REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL APPLICATION NO. 177 OF 2019

IN THE MATTER OF AN APPLICATION BY DESMOND TUTU OWUOTH FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF THE COUNCIL OF LEGAL EDUCATION IN THE MATTER OF FAILING TO REGISTER THE PETITIONER FOR THE JULY 2019 BAR EXAMINATIONS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE COUNCIL FOR LEGAL EDUCATION.....RESPONDENT

AND

DESMOND TUTU OWUOTH.....EX PARTE APPLICANT

RULING

Introduction

1. This ruling disposes a preliminary objection raised by counsel for the Respondent objecting to this court's jurisdiction to entertain this case citing the doctrine of exhaustion of dispute resolution mechanism provided under a statute. The objection is premised on the provisions of Article 159 (2) (c) of the Constitution, Section 9 (3) of the Fair Administrative Action Act[1] (herein after referred to as the FAA Act) and section 3 (1) of the Legal Education Act[2] (herein after referred to as the Act).

2. Differently stated, the objection as I understand is an invitation to this court to determine whether this suit bad in law under the said doctrine and or whether this court is divested of Jurisdiction under the doctrine of exhaustion of remedies? The question here is whether the *ex parte* Applicant ought, first, to have filed his grievance before the Legal Education Appeals Tribunal established under section **29** of the Act.

The Parties

3. The *ex parte* applicant Desmond Tutu Owuoth is a male adult of sound mind residing in Nairobi in the Republic of Kenya.

4. The Respondent, the Council of Legal Education (herein after referred to as the council) is a body corporate with perpetual succession and a common seal established under section 4 of the Act. In its corporate name it is capable of suing and being sued, taking, purchasing or otherwise acquiring, holding or disposing of movable and immovable property, entering into contracts and doing or performing such other things or acts necessary for the proper performance of its functions under the Act. The council is the successor of the Council of Legal Education established under the Repealed Council of the Legal Education Act, 1995 (Repealed).

5. As provided under section 8 of the Legal Education Act, the functions of the Council include regulating legal education and training in Kenya offered by legal education providers. It also licences legal education providers; supervises legal education providers; advises the Government on matters relating to legal education and training; recognizes and approves qualifications obtained outside Kenya for purposes of admission to the Roll and administers such professional examinations as may be prescribed under section 13 of the Advocates Act.[3]

Factual Matrix

6. It is uncontested that in 2015 the applicant was admitted to the Advocates Training Programme at the Kenya School of Law, and, that, in November 2015, he sat for the Bar Examinations offered by the Council of Legal Education and passed in seven out of nine subjects. Subsequently, he passed one subject remaining with only one subject outstanding.

7. The applicant states that between January and March 2019, he faced unexpected economic challenges hindering his ability to register for the remaining unit, and, after much struggle, he raised the Ksh. 10,000/= past the deadline for registration for the July 2019 Bar Examinations and paid. He states that he wrote to the Respondent seeking late registration to sit for the July 2019 Bar Examinations but his request was declined.

8. He states that his failure to register for the July 2019 Bar Examinations within the stipulated periods was not intentional. He also states that the failure to register him for the July 2019 Bar Examinations significantly diminishes his chances of admission to the Bar as he is left with only one final attempt being November 2019 Bar Examinations.

The Reliefs sought.

9. The *ex parte* applicant prays for an order to compel the Respondent to register him to sit for the July 2019 Bar Examinations (now past). He also prays that the costs of this application be borne by the Respondent.

The Respondent's Notice of Preliminary Objection

10. The Respondent's counsel filed a Notice of a Preliminary Objection on 8th July 2019 stating that the application offends the provisions of Article 159 (2) (c) of the Constitution, Section 9 (3) of the FAA Act[4] and Section 31 (1) of the Act.

The arguments

11. Mr. Oduor, the Respondent's counsel submitted that the dispute herein involves the exercise of the Respondent's functions under section 8(1) (f) of the Act. He argued that the applicant seeks to be registered for the July 2019 examinations, and, that, he paid late for the said examinations. He submitted that the dispute herein falls within the jurisdiction of the Tribunal established under section 29 of the Act. It was his submission that the Tribunal is the first port of call; hence, the applicant ought to have approached the said Tribunal before coming to court.

12. He cited section 35 of the Act and maintained that the provision gives powers to the Tribunal to determine the dispute before the court. In addition, Mr. Oduor placed reliance on section 9 (4) of the FAA Act, which provides that where a party fails to exhaust the mechanism provided under the law, he ought to apply for exemption. He added that under section 9 (3) of the FAA Act, the court can direct a party to exhaust the available mechanism before approaching the court. He also placed reliance on Article 159 of the Constitution, which requires courts to encourage alternative dispute resolution mechanisms. He urged the court to strike off this suit.

13. The applicant, appearing in person, admitted the existence of the dispute resolution mechanism provided under the law, but argued that the nature of this case, and the rigid time frames do not permit him to exhaust the said mechanism. He placed reliance on the provisions of Articles 47 and 165 of the Constitution. He argued that his case raises constitutional questions, and, that, the court is the best forum to handle the dispute. He argued that he approached the court because he has two attempts remaining for him to sit for the said examination, and, if, he does not sit for the July examination (now past), he will have only one attempt remaining.

14. A casual look at the applicant's pleadings shows that she is aggrieved by the Respondents' refusal to register him to sit for the July 2019 Bar Examinations. It is common ground that by dint of section 8 (1) (f) of the Act, the Respondent administers such professional examinations as may be prescribed under section 13 of the Advocates Act[5].

15. The above being the crux of his case, the question that falls for determination is whether this court has the jurisdiction to entertain the dispute in view of the provisions of sections **29, 31** and **38** of the Act. Differently stated, the phrase that best describes the Preliminary objection under consideration is ***whether this suit is bad in law under the doctrine of exhaustion of statutory provided dispute resolution mechanism.***

16. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. I have severally stated that this doctrine is now of esteemed juridical lineage in Kenya[6] and was felicitously stated by the Court of Appeal[7] in *Speaker of National Assembly vs Karume**[8]*** in the following words:-

> *"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures*."

17. The above case was decided before the Constitution of Kenya, 2010 was promulgated. However, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution.[9] The Court of Appeal provided the constitutional rationale and basis for the doctrine in *Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others*,[10] where it stated that:-

"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews…. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

18. The High Court in the *Matter of the Mui Coal Basin Local Community*,***[11]*** stated the rationale thus:-

"The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases..."

19. At least two principles can be discerned from the above jurisprudence. *First,* while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.[12] The High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

20. Section 29 of the Act establishes the Legal Education Tribunal. It provides as follows:-

29. Establishment of the Legal Education Appeals Tribunal

(1) *There is established a tribunal to be known as the Legal Education Appeals Tribunal which shall consist of—*

a. a chairperson who shall be—

i. an advocate of the High Court of Kenya of not less than ten years standing; or

ii. a person who has attained at least ten years experience in the field of legal education or as a distinguished academic in law;

b. one person who shall be an advocate of the High Court of Kenya of at least seven years standing or a person with at least ten years experience in the field of legal education or as a distinguished academic in law;

c. three persons who have demonstrated competence in the field of legal education; and

d. the registrar who shall be an advocate of the High Court of Kenya with at least five years experience.

(2) The Judicial Service Commission shall appoint the members of the Tribunal through an open, competitive and transparent process.

21. Section 31 of the Act provides for the jurisdiction of the Tribunal as follows:-

31. Jurisdiction of Tribunal

1. The Tribunal shall, upon an appeal made to it in writing by any party or a reference made to it by the Council or by any committee or officer of the Council, on any matter relating to this Act, inquire into the matter and make a finding thereupon, and notify the parties concerned

2. For the purposes of hearing an appeal, the Tribunal shall have all the powers of the High Court to summon witnesses, to take evidence on oath or affirmation and to call for the production of books and other documents.

3. Where the Tribunal considers it desirable for the purposes of avoiding expenses, delay or for any other special reasons, it may receive evidence by affidavit and administer interrogatories within the time specified by the Tribunal.

4. When determining any matter before it, the Tribunal may take into consideration any evidence, which it considers relevant to the subject of an appeal before it, notwithstanding that such evidence, would not otherwise be admissible under the law relating to evidence.

22. Section **38** of the act provides as follows:-

38 Appeals to the High Court

1. Any party to proceedings before the Tribunal who is dissatisfied by a decision or order of the Tribunal on a point of law may, within thirty days of the decision or order, appeal against such decision or order to the High Court.

2. The Tribunal may of its own motion or on the application of an interested. person, if it considers it appropriate in the circumstances, grant a stay of execution of its award until the time for lodging an appeal has expired or where an appeal has been commenced until the appeal has been determined.

23. The preamble to the Act provides that it is an Act of Parliament to provide for the establishment of the Council of Legal Education; *the establishment of the Legal Education Appeals Tribunal;* the regulation and licensing of legal education providers and for connected purposes.

24. The jurisdiction of the Tribunal is expressly provided in ssection **31** of the act reproduced above. A reading of the section leaves me with no doubt that the Tribunal's jurisdiction is to determine an appeal made to it in writing by any party or a reference made to it by the Council or by any committee or officer of the Council, on any matter relating to the Act. The applicant's dispute falls within the Tribunal's jurisdiction, a position that was not contested.

25. Section **9(2)** of the FAA Act, (an act of Parliament that enacted to bring into operation Article **47** of the Constitution) provides that the High Court or a subordinate court under subsection **(1) shall not** review an administrative action or decision under the Act **unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted**. Also relevant is sub-section **(3)** which provides that "the High Court or a subordinate Court *shall*, if it is not satisfied that the remedies referred to in sub-section **(2)** have been exhausted, direct that applicant *shall* first exhaust such remedy before instituting proceedings under sub-section **(1).**

26. It is instructive to note the use of the word *shall* in the above provisions. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.[13]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[14] The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

27. It is the duty of courts of justice to try to get at the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute to be considered. The Supreme Court of India pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

28. The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[15] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[16] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

29. A proper construction of section **9(2) & (3)** above leads to the conclusion that they are couched in mandatory terms. The only way out is the exception provided by section **9(4)** which provides that:- "Notwithstanding subsection **(3),** the High Court or a subordinate Court *may*, *in exceptional circumstances* and *on application by the applicant*, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. Two requirements flow from the above sub-section. *First*, the applicant must demonstrate exceptional circumstances.

30. Article **47** of the Constitution and the FAA were borrowed from the South African Constitution and their equivalent legislation. Hence, jurisprudence from South African Courts interpreting similar circumstances and provisions are of greater value and may offer guidance that is more useful. The following points from a South African decision rendered by **Thring J** are relevant:-[17]"

a) What is ordinarily contemplated by the words "exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . ."

b) To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

c) Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.

d) Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.

e) Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.? In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.

31. Additionally, in yet another South Africa decision***[18]*** the court said the following about what constitutes exceptional circumstances:-

"What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile."

32. There is no definition of 'exceptional circumstances' in the FAA Act, but this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy. By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.[19]

33. The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in cases generally. The circumstances do not have to be unique or very rare but they do have to be truly an exception rather than the rule.

34. The circumstances presented in this case do not meet the tests prescribed in the above decisions.

35. The *second* requirement is that on application by the applicant, the court may exempt the person from the obligation. My reading of the law is that it is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section **9(4)** of the FAA Act. The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given.[20] Section **9(4)** of the FAA Act postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy. No such application for exemption was made to this court prior to filing the application.

36. It is useful to add that it is uncontested that the impugned decision constitutes an administrative action as defined in section **2** of the FAA Act.Therefore, an internal remedy **must** be exhausted prior to Judicial Review, **unless** the *ex parte* applicant can show exceptional circumstances to exempt her from this requirement.[21] An internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct.[22] An internal remedy is adequate if it is capable of redressing the complaint.[23]

37. There was no argument before me that the internal remedy is not effective. There was no suggestion that the remedy under the act does not offer a prospect of success. There is no argument before me that the remedy under the act cannot be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law. There was no suggestion that the remedy cannot be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct. Lastly, there was no suggestion, even in the slightest manner that the internal remedy is inadequate and incapable of redressing the complaint.

38. The principle running through decided cases is that where there is an alternative remedy or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted, and that in determining whether an exception should be made and Judicial Review granted, it is necessary for the court to look carefully at the suitability of the appeal mechanism in the context of the particular case and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined and whether the appeal mechanism is suitable to determine it. In the case before me, no argument was advanced that the mechanism under the act was not adequate nor do I find any reason to find or hold so.

39. The other principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. The rationale behind this reasoning is that statutory provisions ousting court's jurisdiction must be construed restrictively. This argument was not advanced before me nor do I discern it from the facts of this case.

40. The next question is whether the dispute resolution mechanism established under the Act is competent to resolve the issues raised in this application. The jurisdiction of the Tribunal is expressly provided under the act. No argument was advanced to challenge the jurisdiction of the Tribunal to entertain the dispute.

41. In view of my analysis and the determination of the issues discussed above, it is my conclusion that the applicant ought to have exhausted the available mechanism before approaching this court. I find that this case offends section **9 (2)** of the FAA Act. The applicant has not satisfied the exceptional circumstances requirement under section **9(4)** of the FAA Act.

42. In addition to the doctrine exhaustion discussed above, this suit also suffers another legal challenge, that is, whether it offends the doctrine of mootness. The applicant approached the court on 29 May 2019 seeking leave to commence judicial review proceedings to apply for mandamus to compel the Respondent to register him to sit for the July 2019 Bar Examinations. He admits in his pleadings that as at the time he paid for the examinations, the time prescribed to register had lapsed.

43. Upon obtaining leave, the applicant filed the substantive application on 19th June 2019. Hearing of the preliminary objection closed on 9thJuly 2019, the month the examinations were scheduled. The court had to dispose the Notice of Preliminary Objection first since it raised a jurisdictional question. In the meantime, the Month of July lapsed, meaning that, fundamentally altering the circumstances since the prayer sought relates to the July examinations.

44. The above facts bring into sharp focus the law of mootness which inquires whether events subsequent to the filing of a suit have eliminated the controversy between the parties. Interestingly, the parties did not address this pertinent issue at all. I find it appropriate to spare some ink and paper to address it since it is an important point of law which this Court cannot ignore.

45. Mootness issues can arise in cases in which the plaintiff challenges actions or policies which are temporary in nature, in which factual developments after the suit is filed resolve the harm alleged, and in which claims have been settled.

46. Generally, a case is not moot so long as the plaintiff continues to have an injury for which the court can award relief, even if entitlement to the primary relief has been mooted and what remains is small.[24] Put differently, the presence of a "collateral" injury is an exception to mootness.[25] As a result, distinguishing claims for injunctive relief from claims for damages is important. Because damage claims seek compensation for past harm, they cannot become moot.[26] Short of paying plaintiff the damages sought, a defendant can do little to moot a damage claim.

47. A matter is **moot** if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. **Mootness** arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact.

48. It is trite that as a general principle, the rights and liabilities of parties to any judicial proceedings pending before court are determined in accordance with the law as it was at the time when the suit was instituted and by applying the facts to the law and circumstances.

49. No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. In the instant case, the examination month having lapsed, even if this suit survived the Preliminary Objection, it would still fail on account of the doctrine of mootness considering the relief sought. A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity.[27]

50. A case or issue is considered moot and academic when it **ceases to present a justiciable controversy** by virtue of supervening events, so that an adjudication of the case or **a declaration on the issue would be of no practical value or use**. In such instance, there is **no actual substantial relief which a petitioner or applicant would be entitled to**, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review.[28]

51. Applying the above time tasted and refined principles of law to the instant case, it is obvious that there remains no unresolved justiciable controversy in the present Judicial Review Application. Because courts generally only have subject-matter jurisdiction over live controversies, when a case becomes moot during its pendency, the appropriate first step is a dismissal of the case.[29] On this ground alone, this case falls for dismissal.

52. In conclusion, I find and hold that the applicant's application offends the doctrine of exhaustion of statutory available remedies and the doctrine of mootness discussed above. It must fail. Consequently, I dismiss the application dated **17th** June 2019 with no orders costs.

Signed, Dated and Delivered at Nairobi this **1st** day of_**October** 2019

John M. Mativo

Judge

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[1] Act No. 4 of 2015.

[2] Act No. 27 of 2012.

[3] Cap 16, Laws of Kenya.

[4] Act No. 4 of 2015.

[5] Cap 16, Laws of Kenya.

[6] *Republic v Independent Electoral and Boundaries Commission* (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR

[7] Ibid.

[8] {1992} KLR 21.

[9] Ibid.

[10] {2015} eKLR.

[11] {2015} eKLR

[12] Ibid.

[13]*Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions.* International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

[14] Ibid.

[15] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[16] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[17] In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H

[18] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as Amicus Curiae)*2010 (4) SA 327 (CC) para 39, Mokgoro J

[19] Sir John Donaldson MR in *R v Secretary of State for the Home Department, Ex parte Swati* [1986] 1 All ER 717 (CA) at 724a-b.

[20] See *Nichol & another v Registrar of Pension Funds & others* 2008 (1) SA 383 (SCA) para 15; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd & others* 2014 (5) SA 138 (CC) para 115.) [21]

[21] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as amicus curiae)* {2009} ZASCA 23; 2010 (4) SA 327 (CC) para 34, *Nichol & another v Registrar of Pension Funds & others* [2005] ZASCA 97; 2008 (1) 383 (SCA) para 15).

[22] Ibid para 44.

[23] Ibid paras 42, 43 and 45.

[24] In *Chafin vs. Chafin*, 133 S. Ct. 1017 (2013), the Supreme Court discussed mootness at length in a complex child abduction case and held that the dispute between the parents was not moot because issues regarding the custody of the child remained unresolved. The Court noted that the prospects of success of the suit were irrelevant to the mootness question, and uncertainty about the effectiveness and enforceability of any future order did not moot the case. *Chafin*, 133 S. Ct. at 1024-26. A case is moot, however, when the court cannot give any "effectual" relief to the party seeking it. *See Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012); *Church of Scientology of California vs. United States*, 506 U.S. 9, 12 (1992); *Firefighter's Local 1784 vs. Stotts*, 467 U.S. 561, 571 (1984); *see also Tory vs. Cochran*, 544 U.S. 734, 736-37 (2005) (death of attorney Johnnie Cochran did not moot injunction enjoining plaintiff from defaming Cochran). A case can, of course, become moot when the plaintiff has abandoned their claims, but such abandonment must be unequivocal. *Pacific Bell Telephone Company vs. Linkline Communications*, 555 U.S. 438, 446 (2009).

[25] *In re Burrell*, 415 F.3d 994, 998 (9th Cir. 2005).

[26] *Board of Pardons vs. Allen*, 482 U.S. 369, 370 n.1 (1987), illustrates the use of a damage claim to avoid mootness. Prisoners who were denied parole without a statement of reasons challenged the denial. They claimed that the state statute mandating release under certain circumstances created a liberty interest in eligibility for parole protected by the Fourteenth Amendment. Plaintiffs sought damages as well as declaratory and injunctive relief. Although plaintiffs were later released, mooting their individual claims for injunctive relief, their damage claims remained alive. Because the immunity of defendants was not settled, the Supreme Court reached the merits, holding that plaintiffs had a cognizable liberty interest in the processing of their parole applications. The Court remanded the case for further proceedings. *See also City of Richmond vs. J.A. Croson Company*, 488 U.S. 469, 478 n.l (1989). An inability to pay a damages judgment at present does not moot a claim. *See United States vs. Behrman*, 235 F.3d 1049, 1053 (7th Cir. 2000). However, if the judgment seemingly could never be paid, a claim might be dismissed on prudential grounds. *See, e.g., Federal Deposit Insurance Corporation vs. Kooyomjian*, 220 F.3d 10, 14-15 (1st Cir. 2000).

[27] See *Plateau State vs. A.G.F*. {2006} 3 NWLR (Pt. 967) 346 at 419 paras. F-G wherein the Nigerian Supreme court defined an academic suit or petition the above terms

[28]*Osmeña III vs. Social Security System of the Philippines* G.R. No. 165272, 13 September 2007, 533 SCRA 313, citing *Province of Batangas vs. Romulo*, G.R. No. 152774, 27 May 2004, 429 SCRA 736, 754; *Olanolan v. Comelec*, 494 Phil. 749,759 (2005); *Paloma v. CA*, 461 Phil. 269, 276-277 (2003).,

[29] *Mills vs. Green, 159 U.S. 651, 653 (1895)*