

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

Case No.: 3489/2018

Date Heard: 28/29 March 2019

Date Delivered: 2 April 2019

NOT REPORTABLE

In the matter between:

YOSHIHITO MAVUNGA YAME

Applicant

and

NELSON MANDELA UNIVERSITY

First Respondent

ANDREW PHIRI

Second Respondent

ROONEY NCWADI

Third Respondent

CHANTAL VAN HEERDEN

Fourth Respondent

NOLUTSHA GAYIYA

Fifth Respondent

SHAMEIN MADATT

Sixth Respondent

NOMATHAMSANQA BULEMBU

Seventh Respondent

BUYISWA YAYA

Eighth Respondent

NELSON MANDELA UNIVERSITY TRUST

Ninth Respondent

NATIONAL FINANCIAL AID SCHEME (NSFAS)

Tenth Respondent

LEGAL AID SOUTH AFRICA

Eleventh Respondent

BANKSETA

Twelfth Respondent

SERVICES SETA

Thirteenth Respondent

DEPARTMENT OF HIGHER EDUCATION (DHET)

Fourteenth Respondent

DEPARTMENT OF JUSTICE (DOJ)

Fifteenth Respondent

JUDGMENT

BEYLEVELD AJ:

[1] The applicant, a former student at the Nelson Mandela University (the first respondent) fulfilled the requirements towards a degree of Bachelor of Commerce: Economics and Statistics.

[2] In a relatively prolix notice of motion he seeks a variety of divergent orders which are formulated in such a manner that it is difficult to ascertain the essential import of the relief which is sought against the first respondent.

[3] Various other respondents are cited including various employees of the first respondent university, the National Financial Aid Scheme (NSFAS) and Bankseta.

[4] The affidavit filed in support of the application suffers from a similar deficiency in that the factual basis substantiating the applicant's cause of action is set out in such a manner that it is difficult to establish the basis for his various claims.

[5] The formulation in the notice of motion as well as the affidavit is disjointed and for the most, unintelligible.

[6] This application is proceeded by a variety of prior applications brought by the applicant more particularly urgent applications seeking similar relief against the first respondent. None of such applications were successful.

[7] In addition, the applicant instituted proceedings in the equality court¹ seeking similar relief as sought in these proceedings and making similar allegations as are made in the founding affidavit.

[8] Understandably, the first respondent as a point *in limine* raised the defence of *lis alibi pendens*².

[9] At the commencement of the hearing of this application, the applicant, on being confronted with the elements of *lis pendens* and the particular facts pertaining to this matter and the equality court proceedings deliberately elected to abandon the proceedings in the equality court and elected to proceed with this application only.

[10] Accordingly the point *in limine* raised by the first respondent relating to *lis pendens* fell away.

[11] The first respondent raises two further points *in limine* namely:

- (i) That the notice of motion is fatally defective and non-compliant with the provisions of Rule 6(5)(a).
- (ii) That the affidavit fails to set out the necessary facts required to establish a sustainable cause of action

[12] More particularly, inasmuch as [11](i) is concerned it is contended that the applicant was obliged to serve the application upon every party to the proceedings and as the application was only served on the first to sixth respondents and not the remaining respondents the application is defective.

[13] It could also be said that service for instance on NSFAS and Bankseta who have a material interest in the outcome of these proceedings, is essential and that by virtue of a lack of service, there is a material non-joinder.

¹ In the Magistrates' Court for the district of Port Elizabeth

² The requirements for a defence of *lis pendens* or *res iudicata* are well-known. See in this regard *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others* 2013 (6) SA 499 (SCA); *Nestle (SA)(Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA)

[14] The first respondent further complains that the relief set out in the notice of motion is not formulated with sufficient clarity that one is able to discern what order was prayed for and accordingly redounds to the prejudice of the respondents.

[15] In respect of [11](ii) above, it is contended that facts should be set out simply, clearly and in chronological sequence without argumentative commentary and that the applicant is not entitled to “throw a mass of material” at the other litigant and expect such litigant to discover for himself an obscure cause of action which may be lurking somewhere³.

[16] It is trite law that in motion proceedings the affidavits serve not only to place evidence before a court but also serves to define the issues between the parties⁴.

[17] At the commencement of argument, I invited the applicant, who was unrepresented and who appeared himself, to articulate in layman’s language the relief that he seeks as it was, as indicated, difficult to discern from his notice of motion exactly what relief was sought.

[18] Following upon my invitation, the oral formulation of the relief sought was the following:

- (i) The failure to confer the B.Com Degree Economics and Statistics on the applicant⁵.
- (ii) The obligation of the first respondent University to reimburse him with funds he received from a Bankseta bursary.
- (iii) An obligation on the first respondent University to pay over to him funds received from NSFAS and not utilised.

³ *Reynolds NO v Meckenburg (Pty) Ltd* 1996 (1) SA 75 (W); *Harms Civil Procedure in the Superior Courts* B-48

⁴ *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA) at para 28; *Stiegemeyer Africa (Pty) Ltd v National Treasury of South Africa* [2015] 2 All SA 110 (WCC); *Kwa-Sani Municipality v Underberg-Heimville Community Watch Association* (180/2014)[2015] ZASCA 24 (20 March 2015) at para 18

⁵ This relief the applicant conceded became moot by virtue of the fact that at a subsequent graduation ceremony in December 2018 the degree in fact was conferred upon him.

- (iv) A reimbursement of the costs of a laptop that he pledged and which was ultimately sold so that he was able to pay the costs of a summer school module.
- (v) Funding required by the applicant for further post-graduate studies.
- (vi) A further dissatisfaction with a mark in respect of one of the modules in the degree that was conferred upon him.
- (vii) Damages loosely formulated as contractual and delictual damages.
- (viii) An order that the first respondent University be compelled to offer the applicant an apology for the manner in which he had been treated.

[19] Leaving aside the difficulties I have alluded to above relating to a clear and concise formulation of the facts relied upon and the relief sought, it is apparent from a cursory reading of the affidavits⁶ that whatever relief is being sought, such relief cannot, if sustainable in law, be adjudicated and decided upon by way of motion proceedings.

[20] Applying the Plascon-Evans rule⁷ I do not believe that it is necessary for the purposes of this judgment to set out the various disputes that exist on the papers. An illustration thereof is the contention by the applicant that in respect of a loan funded by Bankseta, he is entitled to be reimbursed for an amount of R14 305,74. Bankseta in terms of a bursary agreement⁸ undertook to provide funds for the benefit of the applicant such funds relating to the provision of food, text books and other material and tuition fees.

[21] In this regard, the first respondent produced the entire account which ends at November 2018 with a nil balance indicating all the debits and credits on the account. Although the applicant disputes two of the entries⁹, he contends not only that he is entitled to a payment of the aforesaid amount which he claims is a surplus of the funds provided by Bankseta but also lays claim to an amount of R6 951,78

⁶ Exacerbated by arguments advanced by the applicant during the hearing of the application

⁷ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A); *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) at para 29

⁸ Bankseta the sponsor paid funds over to the University for the purpose of sponsoring and/or funding the applicant for the particular year.

⁹ In the sense that he disputes not the arithmetical correctness thereof but the underlying basis

which was a refund to NSFAS in respect of funds provided by them for the benefit of tuition and other fees and disbursements relating to the applicant.

[22] Besides the fact that the bursary agreement relied upon by the applicant contains a provision that a student will not be required to pay back any portion of the bursary allotted to them (and his misplaced interpretation that this clause should be interpreted to convey an entitlement to be paid any portion of the bursary not utilised), the factual dispute relating to the debits and credits on the account are such¹⁰ that it is impossible to reach any definitive finding on the affidavits.¹¹

[23] At the commencement of proceedings, and by virtue of the fact that the applicant was unrepresented, I explained to him the difficulties encountered where factual disputes appeared from the affidavits. He was invited to direct a request, if he so chose, that the issues be referred to trial and that the application papers then stand as a simple summons with pleadings to follow thereof¹².

[24] He deliberately elected not to seek such a directive and elected to stand or fall on the allegations as contained in the founding affidavit.

[25] Cumulatively, for the reasons set out above, which includes the points *in limine* raised in respect of the notice of motion and affidavits and the inability in any event to resolve any of the issues in motion proceedings, I have no other option but to dismiss the application.

[26] All that remains is the question of costs. The applicant implored me not to make an adverse costs order against him whilst the first respondent contended that it would be appropriate not only to make an adverse costs order against the applicant but to order that such costs payable by the applicant be on the scale as between attorney and own client. The first respondent contended that the application, together with the preceding applications, were unsubstantiated and in fact vexatious.

¹⁰ The underlying validity thereof

¹¹ The clause in the bursary agreement relied upon by the applicant properly interpreted does not in any event afford him the right to claim payment to him of bursary funds not utilised and which were never paid over to him.

¹² Declaration, plea etc

In this regard it was argued that even in the written heads of argument filed by the applicant, it is self-evident that the proceedings are malicious and vexatious. In this regard I was referred to defamatory comments in the heads which described the respondents¹³ as delusional and persons who “will preserve their egos at the expense of another, even the innocent and vulnerable” and even goes to the lengths of suggesting that I order as part of my judgment that the respondents all be subjected to psychometric testing.

[27] One must, weigh up the deficiencies in the papers drafted by the applicant against his lack of knowledge and experience with regards to litigation.

[28] However, as submitted by Ms *Desi* who appeared on behalf of the first and other respondents¹⁴ such latitude cannot be limitless and unbridled.

[29] Ms *Desi* in response to me pointing out that on the available evidence, any prospect of recovering from the applicant is so remote that it would effectively mean that any cost awarded against him would be meaningless argues that at the very least a cost award would serve as a deterrent against the applicant to persuade him not to embark on future proceedings relating to issues he has with first respondent University.

[30] Besides the fact that the applicant made a conscious decision not to refer the matter to trial and would, in all probability be hard pressed if he subsequent to these proceedings attempted to institute an action against the first respondent, I am not convinced that the purpose of awarding costs in favour of a respondent is designed for the purpose of deterrence.

[31] However, I cannot prevent the first respondent University from electing what to do in respect of a cost award made in its favour.

¹³ More particularly the functionaries who were cited with the University

¹⁴ Those respondents who oppose the application

[32] It is unfortunate, but I am unable to discern any reason why the respondents, as the successful litigants, should not be placed in a position where they are entitled to attempt to recover their costs.

[33] I express the hope¹⁵ that the applicant as a former student and a person who is self-evidently indigent, be treated with compassion with regards the adverse costs award which I intend to make.

[34] In the circumstances I make the following order:

The application is dismissed with costs which include the costs reserved by order of this court dated 20 November 2018.¹⁶

A BEYLEVELD

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicant: In person

For Respondent: Adv Desi instructed by Joubert Galpin Searle, Port Elizabeth

¹⁵ Which of course does not bind the respondents

¹⁶ I have declined to make a costs order against the applicant relating to the equality court proceedings. He abandoned such proceedings and the respondents, may if so advised, set down such proceedings which were postponed *sine die* for the purpose of seeking a cost award.