

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

CASE NUMBER: 076693/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGE: NO

(3) REVISED: NO

DATE: 1 November 2023

SIGNATURE:

In the matter between:

COUNCIL OF THE UNIVERSITY OF SOUTH AFRICA

APPELLANT

and

MINISTER OF HIGHER EDUCATION

SCIENCE AND INNOVATION

FIRST RESPONDENT

PROFESSOR TEMBA MOSIA N.O. AND OTHERS

SECOND RESPONDENT

Coram: Le Grange AJ

Heard: 30 October 2023

Delivered: This judgment and order is handed down electronically by circulation to the parties' representatives by email and uploaded on CaseLines. The date and time for hand-down is deemed to be 08h00 on 1 November 2023.

ORDER

It is ordered that: -

1. the rules relating to service and time periods in disposing of 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. the application for joinder of the further applicants is granted, with no order as to costs;
3. it is declared that the Minister's decision published in Government Gazette number 49582 Vol. 700 dated 27 October 2023 is in breach of the order granted on 24 August 2023 by honourable Adams J, and unlawful;
4. the Minister must immediately retract the Government Gazette number 49582 Vol. 700 dated 27 October 2023;
5. costs are to be costs in the urgent application.
6. the parties are granted leave to approach the Deputy Judge President for a date and time for consideration of the issue contempt.

JUDGMENT

Le Grange AJ:

- [1] Before this Court is an urgent application in terms whereof the applicant ('Council') moves for an order *inter alia* declaring the first respondent's ('Minister') *publication of Government Gazette number 49582 Vol. 700* dated 27 October 2023 to be contemptuous and in breach of the order granted by Adams J on 24 October 2023.

[2] A similar application was heard by Kooverjie J, where the Council moved for an order declaring that the Minister's *Notice of Intention to Act* dated 04 October 2023 is unlawful, *mala fide* and contemptuous. That court found that the said notice was in breach of the order granted by Adams J dated 24 August 2023, and more specifically in breach of paragraph 8 thereof which reads: -

‘8. 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 entitled “Report of the Independent Assessor into the Affairs of the University of South Africa (UNISA)”, dated 31 March 2023, prepared by the second respondent, published in the Government Gazette (Government noticed 3461) of 26 May 2023.’ Emphasis added.

[3] Everyone is back in Court, as the Minister has now gone beyond a notice of intention to act, and factually acted (admittingly) contra to the aforesaid paragraph, in appointing an administrator pursuant to the report. The Minister however claims that the aforesaid paragraph was a mere ‘undertaking’ and not an ‘operative order’ wherefore it can be, and was, disregarded by the Minister. Considering this defence (forget for a moment whether the ‘undertaking’ is an order or not) this Court could not but wonder if we have reached a state in our democracy where a Minister’s (a public litigant, who has a much higher duty to respect the law and uphold the Constitutional principles) word and undertaking means nothing.

[4] Be that as it may and back to the issue, the Minister is of the view that in considering his action now, the only order that should be considered is that of Kooverjie J as that order sought to deal with the order of Adams J. Fortunate for this argument is the fact that that order has been met with an application for leave to appeal and is submittingly suspended. The applicant then submittingly left with an empty order by Adams J.

- [5] The contention is wrong, the matter before Kooverjie J was not one of clarifying, varying, or rescinding the order of Adams J (an order which has not been met any of the aforesaid or with an appeal or review, for obvious reasons). The order of Adams J therefore remains as is, and operative.
- [6] As the Minister has now gone beyond his intention and acted by appointing the administrator, a similar question arise before this Court, i.e. this Court in considering the order of Adams J, questioning whether the Minister is contemptuous and in breach with his appointment of the administrator.
- [7] In adjudicating, the origin of the order of Adams J needs consideration: - The Minister deemed it fit to request a report from an independent assessor into the administration and financial affairs of UNISA. That report (incorporating recommendations *inter alia* to appoint an administrator over UNISA and to dissolve the Council) saw the light on 31 March 2023, and immediately prompted two review applications (setting aside the report – brought by the Council; and by the Vice Councillor and the Senior Management of UNISA) and two urgent proceedings aimed at securing the *status quo* (i.e. keeping the administrator at bay) pending finality of the review and the urgent application(s).
- [8] On 24 August 2023, when one of the matters came before Adams J, all the parties agreed to a draft order being made an order of court, the essence of which was to consolidate the two urgent matters, and to set timelines for the filing of further affidavits and heads of argument. The draft order, which was made an order of court by Adams J, also incorporated paragraph 8 (cited in paragraph 2 *supra*) which is set in a form of an undertaking.
- [9] This undertaking was given in the midst of fending off two urgent applications and with the pure intent to ensure that the *status quo* will remain pending a final decision. It is the norm (with good reason) that parties in a momental ‘cease fire’, agree to such an undertaking for reasons

thereof that the main matter be dealt with sensibly and properly and not be tainted with now new foreseeable or unforeseeable litigation.

[10] The purpose of seeking to make such an undertaking, reciprocally offered and accepted by parties and tendered to court, an order of court, is nothing but to facilitate enforcement of that relief. Kooverjie J in her judgement, referring to *York Timbers Ltd v Minister of Water Affairs and Forestry and Another* 2003 (4) SA 477 at 500G, stated the obvious, i.e. that the undertaking was not just an undertaking but an order.

[11] In the premises, this Court, considering the above and the Minister's concession as stated in paragraph 3 *supra*, cannot find otherwise than that the act of appointing the Administrator was (and is) in direct conflict and breach of the order of Adams J, and unlawful.

Locus standi

[12] The argument goes that, as the Minister published the appointment of the Administrator, the Council dissolved *pari passu*, which leaves the latter without *locus standi*.

[13] The contention is wrong and the Minister's reliance on *Oudekraal* misplaced. This is not a matter where an administrative decision still needs to be declared unlawful by a court of law, during which time a decision will remain operative, this is a matter where an intended (possible) administrative decision is already prohibited by an order, the violation of which is unlawful.

[14] The proper functioning and authority of the courts would be considerably undermined if functionaries are allowed to disregard direct orders, with the conception and belief that its decision remain in place until it be declared unlawful, again.

- [15] Any and all actions that flow from this (already declared) unlawfully decision is void and unenforceable, to be met with contempt of court proceedings.

Non-Joinder of administrator

- [16] The Minister is of the view that the freshly appointed Administrator had to be joint to the proceedings.

- [17] This contention must fail for the same reason as stated above, i.e. that the appointment was unlawful and void *ab initio*, and for the fact that the Administrator (who may have been joint for convenience) does not have a direct and substantial interest in these proceedings.

Joinder of other applicants

- [18] The application for the joinder of the further applicants is granted for the reason that they, have undoubtedly formed part of the whole matter and do not just have (and had) a direct and substantial interest in the outcome of all matters till now, but also in this matter before this Court.

- [19] No order as to costs are made in this regard.

Contempt

- [20] Although urgent, I find that the issue of contempt is not that urgent compared to the main relief sought.

- [21] The parties are further *ad idem* that this Court should not be haste in its pronouncement on contempt as much can, and may, still to be put forward and be said. This Court agrees.

- [22] It has been strongly suggested, by the applicants, that this Court should grant an order calling upon the Minister to show cause why he should not be held in contempt of court. This presupposes a *prima facie* view from this Court which can taint a further court hearing the matter which is simply unwarranted.

[23] Considering the circumstances, this Court is therefore willing to grant the parties leave to approach the DJP for a date to properly deal with the issue of contempt.

Costs

[24] The applicant has invited the respondent to court, losing that costs be costs in the urgent application.

[25] This changed in argument where costs were sought on an attorney and client scale, due to their persistence of the Minister's (second incidence of) contempt of court. Following this argument, it is strange why costs are sought to come from the pockets of the taxpayers.

[26] Be that as it may, as no order is herein granted pertaining to the contempt of the Minister, costs should also not be considered at that level.

[27] Costs are then to be as initially claimed.

A J le Grange
Acting Judge

APPEARANCES:

For the first appellant:

F Nalane SC

N Seme

I Rakhadani

On instruction of Nchupetsang Inc.

Attorenys, Roodepoort

For the second to fourth applicants:

T Ngcukaitobi SC

L Siyo

On Webber Wentzel, Sandton

For the first respondent:

V S Notche SC

State Attorney, Pretoria

