

A...../Mm

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)

Case number: 28989/10

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED: 1 ✓

23/08/2010

DATE

SIGNATURE

APPLICANT

In the matter between:

MTHOBELELI PHAKADE FAKUDE

and

UNIVERSITY OF PRETORIA

RESPONDENT

JUDGMENT

RAULINGA J,

INTRODUCTION

- [1] This is an urgent application in which the Applicant seeks a declaratory order to interdict and direct the Respondent to register the Applicant as a final under-graduate LLB student for 2010 academic year, pending the finalisation of PART B. Further, that the Respondent be ordered and directed to give the Applicant access to its facilities at the main campus, Lynnwood Road Pretoria or any other campus of the Respondent.

These orders are sought by the Applicant under Part A of the Notice of Motion. The *mandamus* is sought by the Applicant pending the finalisation of the review application that the Applicant has simultaneously launched with the application for an interdict. However, at the moment the court is called upon to decide only the question raised under Part A

FACTUAL BACKGROUND

The Applicant first registered with the Respondent in 2005 towards acquiring the LLB degree and has since obtained 53 modules as reflected on his official academic record. As at a date in February 2010 he was left with six modules outstanding to complete the LLB degree.

On the 13th March 2009 it was alleged that the Applicant contravened paragraph 1.1.4.2 of the Rules of the University of Pretoria in that on the said date he unlawfully and intentionally assaulted a visitor on the University campus, Ms B. Mbuqe, by slapping her in the face and/or grabbing her by her throat as a result of which the said Ms Mbuqe was injured or could have been injured.

He was also accused of contravening paragraph 1.1.4.2 of the Rules, due to the fact that on the 13th March 2009 on the said University premises, the Applicant unlawfully and intentionally assaulted a security officer, Mr P J Hlongwane, by pushing and/or kicking him and/or poking his fingers in his eyes as a result of which the said Mr Hlongwane was injured or could have been injured and his shirt was ripped open.

It is common cause that the Applicant was not legally represented during the enquiry, although he was accompanied by a co-student, Mr Ivor Mokoena. There is a dispute as to whether the Disciplinary

Committee questioned the Applicant on the elements of the charges he was facing, and whether he was properly informed about his rights to legal representation. It is also alleged by the Applicant that he was not allowed to call his witness.

IN LIMINE

- [2] In its submissions the Applicant argued that Professor Nienaber had no authority to depose to an affidavit on behalf of the Respondent. Further that Professor Nicholson could not have deposed to a confirmatory affidavit since she is not the Chairperson of the Appeals Committee.

Professor Nienaber was the Chairperson of the Disciplinary Committee for students at the time the enquiry was held. Professor Nicholson is the Registrar at the University and is authorised to depose to a confirmatory affidavit. There is therefore no merit in the argument of the Applicant that both Professors Nienaber and Nicholson had no authority to depose to affidavits as representatives of the Respondent. They both had such authority.

URGENCY

- [3] Before embarking on the merits of the case I wish to deal with urgency first. In short the argument of the Applicant is that the decision of the Disciplinary Committee was made on the 24th July 2009 and that of the Appeals Committee on the 10th November 2009. Applicant was informed of the outcome of the appeal on the 12th November 2009. He could not secure the assistance of an attorney immediately. The Applicant is impecunious and relied on his uncle, Ambrose to assist him with funds to pay the legal costs. He initially negotiated re-registration

with the official of the Respondent Mrs Gardener, who suggested various options to him. This was in January 2010.

The options were for the Applicant to establish whether there were any of the modules outstanding to complete his degree with the Respondent so that he could complete such a module with the Respondent. Applicant subsequently approached Unisa to register such modules for non-degree purposes. Due to the fact that the Respondent would not issue the letters of good standing to the Applicant, he could not register with the Respondent or any other institution. This was at the end of January 2010.

- [4] Mrs Gardener, of the Respondent then suggested to the Applicant that he should consider looking for employment as a paralegal. Indeed the Applicant obtained employment with Kirpal Attorneys but was subsequently dismissed since his services were no longer required for lack of legal qualifications. As a consequence he could not obtain funding in order to secure legal representation.

The Applicant has a loan with NAFSA and another with the Respondent for an amount of R20 000-00.

- [5] It was only in March 2010 that his uncle raised a deposit for the legal fees. The brief was forwarded to Counsel in April 2010. Applicant only consulted with Counsel on 20th April 2010 and the papers were finalised on the 29th of April 2010.

The Respondent conceded that it is correct that the Applicant exhausted all internal remedies provided by the University, but contends that the launch of an urgent application five months after the course for which he wished to be registered had commenced is not an appropriate remedy.

I am of the view that the contention by the Respondent does not turn on this issue. The Applicant had a duty to exhaust all remedies to avoid being held ransom to his failure to comply with the rules. It therefore follows that I find that the matter is urgent and one can now continue to deal with the merits.

MERITS

The arguments by the Parties

[6] (a) *Prima facie* right

The Applicant submits that in terms of Section 29 (1) (b) of the Constitution he is entitled to the right to further education which right, the State has a duty to make progressively available and accessible. Further, that the Applicant has a legitimate expectation to be enrolled as a student with the Respondent for the 2010 academic year, and that the Respondent's decision to expel the Applicant constituted administrative action and consequently the provisions of Section 3 of the PAJA apply.

The impugned decision of the Appeal Committee affected the legitimate expectation of the Applicant to be heard by such a committee and also to enrol for the 2010 academic year and as a result, the Applicant should have been given an opportunity to make a representation to the Appeal Committee before this committee took its decision. Accordingly, it is submitted by the Applicant that the decision of the Appeal Committee was also unfair and consequentially invalid. There is no suggestion by the Respondent that the Applicant's right to further education falls to be limited in terms of the provisions of Section 36 of the Constitution. The Applicant has therefore established

his prima facie right to further education and to legitimate expectation to be re-enrolled as a student by the Respondent for the 2010 academic year.

- [7] On the contrary the Respondent avers that the Applicant has a right to basic education and further education, but he does not have a right to tertiary education. Any rights that he may have while at further/tertiary education institutions must in any event be exercised subject to the rules and regulations of the educational institution at which he is conducting his studies. His right to education is to be exercised subject to the rights of the other people attending that educational institution. In the premises it was submitted that the Applicant does not have a prima facie right to register as a student with the University.

- [8] (b) Apprehension of irreparable Harm and Injury.

The Applicant is of the view that the sanction imposed by the Respondent makes it impossible for the Applicant to register with the Respondent, or any other tertiary institution for the period of 24 months. It is not clear whether the Respondent will after the expiry of 24 months still register the Applicant or would issue the Applicant a certificate of good standing.

In addition the Applicant argues that the Respondent imposed the sanction on the Applicant as against the material irregularities that are to a very large extent manifestly obvious from the disciplinary hearing or the enquiry. The Respondent has discretion to admit the Applicant to either write the agroetat examination or the special examination. If the Applicant does not secure the mandamus on Part A of the Notice of Motions, he is the only party who is to suffer injury under the circumstances and the Respondent would suffer no prejudice or injury at all.

(i) Legal Representation

The First irregularity raised by the Applicant is a procedural aspect concerning legal representation in that when the disciplinary committee constituted itself on the 15th May 2009 to hear the matter, the Applicant was denied legal representation. The Applicant was further refused a postponement which he sought, in order to secure legal representation. Legal representation is a fundamental right provided for in the Constitution-Section 35 (2) thereof. In addition thereto, the Respondent has also made similar provision for the Applicant's right to legal representation in its disciplinary code, clause 1.2.11 thereof. The committee simply ignored that provision or failed to give effect to that provision. This is the centrepiece of the irregularity that is assented to have led to a material irregularity and gross injustice in the proceedings in question.

On this part the Respondent's response is that, the Applicant was informed in the written charge that he was entitled to legal representation. In addition, Mrs Gardener pointed this out to the Applicant when he collected the written charge. The Applicant did not have a legal representative, although he was accompanied by a co-student, Mr Ivor Mokoena.

The Chairperson of the Disciplinary Committee did not allow Mr Mokoena to represent him, it being a general rule in the Courts of the country that only qualified lawyers may act on behalf of clients. The Applicant was refused postponement to seek the assistance of a legal representative and the matter proceeded without legal representation. However after the acceptance of the plea of guilt the Applicant was

once again advised of Legal representation. The Applicant indicated that he had a legal representative who subsequently withdrew from the case.

(ii) Failure to question the Applicant as to the elements.

The Applicant's assertion on this issue is that he did not appreciate the consequences of the tendering of a plea of guilt on the alleged charges. The Chairperson of the enquiry had the legal duty to question the Applicant so as to ascertain whether the Applicant appreciated the consequences of the tendering of a plea of guilt as well as the consequences of sentence or sanction that may be imposed subsequent to such a tender of a plea of guilt. The chairperson also has a duty to satisfy herself as well as the committee that the tender of a plea of guilt amounts to an admission of all the elements of the alleged offence, which was not done in the instant case.

The reaction of the Respondent on this point is that the Applicant pleaded guilty to the three charges, put to him, and the Disciplinary Committee continued to question him to ascertain whether his plea would be accepted. On the basis of his explanation of the events the Disciplinary Committee entered a plea of not guilty. When the Applicant still insisted on pleading guilty, the Committee accepted the plea of guilt.

(iii) No Pronouncement that the Applicant was found guilty

Applicant submits that once the plea of guilt was accepted, the Disciplinary Committee did not pronounce that he was found guilty of the alleged offences. After having pleaded guilty the Chairperson of the hearing proceeded to allow witnesses on behalf of the Respondent or on aggravating circumstances, whereafter, she imposed the sanction of expulsion of the Applicant. The Respondent insists that at the

commencement of the second hearing on the 18th June 2009, the Chairperson informed the Applicant that the Disciplinary Committee had accepted the Applicants' plea of guilt on all three charges. In view of his plea of guilt it was not necessary to formally "find" him guilty.

[9] (c) Balance of Convenience.

The strong argument of the Applicant is that the prospects of success are in favour of the Applicant. The Applicant reiterates that what should be taken into account is an unfair possibility that if the temporary interdict is refused and the review application succeeds the Applicant shall be grossly prejudiced. The Respondent's contention that the re-enrolment and registration for the Applicant would be most unfair towards other students cannot be upheld. This is so because the balance of convenience is normally weighed up only as between the parties to the action, and not to third parties.

In any event, the Applicant in his capacity as a member of the student representative committee assisted a certain Mr Kenneth Maboudi in May 2009, to register long after the date of 15 January 2009. The Applicant avers that the Respondent can make exceptions when applying its rules regulating registration of members as it did in the case of Maboudi. The balance of convenience weigh heavily in favour of the Applicant in that Applicant be allowed to finalise his studies so that he should be in a position to repay the student loans granted to him.

It is the Respondent's submission that the Respondent will be seriously prejudiced if the Applicant is allowed to continue his studies, pending the finalisation of his review application. This is in view of the fact that the Applicant was charged with extremely serious offences such as violence towards women particularly on the Respondent's campus. The

Respondent has a duty to protect its integrity and the safety of its students, staff and visitors to the campus.

Further, the registration for the course which the Applicant now wishes to be registered for closed months ago. It would be unfair to other students who have not been charged with misconduct to allow the Applicant to register for the course at this time, while other aspirant students were not allowed to register. Moreover, the Applicant won't even qualify to write Criminal Procedure for which he obtained a very low mark and will next be seeking a special dispensation to allow him to register for the course for a fourth time.

[10] (d) There is no other Satisfactory Remedy Available.

It is argued on behalf of the Applicant that he has exhausted all the internal remedies. The only option open for the Applicant was to launch this urgent Application. The Respondent accepts that the Applicant has exhausted the internal remedies provided by the University, but the launch of an urgent application five months after the course for which he wishes to be registered has commenced, is not an appropriate remedy.

[11] (e) Refusal to call witnesses

It is submitted by the Applicant that he was refused to call a witness in the name of Ms Mbuqe and the Chairperson of the Disciplinary Committee failed to assist him in ensuring that his witness testifies on his behalf. According to the Respondent when Ms Mbuqe had indicated that she had withdrawn the charge, and when it became apparent that Ms Mbuqe would give evidence, the Applicant changed his plea to guilty, in order, that "there would be no need for witnesses to be

called". Ms Mbuqe was then called by the committee to clarify matters. The other witnesses were called to testify for the Respondent.

[12] (f) Prospects of Success in the Review Application.

The Applicant re-iterates that the failure to inform the Applicant of the Consequences of pleading guilty and refusing him legal representation, resulted in gross irregularity in the proceedings. Ms Mbuqe had withdrawn the complainant. She further stated that she was never assaulted by the Applicant. The Applicant was not given an opportunity to call any witness to rebut any evidence from Messrs Hlongwane and Chiloane. There was no evidence at all led at the enquiry to show that blood samples were taken from the Applicant to prove the alcohol content in the blood and confirm that indeed the Applicant was under the influence of liquor.

The Respondent dismisses this notion by merely stating that the Applicant has no prospect of success.

EVALUATION AND ANALYSIS

- [13] The *mandamus* is sought by the Applicant, pending the finalisation of the review application that the Applicant has simultaneously launched with the application for an interdict.

For an applicant to succeed in a *mandamus*, he must establish the following requirements:

- A prima facie right;
- A well grounded apprehension of irreparable harm;

- Balance of convenience in favour of the granting of the interim interdict; and
- That there is no alternative or other remedy.

In the case of **Manong and Associates (Pty) Ltd v Minister of Public Works and Another All SA 267 (SCA) at 278 para (27) and 279 para (30)** the court held *inter alia* that to succeed the company had to establish prima facie that the mere implementation of the new policy by the Department of Public works would in and of itself, of necessity, have resulted in a discriminatory practice to the company and other similarly placed historically disadvantaged firms and individuals. The court further stated that the application had to fail because the hypothesis advanced by the appellant is a rather tentative and speculative one. Further that the relief sought is not grounded in any factual foundation but rather on conjecture, perception and supposition.

In arriving at a conclusion whether the Applicant has established a prima facie right or not one will have to reconcile this dictum with the facts in the instant case. See also *Sea Lake Investments (Pty) Ltd t/a Sea Lake Industries v Insunduzi Municipality and Another 2006 (1) All SA 656(N)*.

[14] Section 3 (2) of PAJA outlines the minimum requirements which must be met by the Respondent under "procedural fair administrative action affecting any person which are:

- i. Adequate notice of proposed administrative action;
- ii. Reasonable opportunity to make representations;
- iii. A clear statement of the administrative action;
- iv. Adequate notice of the right of review or appeal; and
- v. Adequate notice of the right to request reasons.

See Cora Hoexter –Administrative Law in South Africa pages 332-339

I am of the view that the Respondent's decision constituted an administrative action and therefore legitimate expectation arises. This is further confirmed by Section 29 (1) (b) of the Constitution (Act 108 of 1996) - The right to further education.

The contention of the Applicant is grounded on factual foundation and not on conjecture, perception or supposition.

[15] In considering the test for appealability on an interim interdict in *International Trade Administration Commission v Scaw South Africa (Pty) Ltd and others* 2010 (5) BCLR 457 at 475 para 54 Moseneke DCJ refers to the case of *Machete and Others v Mailula and Others* 1993 (1) SA 523(A) at 532I-533A in which the court reaffirmed the importance of "irreparable harm" when it held: "The primary consideration in determining whether it is in the interest of justice for a litigant to be granted Leave to appeal against an interim order of execution is, therefore, whether irreparable harm would result if leave to appeal is not granted"

Moseneke DCJ, was of the view that, the test of irreparable harm must take its place alongside other important and relevant considerations that speak to what is in the interest of justice such as the kind and importance of the constitutional issue raised; whether there are prospects of success; whether the decision, although interlocutory, has a final effect and whether irreparable harm will result if leave to appeal is not granted. It bears repetition that what is in the interests of justice will depend on a careful evaluation of all the relevant considerations in a particular case - *International Trade Administration Commission case*, supra at 478 para 55.

In the instant case if the applicant is not re-registered during the course of 2010, he can only do so in 2012. One must bear in mind that the Applicant has since exhausted all the internal remedies. He cannot be registered with any other institution in view of the sanction meted out by the Respondent. He cannot be gainfully employed because he does not hold the relevant legal qualification. One has no clue as to what fate holds for his future. Within the next 18 months he may be relegated to a street beggar with all the many modules in his bag. The determining factor though is whether it is in the interest of justice to re-register him or not. This of course should be weighed against the prospect of success in his review application.

[16] I need to deal with the procedural aspects only in a summary form. It is indeed true that legal representation is a fundamental right provided for in Section 35(2) of the Constitution. In this regard Counsel for the Applicant referred the court to the case of *State v Wessels and Another* 1966(4) CPD 89 at 979-H

"The failure to allow audience through a legal practitioner to a person who objects to giving evidence in a criminal trial is a gross irregularity. It is so gross a departure from established rules of procedure that it can be said that the accused have not been properly tried. It seems to me that any reasonable person hearing of what took place would say the accused have not had justice. They have not been allowed to put their respective case to the court as they wanted them represented. In these circumstances nothing is achieved by specularity whether the acumen and persuasiveness of the legal practitioner could rightly or wrongly have persuaded the court a-quo to come to a decision favourable to the accused. The fact remains that the accused have been deprived of this opportunity. It is not for this court to speculate on what would have happened had the accused not been so deprived"

See also –Legal Aid vs Msila and Others 1997 (2) BCLR 229 (E)

- [17] Much can be said about the Disciplinary Committee's failure to give priority to this aspect, suffice to say that as a result the Applicant did not receive a fair hearing due to the irregularity. This is more so because Clause 1.2.11 of the Respondent's regulations provides for this. The Constitution enjoins us as presiding officers that as triers of fact we should endeavour to turn every stone on questioning the litigants or accused persons to ensure that when they plead guilty they should satisfy all the elements of the offence. This applies mutatis mutandis to disciplinary enquiries. Failure to do so amounts to injustice.

Whether the Disciplinary Committee made a pronouncement that the Applicant was found guilty would depend on the circumstances of each case. In a case where detailed questioning was done as to the elements of the misconduct before the Disciplinary Committee and the plea of guilt is properly accepted no injustice will ensue and therefore the finding of the Committee will stand. However, in an instance where the questioning is not properly handled and there is no proper acceptance of the plea of guilt an injustice will ensue culminating into a miscarriage of justice. In this scenario the guilt of the person so changed may not stand.

- [18] In **Maccsand CC v Macassar Land Claims Committee and Others 2005 (2) ALL SA 469 (SCA) at 475 para 18** it was stated that ".....The balance of convenience is often the decisive factor in an application for an interim interdict. The exercise of the discretion vested in the court, where the other requirements for an interdict are fulfilled, must turn on the balance of convenience....." **See also Hix**

Networking Technologies CC v System Publishers (PTY) Ltd and Another 1997 (1) SA 391 (SCA).

One does not see how the enrolment and registration of the Applicant would be unfair towards other students, since the balance of convenience is normally weighed up only as between the parties to the action, and not to third persons. Moreover, the Respondent has in the past registered students in a similar situation as the Applicant. It is my respectful view that the balance of convenience favours the Applicant; and as a consequence the Respondent should make an exception as it did in the past.

[20] One of the essential requirements in interim interdicts for the grant of an order is that the Applicant must show that there is no other satisfactory remedy available- **Food and Allied Workers Union and Others v Scandia Delicatessen CC and Others 2001 (3) ALL SA 342 (A).**

The court has to determine whether the Applicant had established that requirement. The court has also to examine whether the interdict sought by the Applicant is final in substance though interim in form. The Applicant has exhausted all the internal alternatives remedies. The only option was to launch the urgent application. I have already ruled that the application is urgent and the issue that the application ought to have been brought in December 2009 is untenable.

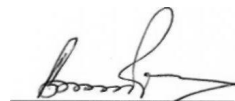
It is clear that even if the Applicant were allowed to register and write the modules in question, he will still be left with a number of other modules outstanding for him to complete the degree. That is a matter which will be decided once the review application is heard. This application only concerns the agroetat examination for the modules in question. It can therefore be concluded that the interdict sought by the

applicant will not be final in both substance and form. There exists overwhelming cumulative evidence pointing to the prospect of success in the review application. There is no need for me to substantiate this point any further. It suffices to mention that the irregularities already discussed above give substance to this view.

CONCLUSION

[21] In the circumstance I am convinced that the Applicant has satisfied all the requirements for an interim interdict. In the event that the Respondent did not make submission to the effect that the order proposed by the Applicant should have certain limitations, I intend giving the order in terms of the notice of motion. It therefore follows that the following order is made:

- 1. The Respondent is interdicted and directed to re-register the Applicant as a final under-graduate LLB student for the 2010 academic year, pending the finalisation of Part B application.**
- 2. The Respondent is directed to give the Applicant access to its facilities situated at the main campus, Lynnwood Road, Pretoria, or any other campus of the Respondent.**
- 3. The Respondent is ordered to pay the costs of this application.**



**T J RAUKINGA
JUDGE OF THE HIGH COURT
NORTH GAUTENG HIGH COURT**