



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

31/05/2023

CASE NO: 7895/2022

In the matter between:

NATHANIEL TSAKANI MAKHUBELE
TSAKANI MAKHUBELE

First Applicant
Second Applicant

and

UNIVERSITY OF THE WITWATERSRAND
VICE CHANCELLOR AND PRINCIPAL UNIVERSITY
OF THE WITWATERSRAND
DEPUTY VICE CHANCELLOR: SYSTEMS AND
OPERATIONS UNIVERSITY OF THE
WITWATERSRAND
DEAN, FACULTY OF HUMANITIES, UNIVERSITY OF
THE WITWATERSRAND
MISHECK NDORO
GAFIEDA PYLMAN
SINDISILE MOOLMAN
CASSIM HILL

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eighth Respondent

AYANDA ZWANE

Ninth Respondent

Neutral Citation: *Nathaniel Tsakani Makhubele & Another v University of the Witwatersrand & 7 Others* (Case No. 7895/2022) [2023] ZAGPJHC 609 (31 May 2023)

JUDGMENT

Coram: G Meyer AJ

Heard on: 20 and 21 April 2023

Delivered: 31 May 2023

Summary: University refuses to allow student to graduate as a result of non-payment of student fees- University acted lawfully in accordance with the Higher Education Act 101 of 1997 and the internal Statutes of the University that were promulgated in the Government Gazette Number 41445 dated 16 February 2018

G MEYER, AJ

[1] The first and second applicants prayed for interdictory relief in the urgent Court against the first respondent (*“the University”*). The first applicant is the biological father of the second applicant who is an adult and who successfully finalised her studies and qualified to attend a graduation ceremony during the week of 24 April 2023 where, subject to certain conditions, the University would confer a B Ed degree upon her. The University refused to allow the second applicant to graduate and refused to allow her to register for the B Ed (Hons) degree programme, as the conditions set by the university were not met.

[2] The first applicant appeared in the urgent Court and argued the matter on behalf of his adult daughter. At the commencement of the argument he alleged that he has *locus standi* to act on behalf of the second applicant as, according to him it was common cause between him and the University that he is liable to pay all her personal expenses which include her educational, accommodation, medical and other expenses.

[3] In the Notice of Motion, the first and second applicants prayed for the following relief:

3.1 That the application be entertained as an urgent application in terms of Rule 6(12) of the Uniform Rules of Court.

3.2 That the University of the Witwatersrand be joined as the first respondent and that the rest of the respondents be renumbered consecutively.

3.3 That, pending finalisation of the relief sought in Part B of the Notice of Motion:

3.3.1 The respondents be directed and compelled to forthwith permit the second applicant to:

(a) graduate at the graduation ceremony scheduled to take place between 21 April 2023 and 25 April 2023; and

- (b) register for a Bachelor of Education Honours degree for the 2023 academic year.

3.4 That the University be directed and compelled to forthwith provide residence to the second applicant at the University's residential facilities for post-graduate students.

3.5 That the costs of the application be reserved.

NARRATIVE

[4] A similar application was launched by the first and second applicants during February 2022 save that in the 2022 application the applicants prayed that the University be directed and compelled to register the second applicant to finalise the final year of the B Ed degree programme, it being her fourth year of studies. The University did not depose to an answering affidavit in order to oppose the 2022 urgent application, as it resolved to allow the second applicant to finalise her studies towards the B Ed degree, subject to certain conditions. The university opposes the urgent application launched in this Court. It should be noted that both the 2022 and the 2023 applications were launched in the urgent court on very short notice to the University.

[5] The Registrar of the University deposed to the answering affidavit and stated that the 2022 urgent application was not adjudicated upon by this Court as it was settled between the parties. The University resolved to

allow the second applicant to register for her final year of studies towards the B Ed degree programme on condition that the first applicant provided the University with an acknowledgment of debt whereby he bound himself as surety and co-principal debtor with his daughter, who is the principal debtor, for payment of an amount of R102,139.32. The first applicant did not comply with the terms of the acknowledgment of debt.

- [6] The University complied with its undertaking and caused the second applicant to be registered as a student at the University immediately after the conclusion of the agreement but before the first applicant provided the University with a signed acknowledgement of debt. He provided the acknowledgement of debt to the University during September 2022.
- [7] The application in this Court is for similar relief save that the applicants now pray for an order that the University be directed and compelled to forthwith register the second applicant as a student at the University to continue and complete her B Ed (Honours) degree studies.
- [8] To the applicants' application that was enrolled as an urgent application in this Court during 2022 the applicants annexed a Supplementary Founding Affidavit. The applicants alleged that in order to enable this Court to entertain the matter an amended Notice of Motion and a so-called supplementary founding affidavit to the 2022 founding affidavit are annexed. The supplementary founding affidavit is deposed to by the first applicant. He justifies the filing and service of the supplementary affidavit by stating that the supplementary affidavit is filed to *"close the gap*

between the time of the filing of the founding affidavit in January 2022 and the setting down of Part A of this application for hearing on the urgent roll on 18 April 2023 as a result of the collapse of the settlement negotiations between the parties on 14 April 2023”.

[9] I allowed the supplementary affidavit to stand as a founding affidavit for two reasons, firstly, the Registrar of the University replied to the supplementary founding affidavit albeit at a much later stage during the urgent Court week, and I was mindful of the fact that the applicants were unrepresented litigants. According to the Registrar of the University the reason for delivering the Answering Affidavit at a later stage was the fact that the applicants served their Supplementary Affidavit less than one day before the hearing of the matter on the Thursday and Friday of the urgent Court week.

[10] During the course of his argument the first applicant alleged that the University was obliged to institute debt recovery proceedings against him and not against his daughter by refusing her to graduate after the successful completion of her studies. He advised this Court that the Regional Divorce Court ordered him, pursuant to a settlement agreement concluded between himself and his erstwhile wife, to pay the second applicant's tertiary education fees. He argued that should I refuse to grant the Order sought he and the University will be in contempt of the Regional Divorce Court's order.

[11] The Registrar of the University joined issue with the fact that the first

applicant appeared on behalf of the second applicant as according to the Registrar of the University, the second applicant is the student and the principal debtor and the first applicant bound himself as a surety and co-principal debtor with the second applicant to the University for payment of the amount of R102 139.32 on the basis that the debt owing to the University is immediately due owing and payable on signature of the Acknowledgement of Debt.

[12] The University argued that the first applicant has no *locus standi* to appear on behalf of his daughter, as she is an adult person. In addition the first applicant will not suffer any prejudice if the relief sought is refused as he is not the student who is refused leave to graduate. If the second applicant is not registered as a student for the 2023 academic year, she cannot apply to be admitted to one of a University's residences set aside for students only.

[13] The second applicant applied for admission to register for the first year of studying towards the B Ed degree programme during 2018 without the assistance of her parents. She was 18 years of age when she first applied and the University allowed her to apply for registration without assistance. She thereafter entered into the prescribed agreements on an annual basis, unassisted by her parents. At the beginning of 2022 at the stage when she was about to commence her final year she was not allowed to register as a student unless all amounts owing by her had been paid to the University. Subsequent to the settlement of the 2022 urgent application the University conditionally allowed her to register as a final

year student.

[14] I allowed the first applicant to argue on his own behalf and requested him to ensure that his daughter, the second applicant attend Court to represent herself. The first applicant is a well-versed man and advised this Court both in the supplementary founding affidavit and in argument that he was awarded a doctorate in education at the University of the Witwatersrand. On his own admission he failed to pay the amounts owing to the University pursuant to the 2022 Acknowledgment of Debt and acknowledged that an amount of R98 000,00 remained due owing and payable as at April 2023. He offered to provide the University with a fresh Acknowledgement of Debt during 2023 which was not accepted by the University.

[15] At the outset, the University made it clear that it opposes the urgent application that came before this Court for one reason and that is to enforce its rules and regulations which, if incorrectly applied, may lead to severe prejudice not only to the University and the body of students which it represents but also to the public in general. In addition, the University alleged that if the order sought is granted, it may open the floodgates for unwarranted litigation which will be counter-productive.

THE ARGUMENTS PRESENTED BY THE PARTIES

[16] The first applicant argued that the University is obliged to allow the second applicant to graduate during the week of 21 April to 25 April 2023 and also

to allow her to register as a B Ed (Hons) student for the 2023 academic year.

[17] The first applicant *inter alia*, stated that the University infringed upon the second applicant's right to human dignity, freedom and equality, education and her right to pursue her trade or profession, her physical and mental health, and further refers to so-called just administration action which, I assume is a reference to administrative action. The difficulty with that argument is that in order for this Court to intervene in the administrative justice arena, the applicants should convince this Court that the University's conduct is and was unlawful¹

[18] The first applicant argues in his Heads of Argument that he is aggrieved at the University's conduct in that, according to him, the University is not conducting itself in a business-like manner and does not act in good faith as it irrationally, capriciously and unreasonably refused to consider or accept an acknowledgment of debt which he allegedly tendered to the University during 2023. In the alternative, he argues that the University unreasonably refused to accept a cession of a Court order granted in his favour in this Court against a third party where, the Court ordered the third party to pay to the first applicant an amount of R1.4 million. He refers to the case number which indicates that the matter is a 2017 matter. The Registrar of the University in the Answering Affidavit indicates that there

Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council and others 1999 (1) SA 374 (CC) para 59

is no provision in its rules and regulations for students to pay student fees by way of the cession of a Court Order, irrespective of the amount awarded in favour of the first applicant.

[19] During the second applicant's argument she referred me to the acknowledgment of debt entered into by the first applicant during 2022 and the 2023 acknowledgement of debt which the University refused to accept together with her motivation for presenting the acknowledgement of debt. The 2022 acknowledgment of debt remains unpaid and, if regard is had to the Registrar of the University's argument, the first applicant attempts to gain a privilege which is not afforded to any student in that students are only allowed to graduate when all outstanding amounts to the University had been paid or, in exceptional circumstances, when a student is allowed to present an acknowledgement of debt.

[20] The Registrar of the University, Ms Crosley, made it clear that the 2022 application was not pursued by the applicants in that the parties reached an agreement to the effect that the first applicant would sign an acknowledgment of debt as surety and co-principal debtor with the second applicant for the outstanding fees of the second applicant whereupon, the second applicant would be permitted to register for the 2022 academic year and continue her fourth year of studies in order to finalise her B Ed degree.

[21] The indulgence granted by the University was exceptional but, was granted in order to allow the second applicant to finalise her degree

studies.

- [22] In the acknowledgment of debt signed during 2022 the first applicant acknowledged that he is liable as surety and co-principal debtor with the second applicant for payment of an amount of R102 139,32 and that in signing the acknowledgment of debt he is entering into an arrangement for the payment of the principal debt and any interest that accrues thereon from date of signature of the acknowledgment of debt being the 14th of September 2022 to date of payment. The first applicant acknowledged that the principal debt became due, owing and payable upon signature of the acknowledgment of debt.
- [23] The second applicant in her argument, admitted that the amount referred to in the acknowledgment of debt had not been paid in full and further, that she will be able to graduate during July 2023. She further conceded that she will be able to register as a student for the B Ed (Hons) degree during 2024 on condition that all amounts owing by her to the University have been paid. She pleaded for a further indulgence but, the University clearly indicated that no further indulgences can be granted. I accept the Registrar of the University's contention that when floodgates of litigation are opened, more than only the affected parties are prejudiced. All debtors that are in arrears will approach a Court despite the fact that their relationship with the University is governed by the Higher Education Act 101 of 1997 (*"the Act"*).
- [24] Counsel for the University argued that the applicants should at the very

least show that they have a *prima facie* right to the relief sought (if the application is found to be an application for interim relief) and, in the event of it being found that the application is for final relief, then and in that event the applicants should show that they have a clear right to the relief sought.¹ In the ***Memory Institute SA CC t/a SA Memory Institute v Hansen and Others***² the Supreme Court of Appeal held that interim orders and rules nisi are not to be had simply for the asking. Courts should satisfy themselves that a proper case has been made out, more so if the subject is technical. *“The fact that a respondent may approach the Court for a reconsideration of the rule ... and that it may be set aside on the return day should serve neither as a sop nor as a soporific”*.

[25] Having regard to the allegations contained in the affidavits filed, it is clear that the University is correct when it states that the applicants have not complied with the requirements of an interim interdict particularly, in that they failed to show a *prima facie* right by proof of facts that establish the existence of a right in terms of the substantive law.

[26] The University proved that its conduct was lawful. The Registrar of the University pointed out that students who enrol at the University voluntarily assume liability to pay all outstanding fees. In this regard I was referred to section 32(1) of the Higher Education Act 101 of 1997 (*“the Act”*) as well as section 32(1) of the Act which provides that:

“32(1) The council of a public higher education institution may make –

- (a) *an institutional statute subject to section 33 to give effect to any matter not expressly prescribed by this Act; and*
- (b) *institutional rules to give effect to the institutional statute.”*

[27] The statute of the University as amended, was published in the Government Gazette No. 41445 dated 16 February 2018 (*“the Statute”*) and has binding force. In terms of section 76(1) to (6) of the University’s Statute it is, *inter alia*, provided that in order to renew registration following the expiry of one year or such shorter period as the Council may determine in general or in a particular case, a student is required to comply with any condition set by the University.

[28] The University may refuse to allow a student to renew his/her registration should the student fail to comply with the conditions set by the University which may include the payment of outstanding fees.

[29] Section 77 of the Statute regulates the conferment of degrees by the University and, that section provides that:

29.1 The University is empowered to confer in any faculty a qualification as it may deem expedient to confer (section 77(1));

29.2 Grant a qualification to any person who has pursued a course of study or academic programme, and who has satisfied any other

requirements as may be prescribed by or in terms of this Statute (section 77(3)).

[30] Section 77(6) of the Statute provides that a student who otherwise qualifies for the conferment of a qualification may be deemed not to have done so if all unpaid fees, levies, disbursements, and any other monies lawfully owing to the University have not been paid. In the aforesaid regard, the Registrar of the University relied upon the Statute in making a submission that the University is not a profit-making institution and views the non-payment of fees in a serious light. In terms of the University's fiduciary duties, it is responsible for the collection of all monies owed to it. If fees are not paid, a student will not be allowed to re-register in any faculty until all fees and other monies due to the University have been paid and a final year student will not be permitted to graduate.

[31] Clause 16.4 of the General Rules for the Faculty of Humanities – Education 2023 to which the second applicant agreed provides that:

“A student who otherwise qualifies for the conferment of a qualification may be deemed not to have done so unless and until –

(a) the student has paid all outstanding fees, levies, disbursements, fines and any other monies lawfully owing to the University.”

[32] A student will be allowed to sign an acknowledgment of debt and permitted to graduate if he/she has been shown that the student owes less than the graduation limit in total and has a total household income of

less than the household income cap, which figures the Registrar annexed to the answering affidavit. She further indicates that an acknowledgment of debt must be signed at least three weeks before the graduation ceremony.

[33] On 9 January 2023 the University addressed a letter to the second applicant offering her a place as a B Ed (Hons) student in the 2023 academic year, which is a one year programme. In that letter, the University made such offer subject to the following: *“We would like to inform you that there is a hold against your student record and that unless this is cleared, you will not be able to register”*. The University further advised her that she will be able to be apply to be registered as a B Ed (Hons) student for the subsequent academic session if all amounts have been paid.

[34] Having regard to the aforesaid, the University is entitled to preclude a student from registering or graduating until all fees have been paid. The second applicant is obliged to, as a result of her relationship with the University, ensure that her account with the University is in order and she is obliged to respect and abide the University’s internal statutes, rules and policies.

[35] Neither the first nor the second applicants will be prejudiced should the second applicant attend the July 2023 graduation. The Registrar pointed out that if all outstanding amounts are paid up, the second applicant may graduate during the July 2023 graduation ceremony. She may also seek

employment notwithstanding the fact that she had not graduated and she may re-apply for admission to the post-graduate programme for the 2024 academic year.

[36] Of importance is the fact that registration for the B Ed (Hons) degree for the 2023 academic year has closed and the University's first semester has concluded.

[37] The University will suffer prejudice if it fails or if it is precluded from enforcing its statutes and rules. If it inconsistently apply the rules and policies of the University without any regard to the rest of the student body who may insist on similar treatment, the University will be the author of its own misfortune.

[38] When completing the online application for registration as a student in any year of study a student indemnifies and undertakes towards the University *inter alia* as follows:

"I, the applicant ...

3. *undertake, during the orientation period and for any period in which I am registered as a student, to be bound by the rules and regulations of the University for the time being in force, including the rules and regulations of any university resident, club or society to which I may be admitted or become a member and by any requirements or conditions imposed by the University on me as a pre-requisite to my registration as a student of the University in any faculty."*

[39] On 1 August 2018 the second applicant applied to be admitted as a B Ed student at the University and she bound herself to the rules and statutes of the University as a pre-condition of her enrolment at the University. On the 24th of January 2020 the second applicant completed a written curriculum planning form to register for the 2020 academic year and, in that form undertook the following:

“1. I must:

(b) conform to the University’s rules, regulations, policies, procedures and standing order (“the rules”) as approved and amended from time to time by the Council of the University ...

2. I hereby acknowledge that:

...

(e) I have received or been referred to the University’s website as well as the office of the Faculty Registrar where the rules including the general rules for student conduct are available and acknowledge further that I must acquaint myself with them and I am bound by the contents thereof ...

3. I further acknowledge that:

(a) I am aware that the University follows a particular procedure for determining whether a student is qualified to present him/herself for an examination assessment.

(b) *I undertake to acquaint myself with the procedure and acknowledge that I am bound thereby.”*

[40] During March 2022 the Central Finance Department of the University addressed a letter to both the first and second applicants wherein the following is highlighted:

“2. *On 2 March 2022, you met with my colleagues, Charlene Timmerman and Ismail Soobader, in order to discuss issues arising out your daughter’s outstanding fees. I confirm that the following was discussed and agreed:*

2.1 *You will make payment of R35 000,00 towards the settlement of the outstanding fees. Proof of payment must be sent to Charlene Timmerman by e-mail.*

2.2 *You will be furnished with an acknowledgment of debt for the remaining fees, which will be signed and returned to the University ...*

2.4 *You will investigate whether less expensive accommodation is available to your daughter.*

3. *In light of the above, the University will remove any financial holds on Tsakani Makhubele’s profile (the second applicant). Tsakani Makhubele will be permitted to register at the University subject to the University’s usual rules, regulations, policies, procedures and standing orders, as amended from time to time.”*

[41] As a result, this Court is satisfied that since the second applicant’s enrolment at the age of 18 years old she bound herself to the rules and

Statutes of the University and that she continued to do so on an annual basis. She applied to be admitted as a BEd (Hons) student knowing that all outstanding fees and amounts owing to the University needed to be paid.

[42] I took into account all of the submissions made by the first and second applicants as well as the first respondent and am satisfied that the first and second applicants failed to show that they have a *prima facie* or a clear right to be protected and that their *prima facie* or clear right is being contravened by the University. On the contrary, it appears that the second applicant is in contravention of the University's rules and regulations.

[43] I accept the Registrar of the University's clear stance namely that if an order is granted in favour of the applicants despite the provisions of the internal statutes of the University, the flood gates of litigation will be opened to the detriment of the University, the body of students as a whole and the public insofar as it has an interest in the welfare of the University.

[44] In addition I found that the University acted lawfully in refusing to allow the second applicant to graduate during April 2022 and acted lawfully in refusing to authorise her to register as a student in breach of the University's statutes, rules and regulations. I further found that the University is not collecting a debt as defined in the National Credit Act 34 of 2005 but opposed the application in a bona fide attempt to enforce its rules and regulations in order to prevent any prejudice which may result should it fail to oppose an application such as the application enrolled for

hearing in this Court.

DISCUSSION

[45] In a judgment reported as ***Hotz v UCT***³ the Supreme Court of Appeal per Wallis JA who spoke on behalf of the Full Court held as follows in paragraph 36 of the judgment:

“Firstly, the purpose of an interdict is to put an end to conduct in breach of the applicant’s rights. The applicant invokes the aid of the court to order the respondent to desist from such conduct and, if the respondent does not comply, to enforce its order by way of the sanctions for contempt of court. Secondly, the existence of another remedy will only preclude the grant of an interdict where the proposed alternative will afford the injured party a remedy that gives it similar protection to an interdict against the injury that is occurring or is apprehended.”

[46] If regard is had to the legal position as stated by the Supreme Court of Appeal, the fact that the University offers to allow the second applicant to graduate during July 2023 on condition that all outstanding amounts are paid and that she will be allowed to apply to register for the 2024 BEd (Hons) degree programme on condition that all outstanding amounts due to the University are paid amounts to another remedy which will preclude the grant of an interdict as the proposed alternatives afford the second applicant a remedy that gives similar protection against injury that, according to the first applicant, is occurring.

[47] Having regard to the fact that there is an alternative remedy available to

the applicants, it is clear that the harm which the applicants allege is neither *bona fide* anticipated nor irreparable and for that reason, this matter should not have been enrolled in the urgent Court during the course of the urgent Court week as the applicants overlooked judgments such as the judgment handed down in this Court and reported as ***East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others***⁴ where, my brother Notshe AJ *inter alia* held that:

“... The procedure set out in rule 6(12) is not there for the taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.” [par 6]

And in paragraph 8 of the judgment Notshe AJ held that:

“In my view the delay in instituting proceedings is not, on its own a ground for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not as urgent as the applicant would want the Court to believe. On the other hand a delay may have been caused by the fact that the Applicant was attempting to settle the matter or collect more facts with regard thereto.”

[48] Despite all of the aforesaid I was satisfied that the application was of such an urgent nature that this Court could dispense with the rules pertaining to notice and service and allow the application to be heard as an urgent application as it was clear that unless the matter was adjudicated upon forthwith, the second applicant might not have been able to obtain substantial redress in future as the graduation ceremony commenced on the 21st April 2023.

[49] Directly after the hearing, I dismissed Part A of the applicants' application and postponed Part B thereof to the opposed application roll.

COSTS

[50] The determination of costs and who is to pay the costs of the application falls within the discretion of the Court and the general rule is that costs follow the result.

[51] In my view, costs should follow the result in this matter and I ordered that the applicants pay the costs of Part A of the application jointly and severally on the party and party scale.



G MEYER
*Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

HEARD ON: 20 and 21 April 2023

DATE OF JUDGMENT: 31 May 2023

FOR THE APPLICANTS: IN
PERSON: NT MAKHUBELE

E-mail: drntmakhubele@gmail.com

FOR THE FIRST
RESPONDENT: Adv U Gcilishe

E-mail: unathi@counsel.co.za

INSTRUCTED BY: Ms Tasneem
Wadvalla

011-717 1245

¹ *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another* 1973 (3) SA 685 (A) at 691C

² 2004 (2) SA 630 (SCA), para 10

³ 2017 (2) SA 485 at 499D-F

⁴ (11/33767) (2011) ZAGPJHC 196 (23 September 2011) at para 529