

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

Case No: 476/2021

Date heard: 4 March 2021

Date delivered: 30 March 2021

In the matter between:

CEBO TOYI

First Applicant

NSOVO MTILENI

Second Applicant

NKOSINATHI MKANSI

Third Applicant

LUTHO MADLANGA

Fourth Applicant

HLULANI RIVISI

Fifth Applicant

BANDILE NDZIMANDE

Sixth Applicant

TSEBO NKOMO

Seventh Applicant

MGANGANTO SHIKOZA

Eighth Applicant

ZIKHONA SABHIZA

Ninth Applicant

IGENCIOUS NETHAVHANI

Tenth Applicant

and

THE NELSON MANDELA UNIVERSITY

Respondent

JUDGMENT

ZIETSMAN AJ:

- [1] Nelson Mandela has rightly said that “Education is the most powerful weapon which you can use to change the world”. The necessity of education cannot be overstated. But, the world as we know it has been tipped on its head and everyone, including universities and students alike, had to adapt to all the various challenges brought about by the Covid-19 pandemic. It has caused unprecedented disruption and uncertainty, which, has in turn, forced universities and students to adapt very quickly. As might be expected, this has not been an easy ride at all.
- [2] The Applicants are students at the Nelson Mandela University (‘the University’). They are enrolled for degrees in either Construction Management or Quantity Surveying. However, First Applicant is not authorised to depose to the founding affidavit on behalf of the Sixth to Ninth Applicants. The only Applicants properly before court are the First to Fifth and Tenth Applicants (‘the Applicants’).
- [3] The Applicants launched an application, on an urgent basis, in terms whereof they seek orders interdicting the University from proceeding with an examination which was scheduled to take place on 24 February 2021, and further interdictory and review relief. By the time the application was served on the University, the examination had already

been conducted. That being so, at the hearing of the matter the Applicants abandoned the urgent relief.¹ The remainder of the relief is set out as follows in the notice of motion:

“1. ...

2. ...

2.3 *That the decision of the respondent:*

2.3.1 *to refuse the applicants access to their marked scripts in respect of the 20th January 2020 Accounting 1 examination;*

2.3.2 *to direct them to submit themselves to a re-examination, which is to take place at 14h00 on the 24th of February 2021 be reviewed and set aside;*

2.3.3 *that the applicants be allocated marks in respect of the examination scripts of Accounting 1 (as they appear on their marked scripts), which were written on the 20th of January 2021, and such marks be published and taken into account in respect of the completion of the degrees of all the students who wrote Accounting 1 on the 20th of January 2021;*

2.3.4 *that the marked papers (of the 20th January 2021) be kept in safe custody pending any possible later review, disciplinary, criminal or other proceedings.”*

[4] At the hearing of the matter Mr Nobatana, who appeared on behalf of the Applicants, applied for a postponement of the application on the basis that the Applicants are entitled to the record of proceedings and will supplement their papers in due course. After hearing argument, I dismissed the application for postponement and stated that my reasons will follow in the judgment.

¹ Prayers 2.1 and 2.2 (inclusive) of the notice of motion.

Application for postponement

- [5] In *Persadh and Another v General Motors South Africa (Pty) Ltd*² Plasket J (as he then was) summarised the principles applicable to an application for a postponement follows:

“[13] The following principles apply when a party seeks a postponement. First, as that party seeks an indulgence he or she must show good cause for the interference with his or her opponent's procedural right to proceed and with the general interest of justice in having the matter finalised; secondly, the court is entrusted with a discretion as to whether to grant or refuse the indulgence; thirdly, a court should be slow to refuse a postponement where the reasons for the applicant's inability to proceed has been fully explained, where it is not a delaying tactic and where justice demands that a party should have further time for presenting his or her case; fourthly, the prejudice that the parties may or may not suffer must be considered; and, fifthly, the usual rule is that the party who is responsible for the postponement must pay the wasted costs.”

- [6] It has also been held, although in the context of a trial it is equally applicable in this instance, that a postponement will not be granted in circumstances where the postponement is occasioned by a happening or circumstance which applicant, at the time of set-down, could have or should have foreseen.³ The Applicants, at the time that the application was served, on 25 February 2021, not only could or should have foreseen, but in fact knew that the interdictory relief which they seek pertained to an examination which had already taken place on 24 February 2021. In respect of the remainder of the relief, Mr Nepgen, who appeared on behalf of the University, submitted that the Applicants have

² 2006 (1) SA 455 (SE) at para [13] (I have omitted the references to authorities).

³ *Greyvenstein v Neethling* 1952 (1) SA 463 (C) at 466A – D.

not made out a case for a final interdict and the application was otherwise premature since no decision has been taken yet. I held a similar view.

- [7] I cannot see how it can be in the interest of justice to postpone an application which bears no prospects of success on the merits. I deal with this in greater detail below. This is not a case where justice demands that the Applicants should have further time for presenting their case. On this basis the application for postponement was refused.

Background

- [8] All of the Applicants are enrolled in the accounting module RSS102: Accounting for Construction Students – Accounting 1 Special ('the Module') in respect of the 2020 academic year. This Module is offered by the Accounting Science Department ('the Department') of the University.
- [9] Following the declaration of the National State of Disaster under the Disaster Management Act⁴ on 15 March 2020, the national lockdown commenced at midnight on 26 March 2020, to contain the spread of what is now commonly known as the Coronavirus. The Covid-19 pandemic was upon us. Due to the national lockdown, and in keeping with having to adapt to the various challenges as quickly as possible, the University found it necessary to extend the academic year and change to an online platform for learning through an electronically based Moodle learning management site ('Moodle').
- [10] All students are registered on Moodle, which allows them to access learning material; write online tests; and upload written tests and

⁴ 57 of 2002.

examinations on a remote based approach. How it works for examinations is that students are required to sign an examination protocol and ethics declaration ('Ethics Declaration') before accessing the examination paper, in terms whereof they make certain declarations, *inter alia* that the answers submitted are entirely their own. Thereafter, the exam paper is released; students write the examination by hand; scan in their written manuscripts; and upload same before the stipulated cut-off time.

- [11] With regard to students' performance during the year, the Department had previously required that a due performance requirement be met in respect of weekly assignments. Given that many students were struggling with connectivity issues, the Department took a decision that it would not be necessary for the students to meet the due performance threshold to qualify for the final examination, but instead encouraged them to submit their assignments. In my view, again, adapting to the times we live in, and in order to accommodate the students as far as possible, this decision was fairly taken. The students were however required to work through their assignments in accordance with the memoranda provided, and prepare and retain a self-reflection, as stated, it was not compulsory for the students, in the ordinary course, to submit same. Where such self-reflections were submitted, it enabled the lecturer and module co-ordinator to identify and assist those students who were in need of assistance.
- [12] With the above background in mind, the year-end examination in respect of the Module was conducted on 20 January 2021. All the Applicants completed the Ethics Declaration and wrote the examination, whereafter their scripts were uploaded and the lecturers attended to the marking of the papers. The class and semester marks determine the year mark. The

year mark determines whether the student passes or fails, with the examination mark being the heavier in weighting.

[13] The University picked up a significant discrepancy between certain students', including the Applicants', class marks and examination results. The discrepancy is not what was expected, which is usually a decrease from class mark to exam results (due to the increased learning volume), but a significant increase above the class marks. The increase was of concern to the Department and the identified students, including the Applicants, were requested to submit their self-reflections. The Applicants elected not to do so, stating that it is not compulsory and for students that are not coping, and instead insist that they had passed the examination. On closer inspection it appeared that the students answered the questions with identical wording and layout, and made identical errors. Consequently, the Department concluded that sufficient evidence existed to require the legal department of the University to investigate whether a disciplinary inquiry into the examination irregularities and conduct of the students should follow. The investigation is ongoing and only once it is finalised, a decision will be taken whether to award the Applicants with their 20 January 2021 examination marks or to pursue disciplinary proceedings against them to decide whether there was misconduct.

[14] The Department realised that the Module could leave the students with a last outstanding credit⁵ should they be found guilty. Since the investigation or potential disciplinary process would take time to finalise, and most likely would not be finalised before the two re-examinations,

⁵ In terms of the University's Last Outstanding Credit (LOC) rule, a student with only one outstanding module preventing him or her from qualifying for a degree is afforded an opportunity for a re-examination, during the re-examination period. According to the University, this measure is aimed at seeking to avoid prejudice to a student who otherwise may be compelled to enrol for a single module over the course of a further year to complete his or her degree.

the Applicants were allowed an opportunity to re-write the exam and avoid facing the last outstanding credit dilemma. Clearly, the University acted in the best interest of the students, including the Applicants, in giving them an opportunity to rewrite the examination on 24 February 2021. As submitted by the University, the re-examination was offered as a 'compassionate' gesture and an act of good faith on their part. I agree. It is a pity that the Applicants elected not to make use of the opportunity, but rather remained steadfast in their view that they passed the examination. To make matters worse, there was also one final opportunity available, to final year students, to avail themselves for another re-examination during the week of 8 to 12 March 2021. Accordingly, and in the event of a guilty finding in the disciplinary proceedings, the Applicants, even if not sanctioned with expulsion, will at the very least have to redo the relevant Module as a consequence of having been stripped of their January 2021 result/s. Once again, the Applicants elected to rather proceed with this application. Against this background, the relief which the Applicants seek must be determined.

The relief

- [15] With regard to disputes of fact in motion proceedings, the time-honoured *Plascon-Evans*⁶ rule applies.
- [16] Prayers 2.3.1 to 2.3.3 constitute, what appears to be, review relief, whereas in prayer 2.3.4 the Applicants seek relief in the form of a final interdict. The requirements for a final interdict are (1) a clear right; (2) an injury actually committed or reasonably apprehended; and (3) the absence of similar protection by any other ordinary remedy.

⁶ *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H – 635C.

- [17] The Applicants allege that the University refused to give them access to their marked scripts. According to the University's General Prospectus the Applicants have a right to view their examination scripts on application to the examination office⁷. The Applicants have not availed themselves of such application and accordingly no such application has been refused.
- [18] The Applicants seem to labour under the misapprehension that they were directed by the University to submit themselves to re-examination on 24 February 2021. To the contrary, there was no decision that the Applicants submit themselves to re-examination as contended for by them. The University explains, in detail, the status of the re-examination, and that it was a concessionary and precautionary allowance, in respect of the Applicants, should they in future be pursued in disciplinary proceedings and found guilty of cheating, and thus stripped of their 20 January 2021 marks. As stated by the University, it was an effort to avoid prejudice being suffered and offered as a 'compassionate' gesture and an act of good faith on their part. There was no obligation on any of the Applicants to write the re-examination. Furthermore, the final year students (including the Applicants) who did not write on 24 February 2021 were offered one final opportunity to avail themselves for a re-examination during the week of 8 to 12 March 2021. Accordingly, in the absence of a decision, on behalf of the University, requiring the Applicants to submit themselves to the re-examination, there is nothing to review. Even if there was such a decision, the investigation and process to follow thereafter, if any, have not yet been finalised.

⁷ See G1.15.1 of the General Prospectus of the University which provide as follows: "*A student has the right to view his/her examination scripts and associated memoranda on application to the Examination Office provided that the student account is not in arrears by any of the payment dates and subject to the following time frames...*"

[19] The Applicants not only seek an order that they be awarded their final results, in respect of the relevant examination in terms of the 20 January 2021 marks, but also that such marks be published and taken into account in respect of the completion of the respective degrees for all students who wrote the examination on this date. Leaving aside the issue of non-joinder of the other students,⁸ the University sets out in various instances that the decision as to which mark to award to the Applicants can only finally be made either once the disciplinary process is complete, or when the investigation is complete and no charges are pursued against one or more of them. Simply put, the relief which the Applicants seek is premature.

[20] The Applicants also seek relief that their marked papers be kept in safe custody. It is not disputed that the University's Records Retention Policy provides that exam scripts must be retained in its Electronic Records and Documents Management Repository for a period of five years, and the originals for a period of one year after the exam. The Applicants do not allege that the University will dispose of the marked papers. The Applicants have therefore not satisfied the requirements for a final interdict. In fact, First Applicant's examination paper is attached to the University's answering papers.

[21] Mr Nobatana also submitted that the matter is on all fours with the judgment of *Spies and others v The Minister of Basic Education and others and related matters*.⁹ It bears mention that the facts in *Spies* are entirely distinguishable from the facts of this matter. In *Spies*, the decision was taken by the Minister that the Maths II and Physical Science II papers had to be re-written by all matric pupils enrolled for those two

⁸ Who most definitely have a direct and substantial interest in the subject-matter of the litigation which may prejudice them. Cf. *ABSA Bank Ltd v Naude NO and others* 2016 (6) SA 540 (SCA) at para [10].

⁹ [2020] JOL 49157 (GP).

subjects, in circumstances where only a number of learners had access to the aforementioned papers. In this matter the converse is true. It is only a handful of students that had the option to write the re-examination. They were not compelled to do so.

Conclusion and costs

[22] In light of the conclusion that I have arrived at, no purpose would be served in dealing with and expressing a view on the issue of non-joinder. The Applicants have not made out a case for interdictory relief. With regard to the remainder of the relief, the Applicants were neither refused access to their scripts nor were they directed to submit themselves for re-examination. Lastly, the decision as to which marks to finally award the Applicants has not yet been taken. As previously stated, as there is no decision, there is nothing to review.

[23] With regard to costs, Mr Nobatana submitted that the *Biowatch* principle¹⁰ ought to apply and in this regard referred to the judgment in *Ferguson and Others v Rhodes University*.¹¹ In my view the facts in *Ferguson* is distinguishable from the facts at hand. The applicants in *Ferguson* were asserting their constitutional right of freedom of expression and association in challenging the interim interdict, which was ultimately found to be overly wide.¹² The Court held that those proceedings activated the principle enunciated in *Biowatch* with regard to costs. It was further argued that this matter raises a constitutional issue, being the Applicants' right to further education. It was submitted that

¹⁰ Recently summarised by Nhlangulela DJP in *Dyanti v Rhodes University and Others* (1604A/18) [2020] ZAECHC 34 (26 March 2020), at para [41], as follows: "*Biowatch Trust v Registrar, Genetic Resources 2009 (6) SA 232 (CC) in which it was held that as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the State ought not to be ordered to pay the costs; the rationale for this rule being that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights.*"

¹¹ 2018 (1) BCLR 1 (CC).

¹² At para [24].

each party should be ordered to pay their own costs; alternatively, that costs be reserved, and that the applicants that are not properly before court should not be ordered to pay any costs.

- [24] Mr Nepgen on the other hand referred to the matter of *Harrielall v University of KwaZulu-Natal*¹³ and submitted that this matter is not a genuine constitutional matter since there is no infringement of the Applicants' right to further education. Further, referring to *Harrielall*, that legal action that is not likely to lead to any procedural result is vexatious and the Applicants cannot escape liability for costs. It is true that in *Harrielall*¹⁴ the caveat to the general rule was stated in the following terms:¹⁵

"However, the rule is not a licence for litigants to institute frivolous or vexatious proceedings against the State. The operation of its shield is restricted to genuine constitutional matters. Even then, if a litigant is guilty of unacceptable behaviour in relation to how litigation is conducted, it may be ordered to pay costs. This means that there are exceptions to the rule which justify a departure from it. In Affordable Medicines this Court laid down exceptions to the rule. Ngcobo J said:

'There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. '"

- [25] In my view, the Applicants' constitutional right to further education has not been infringed in any way. Even if I am wrong, one has to look at how the litigation was conducted. In this regard, I have taken into account the following facts. The Applicants launched the present application, on an urgent basis, and prematurely I might add, after the re-

¹³ 2018 (1) BCLR 12 (CC) at paras [11] to [13].

¹⁴ At para [12] (footnotes omitted).

¹⁵ Borrowing from Nhlangulela DJP in *Dyanti* supra at para [41].

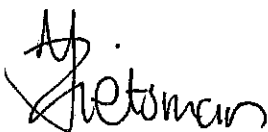
examination had already been conducted. They elected not to write the re-examinations and wait for the investigation and/or disciplinary process to be finalised. The decisions which the Applicants seek to challenge are in any event either moot or have not yet been taken. I can therefore find no reason why there should be any deviation from the rule that costs follow the result.

Order

[26] In the result, the following order is issued:

[26.1] The application is dismissed.

[26.2] The First to Fifth and Tenth Applicants are ordered to pay Respondent's costs jointly and severally, the one paying the other to be absolved.



T. Zietsman

ACTING JUDGE OF THE HIGH COURT

Appearances:

Obo the Applicants: Adv MW Nobatana

Instructed by: MLN Law Incorporated, Port Elizabeth

Obo Respondent: Adv J Nepgen

Instructed by: Joubert Galpin Searle, Port Elizabeth