



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: YES / NO

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

(3) REVISED

6 October 2023

DATE



SIGNATURE

CASE NO: 076693/23

In the matter between:-

COUNCIL OF THE UNIVERSITY OF SOUTH AFRICA

Applicant

VS

**THE MINISTER OF HIGHTER EDUCATION SCIENCE
AND INNOVATION**

First Respondent

PROFESSOR THEMBA MOSIA AND OTHERS

Second Respondent

And

CASE NO: 082535/23

In the matter between:-

**PRINCIPAL AND VICE CHANCELLOR OF THE UNIVERSITY
OF SOUTH AFRICA**

First Applicant

**THE MANAGEMENT COMMITTEE OF THE UNIVERSITY
OF SOUTH AFRICA**

Second Applicant

**CHAIRPERSON OF THE COUNCIL OF THE UNIVERSITY
OF SOUTH AFRICA**

Third Applicant

**CHAIRPERSON OF SENATE OF THE UNIVERSITY
OF SOUTH AFRICA**

Fourth Applicant

VS

**THE MINISTER OF HIGHTER EDUCATION SCIENCE
AND INNOVATION**

First Respondent

**PROFESSOR THEMBA MOSIA AND OTHERS
(in his capacity as an Independent Assessor)**

Second Respondent

Coram: Kooverjie J

Heard on: 5-6 October 2023

Delivered: 6 October 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *Caselines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 6 October 2023.

ORDER

It is ordered that:-

1. the rules relating to service and time periods in dealing with the application as one of urgency in accordance with the provisions of Rule 6(12) of the Uniform Rules of Court are dispensed with and this matter is dealt with as one of urgency;
2. it is declared that the Minister's Notice of Intention to Act dated 04 October 2023 ("the Notice") is in breach of the order of the above Honourable Court granted by Mr Justice Adams on 24 August 2024, and in particular order number 8;
3. the Minister is ordered to withdraw the Notice forthwith upon the granting of this order;

4. the Minister is ordered to immediately cease and desist from taking any steps to publish and implement the Notice or to take any steps of whatever nature to implement the Notice;
5. the Minister is interdicted from taking any action in respect of his Notice; and
6. the Minister is ordered to pay the costs of the applicants on an attorney and client scale.

JUDGMENT

KOOVERJIE J

[1] This urgent application was instituted at the eleventh hour by the applicant, the Council of the University of South Africa, due to the Minister of Higher Education Science and Innovation (“the Minister”) issuing a notice of intention to act. The said notice was issued on 4 October 2023.

[2] The notice reads:

“Be pleased to take notice that the Minister of Higher Education Science and Innovation, the first respondent in both applications, intends to publish and

implement his decision regarding the Council of UNISA on Friday, 6 October 2023.”

[3] The said notice also affected the applicants in the other matter of case nr 082535/2023, namely the Principal and Vice Chancellor of UNISA, the management committee and others. In that regard they caused a supplementary affidavit to be filed seeking similar relief to that of the Council namely an interdict to restrain the Minister from taking a decision in terms of the IA Report.

[4] The backdrop of the urgent application is centered on the order of Adams J of 24 August 2023, which order was granted by agreement between the parties, namely the applicants in both matters and the Minister.

[5] This order made provision for the respective parties to file outstanding affidavits, particularly in respect of the intervention application, but more importantly paragraph [8] stipulated:

“That pending the finalisation of the urgent application herein and the urgent application under case number 2023-082535, the first respondent undertakes not to take any decision pursuant to the report titled “Report of the Independent Assessor into the affairs of the University of South Africa (UNISA)” dated 21 March 2023, prepared by the second respondent, published in the Government Gazette 48660 (Government Notice 3461) of 26 May 2023.”

[6] Prayer 1 of the order made provision for the consolidation of the two matters under case numbers 2023-082535 and 2023-076693 together with the intervention applications. Prayer 1 of the order reads:

“The urgent application herein and Professor Mothata’s intervention applications are adjourned on Thursday, 7 September 2023, wherein they shall be heard together with the urgent application under case number 2023-082535 and the intervention application delivered in that application.”

[7] It is common cause that upon the said order being granted, the applicants, together with the Minister approached the Deputy Judge President’s (“DJP’s”) office and sought a special allocation as well as an appropriate date for the hearing. In fact, the case management meeting was convened with the DJP on the 4th of September 2023.

[8] Although the papers were eventually filed, the DJP had not come back to the parties with a preferential date. As late as the 14th of September and 22nd of September 2023, the parties in further correspondence followed up with the office of the DJP. At all relevant times the Minister was party to the arrangement with the office of the DJP.

[9] Despite this arrangement, the Minister issues the Notice. On receipt of same, the applicants undertook to remind the Minister of the Adams J order, particularly paragraph [8]. The Minister was cautioned that should he publish and implement the decision as set out in his notice, he will be in contempt of the Adams J order

and his conduct will be considered to be *mala fide*. He was further informed that the parties agreed to obtain a preferential date from the office of the DJP.

[10] The Minister's response in the papers and in argument were premised on various grounds, firstly, that the Minister was not bound to the undertaking as per the order. Prayer [8] of the Adams J order merely recorded that the Minister undertook not to take a decision in respect of the AI Report. The Minister's view is simply flawed.

[11] Our authorities have pronounced that an undertaking recorded in a court order is binding and has the same force and effect as an order of court. Any breach of the said undertaking would constitute misconduct that would amount to contempt.¹

[12] Secondly, it was argued that the undertaking was given by the Minister on the basis that the urgent application will be disposed of expeditiously. It was contended that the applicants did not wish for this to happen. Since a date for the hearings have not been canvassed by the applicants, the Minister was entitled to proceed with his statutory obligations regarding the affairs of UNISA.

[13] Once again this argument is untenable. The Minister was clearly a party to the arrangements made with the office of the DJP and was well aware that no date was as yet communicated to the parties for the hearing of the urgent applications.

¹ York Timbers Ltd v Minister of Water Affairs and Forestry and Another 2003 (4) SA 477 T at 500 G and Simon NO and Others v Mitsui & Co Ltd and Others 1997 (2) SA 475 W at 498 G-I

[14] Thirdly, it was argued that the requirements for contempt of court have not been met. The applicants indicated that they do not seek a contempt order. They pointed out that the Minister was merely informed that should he publish and implement his decisions he will be in contempt of an existing court order which has not been set aside or varied. I have noted that although the such relief was sought in the notice of motion, it was not persisted with.

[15] Fourthly, it was contended that the applicants have not made out a case for an interim interdict and further for such relief. Once again the Minister's contentions are flawed.

[16] In my view, I am in agreement with the applicant's counsel that the circumstances in this matter do make out a case for exceptional grounds. I am mindful that the court should not ordinarily interfere with the affairs of state organs, particularly with their decisions. However certain circumstances justify an order restraining a state organ. It has been pronounced by our courts that it is this court's inherent duty to ensure that even state organs promote and fulfil the rights entrenched in the Constitution. Section 8(1) of the Constitution provide that the Bill of Rights apply to all and further binds all organs of state.²

[17] I am satisfied that both applicants have established *prima facie* rights, they would suffer irreparable harm, the balance of convenience is in their favour, and further there is no other alternative remedy.

² National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 CC

- [18] In brief, it cannot be gainsaid that the applicants have a *prima facie* right to oversee the management and administration of UNISA, which includes teaching, learning, academic and research functions.
- [19] The applicants would most certainly suffer irreparable harm. If an administrator is appointed, the management, governance and administration of UNISA would be taken over. The applicants' positions would become redundant and Council would inevitably be dissolved. More evidently, their credibility and reputations would be at stake.
- [20] UNISA's right to institutional autonomy would further be threatened as UNISA will lose their institutional autonomy. In my view, the harm that the applicants may suffer if the Minister is left to his decisions, by far outweighs the Minister's inconvenience if he is not allowed to make a decision at this stage. The Minister has failed to demonstrate any prejudice he may suffer if he is restrained from acting in terms of the Notice.
- [21] Lastly, the applicants have been left with no other remedy but to approach this court. The applicants had done everything in their power to avoid this urgent application. Various correspondences were sent to the Minister requesting him to withdraw the Notice and not proceed with a decision in respect of the Report. In fact such correspondence were sent by two sets of legal representatives representing the two sets of applicants.

[22] At this juncture, I reiterate that the effect of this order does not interfere with the doctrine of separation of powers in any way. This court is not called upon to interfere with the decision-making powers of the Minister in any manner. What the court is requested to do is to ensure that the Minister respects the Rule of Law and complies with a valid court order. The Minister retains all his statutory powers. At this stage he is merely interdicted from exercising them for the time being pending the outcome of the urgent applications.

[23] The Constitutional Court in ***Municipal Manager O R Tambo District Municipality and Another v Ndabeni 2023 (4) SA 421 at paragraph 25*** reaffirmed that a court order is binding until it is set aside by a competent court. This necessitates compliance, regardless of whether the party against whom the order is granted believes it to be nullity or not. Organs of state are enjoined to assist and protect the courts to ensure the independence, impartiality and effectiveness of our courts.

COSTS

[24] It is settled law that punitive costs are granted by the court when it expresses its displeasure in respect of a party's conduct. In this instance, this court disapproves the conduct of the Minister. The Minister was cautioned that his conduct in persisting with making an imminent decision was contrary to the undertaking as per the court order of 24 August 2023. Furthermore the Minister only notified the applicant a day before he intended to publish the decision. This court takes a dim view of such conduct. The Minister was at all relevant times

aware that the issues between the parties, emanating from the urgent applications, had to be properly ventilated in court and furthermore a date for the hearing of the urgent applications was not yet furnished.

[25] In the circumstances of this matter and the facts before me, I find that a punitive costs order is justified. The Minister is ordered to pay the costs on an attorney and client scale.



H KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

URGENT INTERDICT UNDER CASE NR 076693/23

Counsel for the applicants:

Adv. Fana Nalane SC

Adv Nompumelelo Seme

Adv Ipfi Rakhadani

Instructed by:

Nchupetsang Attorneys

Counsel for the first respondents:

Adv VS Notshe SC

Instructed by:

The Office of the State Attorney

URGENT APPLICATION UNDER CASE NR 082535/23

Counsel for the first, second and fourth applicants: Adv Lunga Siyo

Instructed by:

*Adv Neo Ntingane
Webber Wentzel*

Counsel for the first respondent:

Adv VS Notshe SC

Instructed by:

The Office of the State Attorney

Counsel for the applicant intervenor:

Adv M Vimbi

Instructed by:

MP Mannya Inc

Date heard:

5-6 October 2023

Date of Judgment:

6 October 2023