IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE (HUMAN RIGHTS DIVISION) HELD IN ACCRA ON THURSDAY, THE 29TH DAY OF JANUARY, 2015, BEFORE HIS LORDSHIP, JUSTICE KOFI ESSEL MENSAH, HIGH COURT JUDGE.

SUIT NO. HRCM 353/12

JESSE CALEB BROWN & 651 ORS. - APPLICANTS

VRS.

1. METHODIST UNIVERSITY COLLEGE
2. NATIONAL ACCREDITATION BOARD
3. MINISTRY OF EDUCATION
4. ATTORNEY GENERAL

- RESPONDENTS

JUDGEMENT

The applicants commenced this action against the respondents to enforce their fundamental human rights to education as guaranteed by article 25(1) of the 1992 Constitution and other international covenants, i.e. article 26 of the Universal Declaration of Human Rights and articles 13 and 14 of the International Covenant of Economic, Social and Cultural Rights among others.

The background history of the case is that, the 2nd respondent, a regulatory body set up by an Act of Parliament to regulate the activities of tertiary institutions, both public and private in the Country, by a letter dated 28th May, 2012, which is exhibited as exhibit 19, requested the 1st respondent institution to withdraw close to 1,500 students on the grounds that their minimum entry requirement, by which they sought admission and were admitted into 1st respondent's institution did not meet the national approved entry minimum qualification. For some, it was alleged that the equivalencies of their certificates on the basis of which they gained admission into 1st respondent's institution were not established and certified by 2nd respondent as being appropriate for admission into tertiary institution.

By the tone of 2nd respondent's letter (exhibit 19), 1st respondent had a choice to either withdraw all the affected students from its institution or have its accreditation withdrawn.

1st respondent's was also commanded by the same said letter (exhibit 19), to cease advertising for enrolment and the admission of fresh students until the directive was complied with and evidence of the compliance communicated to 2nd respondent.

A prudent investor who has invested so heavily in establishing a university would not want his investment to go waste, as a result, 1st respondent was compelled to withdraw the affected students as demanded by 2nd respondent.

The affected students comprise those who had been admitted into 1st respondent institution on the basis of their WASSCE/SSSCE results/certificates, holders of varied certificates like HND, DBS, RSA stages II and III, Post-Secondary Teacher Training Certificates, Diplomas and Professional Certificates from recognised professional bodies who are classified as "other Applicants" and mature students.

The case against the mature students was dropped when the adverse report made against them was subsequently found to be untenable. The other category of students were withdrawn from 1st respondent university.

Dissatisfied and aggrieved by their expulsion from the school, the applicants filed the instant suit to challenge the lawfulness of their expulsion and the decision of 2nd respondent to demand their expulsion.

From the perspective of the applicants, at all materials times prior to their expulsion, there was a valid and binding contract between 1st respondent on the one hand and they the applicants on the other hand.

It is the case of the applicants that they were induced by the publications put up by 1st respondent in the daily graphic newspaper advertising for suitably qualified applicants to apply for enrolment, to apply to be considered for admission in 1st respondent institution.

For the avoidance of doubt, the entry requirements advertised, among others, were as follows:

"WASSCE/SSSCE CERTIFICATES HOLDERS

(a) Applicant must have:

(i) A pass in the Core English and Core Mathematics in addition to a pass in one (1) of the following other core subjects: Integrated Science, Social Studies/Life Skills.

(ii) Passes in any three (3) elective subjects. The aggregate score for the core and elective subjects must not be more than twenty-four (24).

(b) Please note that a pass in elective mathematics is also required of all Applicants to the BSC Mathematics and Mathematics Statistics and BSC Economics Programmes.

(c) Applicants to the English Studies Programmes are also required to have a pass in Literature in English."

The WAEC equivalent of the WASSCE/SSSCE grading system has been adopted.

This is shown below:

WASSCE	SSSCE	EQUIVALENCE
A1	A	1
B2	B	2
B3	C	3
C4/C5/C6	D	4
D7 & E8	E	5
F9	F	Fail

In the same publication were also listed under the heading "Other Applicants. Those with the following qualifications are also acceptable.

(a) HND
(b) DBS or Diploma from any recognized Institution
(c) RSA Stage II & III
(d) Post-Secondary Teacher Training Certificate from a recognized Institution
(e) Diplomas from recognized Universities
(f) Professional Certificates from recognized professional bodies".

See exhibits 3 series.

It is also the case of the applicants that, having satisfied all the entry requirements; and having been admitted into the institution and after having paid school fees for a whole year and beyond, it lies ill in the mouth of the respondents to expel them from the university.

The applicants also contend that the withdrawal exercise orchestrated by 2nd respondent and implemented by 1st respondent was done in breach of the audi alteram partem rule since they were not given a hearing before their expulsion.

From the standpoint of 2nd respondent, it had to carry out the withdrawal exercise when it observed per its audit report that 1st respondent had admitted students without regard to its existing directives contained in a letter dated 8th November, 2010 (exhibit 6).

It is not in doubt, that 2nd respondent has a statutory duty to ensure that all tertiary institutions, the 1st respondent inclusive comply with its directives especially in the area of the maintenance of standards.

To correct distortions in the application of the minimum entry requirements, 2nd respondent by exhibit 6 sought to streamline the minimum entry requirements and came

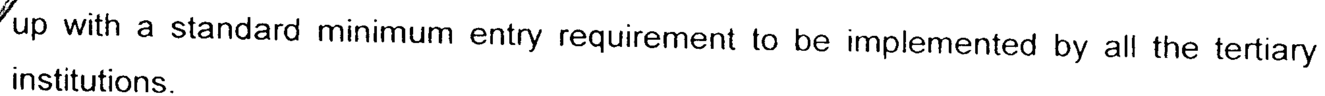

up with a standard minimum entry requirement to be implemented by all the tertiary institutions.

Exhibit 6 titled "NATIONAL MINIMUM CRITERIA FOR ADMISSION INTO TERTIARY EDUCATION INSTITUTION" among others states as follows:

> "... Therefore to ensure fairness, avoid ambiguity in the admission process, and to cater for the interest of the majority of candidates, council recommends that the SSCE and the WASSCE results should be treated separately for admission purpose, and that the national requirements for admission into tertiary education institutions should read as follows:
>
> > FOR SSCE CANDIDATES: Passes (A – D) in six (6) subjects comprising three (3) core subjects, including English and Mathematics and three (3) elective subjects.
> >
> > FOR WASSCE CANDIDATES: Credit Passes ($A^1 - C^6$) in six (6) subjects comprising three (3) core subjects, including English and Mathematics and three (3) elective subjects.
> >
> > Candidates with a combination of the two grading system should be treated on a case by case basis."

Plainly, exhibit 6 was authored to satisfy the statutory obligation cast on 2nd respondent by section 2(2) (2) (a) and (b) of the National Accreditation Board Act, 2007 (Act 744).

The section provides:

> "Section 2(1) The Board is responsible for the accreditation of both public and private institutions as regards the contents and standards of their programmes,

(2) Without limiting subsection (1), the Board shall:

(a) determine the programmes and requirements for the proper operation of an institution and the maintenance of acceptable levels of academic or professional standards in the institution in consultation with that institution;

(b) determine the equivalencies of diplomas, certificates and other qualifications awarded by institutions in the country or elsewhere."

By exhibit 6, grades D7 and E8 were not to be considered as passes for the purposes of admissions into tertiary institutions.

It seems to me, that if there were doubts as to how to compute the minimum entry requirement prior to 8th November, 2010, exhibit 6 removed those doubts. Thus applicants or students with grades D7 and E8 did not become eligible for university admission, notwithstanding that their total aggregate fell within aggregate 24 which hitherto was the case.

1st respondent flatly denied receipt of exhibit 6, and thus rebuffed a suggestion that it did admit students contrary to the standards set by the said exhibit. Unfortunately, no scintilla of evidence was adduced by 2nd respondent to show that exhibit 6 was served on 1st respondent.

It is surprising that inspite of the alleged service of exhibit 6 on all the tertiary institutions, almost all the private universities were found not be have complied with the directive. Consequently, students whose entry requirements fell below the required standards, as per exhibit 6, were asked to be withdrawn.

On its part, 1st respondent denies any wrong doing and contents that it admitted the affected students in accordance with the minimum entry requirement approved by 2nd respondent.

Evidence of 2nd respondent's approval of the minimum entry requirements submitted to it by 1st respondent can be found in exhibits 1, 1A and 1B which were submitted to 2nd respondent for accreditation and re-accreditation. It is indeed not in dispute that the programs together with the entry requirements for 2011/2012 academic year advertised by 1st respondent in the daily graphic newspapers had been approved by 2nd respondent before the students were admitted.

Throughout the trial, 1st respondent demonstrated that since its inception in the year 2000, it had pursuant to its accreditation and re-accreditation, admitted applicants with grades D7 and E8 whose total aggregate score fell within aggregate 24; and applicants with other qualifications to the knowledge of the 2nd respondent.

At all material times, 1st respondent had treated grades D7 and E8 as passes in accordance with the West African Examination Council's (WAEC) grading system which grading system it had consistently advertised in the national newspapers in the full view of the 2nd respondent.

The process of accreditation and re-accreditation is quite rigorous but fair and transparent. During the process, 2nd respondent would insist that the right thing is done. Nothing is left to chance. Accordingly, 2nd respondent would demand for clarification on issues, and call for corrections, changes and amendments to be made on any matter it considers appropriate.

Once it is approved, the accreditation document is deemed to contain information which is true, accurate, certain and unambiguous. Where therefore, the 2nd respondent through omission or inadvertence leaves any set of facts to be inferred from the accreditation document and the same is acted upon by third parties without timeous objection by 2nd respondent, it cannot subsequently say that it did not cause those facts to exist.

I find from the evidence adduced that at no point in time, since 1st respondent was accredited, did the 2nd respondent make it known and insisted that grades D7 and E8

were not passes in its estimation. Indeed no evidence was adduced by 2nd respondent to suggest even faintly that it did not consider grades D7 and E8 as passes

It is also the case that, in the accreditation documents, 1st respondent had always stated that applicants with HND, Diplomas, RSA II and III etc. would be considered for admission. Like it would always do, if the 2nd respondent was doubtful about anything, it would have called for clarification, corrections, changes and amendments to be made.

As it were, 1st respondent, acting pursuant to the mandate given to it in the accreditation document, admitted students with the clear understanding that the entry requirements of the applicants met the standards approved by the 2nd respondent.

Acting in accordance with existing practices, in relation to the computation of the minimum entry requirement, the 1st respondent admitted the applicants into 1st respondent university.

Now, it is being alleged by the 2nd respondent that exhibit 6 had altered the previous status quo and had ushered in new standards.

It is important to discuss the legal effect of exhibit 6, but before I do so, I wish to reiterate that it is doubtful if exhibit 6 was ever served on the 1st respondent at all.

It is indisputable that at all times during the period exhibit 6 was supposedly in force, the 2nd respondent saw the advertisement put up by 1st respondent. It saw that grades D7 and E8 have been advertised as being pass marks for admission. 2nd respondent also saw the advertisement relative to the holders of other certificates and did nothing about the advertisements.

By its silence, 2nd respondent admitted *sub silentio* that, the matters disclosed in the advertisement were true and accurate.

Certainly, 2nd respondent cannot approbate and reprobate. It cannot induce the 1st respondent and the public at large to believe in and act upon a certain set of facts and

subsequently alter its stance. On this score, the conduct of the 2nd respondent is caught by section 26 of the Evidence Act 1975, NRCD 323. The section provides:

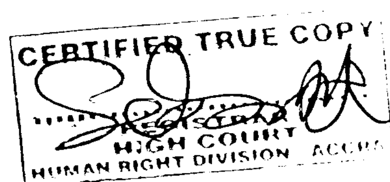
> "Except as otherwise provided by law including a rule of equity, when a party has, by his own statement, act or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and act upon such belief, the truth of that thing shall be conclusively presumed against that party or his successors in interest in any proceedings between that party or his successor in interest and such relying person or his successors in interest."

It beats my imagination why the 2nd respondent stood by and did nothing about the advertisement. Why did the 2nd respondent fail to call 1st respondent to order if it felt that 1st respondent was going wayward? The 2nd respondent had a duty to speak and to correct the wrong impression being put up by the 1st respondent if it thought that 1st respondent was doing the wrong thing.

Regrettably, 2nd respondent stood idly by and watched all these happen right under its nose and did not raise a finger in protest.

In these circumstances, equity will be too reluctant to aid 2nd respondent to denounce or disclaim that which it had consciously, deliberately and impliedly announced, caused to be announced or done.

It is my judgment that 2nd respondent is estopped by acquiescence from disputing the fact that it did not approve the entry requirements advertised by 1st respondent. I dare say that, if any person or body of persons did encourage the students to act upon the advertisement put up by 1st respondent, it must be the 2nd respondent because the students or applicants were convinced beyond doubt that the matters put up in the advertisement were true and accurate and bore no mark of ambiguity or illegality as the same had received the blessings of 2nd respondent as per the accreditation document.



I shall at this juncture examine the administrative fiat issued by 2nd respondent on 8th November, 2010 (exhibit 6) vis a vis the requirements imposed on 2nd respondent by law, that is the Tertiary Institutions (Establishment and Accreditation) Regulations, 2010 L.I. 1984.

L. I. 1984 came into force on 24th February, 2011; and regulation 25(1) and (2) (a) provides that:

> "25(1) The Board shall prepare and publish in the Gazette standards to govern the performance, operation and general conduct of institutions authorized to operate under these Regulations.
>
> (2) Without limiting the scope of sub-regulation (1), institutional standards shall, in particular, indicate for each category or kind of institution.
>
> (a) the minimum entry requirements for admission to any certificate, diploma or degree programme being or to be offered by the institution."

The duty imposed on the 2nd respondent by regulation 25(1) and (2)(a) of L. I. 1984 is legislative. By the said regulation, 2nd respondent was required to promulgate the minimum entry requirements.

As at 28th May, 2012, when 2nd respondent wrote to demand for the withdrawal of the applicants and others, L. I. 1984 was in force, yet it chose to rely on an administrative fiat (exhibit 6) which it had no legal mandate to pass.

In this connection, I hold that exhibit 6, upon which 2nd respondent sought to rely was of no consequence because it was issued without jurisdiction. Exhibit 6 is therefore not a legitimate fiat, which legally speaking could compel obedience. The failure to adhere to the directives contained in exhibit 6 cannot therefore attract sanctions. In short, exhibit 6 is a *brutum fulmen.*

The decision of 2nd respondent to have the applicants withdrawn when it had failed to act within the powers conferred upon it by L. I. 1984 raises a serious legal and ethical issues.

The directive to compel the withdrawal of the applicants and others was unlawful and illegitimate. This brings to mind the principle of legality. As Ngcobo CJ said in **ALBUT v CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION 2010** (3) S. A. 293 (cc) paragraph 49, "it has now become axiomatic that the doctrine or principle of legality is an aspect of the rule of law itself which governs the exercise of all public power, as opposed to the narrow realm of administrative action only. The fundamental idea expressed by the doctrine is that the exercise of public power is only legitimate when lawful. (see **FEDSURE LIFE ASSURANCE LTD. v GREATER JOHANNES TRANSITIONAL METROPLITAN COUNCIL** [1998] ZACC 17; 1999 (1) S. A. 374 (cc) paragraph 56). By way of example, it was held in FEDSURE, on the basis of the legality principle that a body exercising public power has to act within the powers lawfully conferred on it".

Acting within the powers lawfully conferred on a public body means doing exactly and precisely what the law requires the public body to do. In this case, 2nd respondent was required by the empowering legislation, L. I. 1984, to publish and gazette standards including the minimum entry requirements for admission into tertiary institutions. It was not required to issue circulars or administrative fiat.

The requirement of publication was intended to serve notice to the whole world of the standards approved by 2nd respondent; and the requirement to gazette the standards is to legitimize the standards.

I am of the view, that until the requisite standards are published and gazetted in accordance with regulation 25 of L. I. 1984, the standards made pursuant to the repealed National Accreditation Board Law, 1993 (P.N.D.L. 317) must continue to be in force by reason of section 27 of Act 744, which saved regulations, notices, orders and directions or any act lawfully made or done under the repealed enactment.

By the clear language of Section 27(2) of Act 744, these lawful acts are deemed to have been made or done under Act 744. Thus the pre-existing status quo cannot be altered by any means except in accordance with regulation 25 of L. I. 1984.

At the time the 2nd respondent sought to implement the decision contained in exhibit 6, it had not in accordance with regulation 25(1) and (2)(a) published and gazetted any standards including the minimum entry requirements. What was legitimately in force was the standards approved or made under the repealed National Accreditation Board Law, 1993 (P.N.D.C.L. 37).

It is clear therefore that the purported implementation and enforcement of the directives contained in exhibit 6 lacks the requisite legal justification.

By its conduct, 2nd respondent failed or refused to act in accordance with the dictates of Act 744 and thus veered off the route of legitimacy and landed into a ditch of illegitimacy.

Exhibit 6, spewed out unlawful and illegitimate orders and directives. Whatever 2nd respondent purported to do pursuant to exhibit 6 is equally illegitimate, null and void and of no effect. 2nd respondent completely engaged in an unlawful act. It decided to use sheer power rather than seeking authority under the law. The court under these circumstances, cannot lend its aid to the 2nd respondent and endorse its unlawful conduct.

In the South African case of **COMMISSIONER OF CUSTOMS AND EXCISE v CONTAINER LOGISTICS (PTY) LTD; COMMISSIONER OF CUSTOMS AND EXCISE v RENNIES GROUP LTD** t/a RENFREIGHT 1999 (3) SA 77 (SCA), it was said:

> "No doubt administrative action which is not in accordance with the behest of the empowering legislation is unlawful and therefore unconstitutional ..."

The principle of legality also requires that, the exercise of public power should not be arbitrary or irrational. See **Pharmaceutical Manufacturers Association of South Africa and Another; In re Ex-Parte President of South Africa and Others** [2000] ZACC 1; 2000 (2) SA 674.

Consistent with this principle, articles 23 and 296(a) and (b) of the 1992 Constitution provides that:

> "Article 23: Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law..."
>
> Article 296: Where in this Constitution or in any other law discretionary power is vested in any person or authority:-
>
> (a) that discretionary power shall be deemed to imply a duty to be fair and candid
>
> (b) the exercise of the discretionary power shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with due process of law."

The duty to comply with the requirements imposed by law and the requirement that discretionary power shall be exercised in accordance with due process of law, so elegantly expressed in articles 23 and 296(a) and (b) of the Constitution 1992, is a fundamental aspect of the Tertiary Institutions (Establishment and Accreditation) Regulations 2010 L. I. 1984.

As it did happen in this case, 2nd respondent did not comply with the requirements imposed on it by regulation 25(1) and (2) of L. I. 1984 or the saving clause section 27(2) of Act 744, but chose to rely on its clout to bring about changes in the admission requirements in a manner that despised due process.

2nd respondent must have been influenced by good intentions and proper motives but it could only act within the confines of the law. Where statute provides the mode of doing something, that thing cannot be done by any other means except in accordance with the provisions of the statute. See **HEWARD MILLS v HEWARD MILLS** [1992 – 93] GBR 239. CA.

The process by which 2nd respondent came up with the directives spelt out in Exhibit 6 and its subsequent implementation was unfair and unreasonable and therefore made in contravention of articles 23 and 296(1) and (b) of the 1992 Constitution. An act that does not meet the requirements of law is procedurally unfair, void and unconstitutional.

I should have ended my judgment here, but before I do so, permit me to briefly discuss the issue whether or not 2nd respondent ought to have given the applicants hearing before their expulsion.

The directive to have the applicants withdrawn from 1st respondent's institution is quite drastic and draconian. The consequence of such a directives or decision on the social, psychological and emotional life of the affected students cannot be imagined.

By the singular act of 2nd respondent, the ambition and zeal of the affected students to climb the educational ladder in order to improve themselves academically was to be aborted. The shock of it may disenable some of them from putting themselves together to embark upon a new journey to pursue their educational ambition again. To these category of people, their ambition to acquire knowledge through tertiary education would have been obliterated.

The law is now firmly established, that before a person or group of persons suffer sanctions or punishment from either a judicial or an administrative body, the person to be affected by the order must be given a hearing. Hearing in this context does not mean formal hearing. By failing to hear the applicants in their defence, 2nd respondent contravened the applicants' right to administrative justice under article 23 of the 1992 Constitution. See **AWUNI v WEST AFRICA EXAMINATION COUNCIL** [2003 – 2004] SCGLR 471.

It is obvious to me, that when the 2nd respondent set out to enforce its directive embodied in exhibit 6, they were so fixated in their belief that the applicants had not qualified for admission and thereby failed to examine its action in the light of the law. They also refused to listen to contrary views. If they had paid heed to the response of the 1st respondent and the message of the heads of private universities, this ugly mess would have been avoided.

The 2nd respondent, in the name of carrying out an official duty, carelessly and with impunity set out to destroy the lives of many.

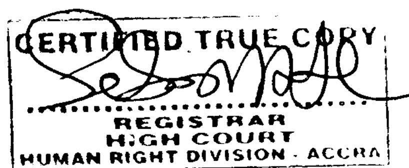
I find the conduct of 2nd respondent most reprehensible, irregular and unlawful. I am however constrained to nonsuit the 2nd and 3rd respondents because they are not legal persons. They are agents of the State which cannot be sued. The State which is the proper party is adequately represented by the Attorney General, the 4th respondent herein. The 2nd and 3rd respondents are accordingly nonsuited.

It is my judgment that the suit filed by the applicants against the 1st and 4th respondents must succeed. I hereby enter judgment for the applicants against the 1st and 4th respondents on the reliefs claimed. Consequently, I hold that:

> The withdrawal of the applicants from 1st respondent institution is unconstitutional and unlawful; and order that: an order of perpetual injunction is granted restraining the 1st and 4th respondents, the National Accreditation Board and the Ministry of Education from ever demanding the withdrawal of the applicants form 1st respondent institution on account of their minimum entry requirements.

COUNSEL:

1. GARY NIMAKO MARFO FOR APPLICANTS.
2. OPOKU AMPONSAH FOR 1ST RESPONDENT.
3. GRACE EWOAL FOR 4TH RESPONDENT.



(SGD.) KOFI ESSEL MENSAH
JUSTICE OF THE HIGH COURT