in the attendance registers could not be challenged.

Moving to the submissions by the students, the court divided the applicants into three groups:

- Those who had acknowledged that they had not attended, but without declaring any factual dispute
- Those who had used phrases such as –
  - "I submit I was not there"
  - "I cannot remember not having attended", or
  - "I have no record of not having attended",

  indicating that they may have attended the lectures in question, but had not declared a factual dispute, and
- Those who had declared a factual dispute, e.g. by stating "I was there", and then giving reasons why they had disputed the said register.

Relying on De Ville[4] and *Bel Porto School Governing Body v Premier Western Cape*,[5] the court pointed out that, if administrative action were inherently unreasonable and unfair, the court was entitled to grant relief, even if some applicants had not suffered prejudice. In this specific case, the Board's actions were so intrinsically unfair and unreasonable that they could not be condoned, even if their actions were not brought about by design but by circumstances.

The students were only informed of the Board's decision on Saturday, 10 October 2009, and they were not given a list of the subjects from which they had been barred from writing; nor were reasons given for the Board's decision. To make matters worse, the information given to the students was incorrect. They were informed that they could not write any of their subjects if they were in attendance default in one or more. On 11 October 2009, the Sunday, the students were again contacted and informed that the information of the previous day had been incorrect, and that they could in fact write all the subjects for which they had qualified.

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[4] De Ville, J. 2003. *Judicial review of administrative action in South Africa*. Durban: LexisNexis Butterworths, p 445.

[5] SALR, 2002, p 265 ff CC.

However, as before, the students were not given a list of subjects from which they had been barred and, again, no reasons were given for the decision taken.

The court also took cognisance of the fact that the classes in question had ended in June 2009. Consequently, there had been no reason whatsoever for the long delay until mid-September, which was when the students had been requested to give reasons for their non-compliance with the Regulation.

Consequently, the court granted the students' application. The court did not make a ruling on the costs apart from three students initially having been informed that they could not write some subjects, but later being informed that they qualified to write all the subjects, and whose costs therefore had to be paid by the Board.

The judgment of Acting Judge Heathcote was, as he himself acknowledged, somewhat contradictory. To say, on the one hand, that those students who had acknowledged their non-compliance had not suffered any prejudice and, on the other, to grant them relief seemed to take the expectations of Article 18[6] of the Namibian Constitution too far.

In the light of Article 18, can one really argue that, when an administrative body acts extremely unfairly or unreasonably, it creates rights for litigants who did not suffer prejudice? Or is this relief only broad because it was an urgent application? Alternatively, is the court applying a general constitutional principle here? In the minority judgment of the *Frank* case,[7] then Chief Justice Strydom followed a similar line of thinking. Without going into the merits of the appeal, Justice Strydom looked at the defects in the Immigration Board's appeal process, and concluded that the appeal was to be set aside. The court also made the following comment:[8]

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[6] Article 18 reads as follows:
Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

[7] *The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank & Another*, Case No SA 8/99, minority judgment of Judge Strydom, p 23.

[8] (ibid.).

> Furthermore, it seems to me that it is implicit in the provisions of Article 18 of the Constitution that an administrative organ exercising a discretion is obliged to give reasons for its decision. There can be little hope for transparency if an administrative organ is allowed to keep the reasons for its decision secret. The Article requires administrative bodies and officials to act fairly and reasonably. Whether these requirements were complied with can, more often than not, only be determined once reasons have been provided. This also bears relation to the specific right accorded by Article 18 to persons to seek redress before a competent Court or Tribunal where they are aggrieved by the exercise of such acts or decisions. Article 18 is part of the Constitution's Chapter on fundamental rights and freedoms and should be interpreted "… broadly, liberally and purposively…" to give to the [Article] a construction which is "… most beneficial to the widest possible amplitude". (*Government of the Republic of Namibia v Cultura 2000*, 1993 NR 328 at 340 B–D.) There is therefore no basis to interpret the Article in such a way that those who want to redress administrative unfairness and unreasonableness should start off on an unfair basis because the administrative organ refuses to divulge reasons for its decision. Where there is a legitimate reason for refusing, such as State security, that option would still be open.

But Justice Strydom's judgment was not acceptable to the Supreme Court. In the majority judgment, Judge O'Linn took a different approach:[9]

> It should be noted however, that such reasons, if not given prior to an application to a Court for a review of the administrative decision, must at least be given in the course of a review application.

For the present, the legal fraternity will have to wait for the review judgment to clear the issue.

An even more disturbing issue, while only marginally considered in the judgment, is the prolonged process to obtain justice in Namibia. The court addressed the issue of balance of convenience raised by counsel for the Board. The latter counsel also mentioned that the students, in obtaining judgment against the Board, might be worse off than if they had lost. While all the students were granted permission to write their examinations in all subjects, they might end up spending another year in litigation. A trial date might only be available in the middle of 2010.

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[9] See the reported version of *Chairperson of the Immigration Selection Board v Erna Elizabeth Frank & Another* 2001 NR 107 NS, on p 109.