

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO: 124/2022

In the matter between:

MAKHANDA AGAINST MANDATES

First Applicant

FRANCIS WILLIAMSON

Second Applicant

EDWARD DE LA REY

Third Applicant

DAVID DRENNAN

Fourth Applicant

JERRALEIGH KRUGER

Fifth Applicant

ALICK BURGER

Sixth Applicant

ROBERT VAN DER MERWE

Seventh Applicant

EMILY VAN DER MERWE

Eighth Applicant

KELLIE STEINKE

Ninth Applicant

And

RHODES UNIVERSITY

Respondent

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED.

JUDGMENT

NONCEMBU AJ

INTRODUCTION

[1] This is an interlocutory application brought on an urgent basis by the second, third, fourth and fifth applicants (the employee applicants/applicants), seeking an order –

- (a) condoning the applicants' non-compliance with the prescribed requirements pertaining to form, process and time periods, and permitting the matter to be heard as one of urgency as envisaged in rule 6(12) of the Uniform Rules of Court;
- (b) interdicting and restraining the respondent from taking any steps to terminate their contracts of employment for any reasons relating to the respondent's mandatory vaccine policies, pending the finalization of an application for an interim interdict pending before this court under case number 124/2022; and
- (c) for costs of the application.

[2] The main application is made up of two parts, part A being the aforementioned interim interdictory relief pending the finalisation of a review application contemplated in part B thereof.

BACKGROUND

[3] The applicants are employees of the respondent, and together with the third, sixth to the ninth applicants (some of whom are students of the respondent), are members of the first applicant. The first applicant lodged the main application, part A of which was originally set down for hearing on 15 February 2022. By agreement between the parties, subject to certain conditions to be dealt with hereunder, the matter was postponed to 1 March 2022. The second to the ninth applicants were subsequently joined in the matter by agreement between the parties.

[4] The genesis to the main application arises from a decision taken in October 2021 by the Council of the respondent making vaccinations mandatory and placing unvaccinated staff on unpaid leave. The applicants decided to take the decision on review, but considering the period it would take to obtain the final relief they were seeking, they decided to apply for an interim interdict (part A of the application). Their

reasoning was that if the court were to ultimately find that the mandatory vaccinations were unlawful, harm would have been done already.

THE UNDERTAKING

[5] With the intervention of the Judge President, a case flow management meeting was held on 8 February 2022 to determine how the matter was to be dealt with. The parties agreed at the said meeting that part A of the application would be heard on 1 March 2022, subject to a condition that the respondent would give an undertaking on the following terms:

- “7. It is recorded that the Respondent undertakes that there will be no interruption of payment of staff salaries prior to the hearing and judgment in the application for interim relief (Part A).*
- 8. It is recorded that the provisional registration for students currently in operation at the Respondent will continue, subject to the required final registration, which involves curriculum approval with the dean of any of the respective faculties, and which approval does and will require direct communication with the dean of the relevant faculty.*
- 9. In the event that interim relief is granted, the cut-off date for final registration of students will be extended to a date 5 (five) days after the date of the court order.”*

[6] Accordingly the matter was heard on 1 March 2022, and in an *ex tempore* judgment by Lowe J, handed down on 2 March 2022, it was struck off the roll for want of urgency.

[7] Subsequent to the above ruling, the respondent was invited to supplement its answering papers in order to prepare for the re-enrolment of the matter on the normal motion court roll. The respondent filed its supplemented papers on 14 March 2022 and the applicants thereupon filed their supplementary replying papers. No set down has been allocated to the matter to date. It was however indicated at a subsequent case flow management meeting that the earliest allocation date in the normal motion court roll could be in September 2022.

[8] On 10 March 2022 the employee applicants received letters from the respondent's attorneys which apprised them that the time period within which they were required to provide proof of vaccination or apply for exemption had expired and that, therefore, Human Resource processes were to commence immediately.

[9] Having received no joy when enquiring as to what was meant by '*Human Resource processes*', and what the applicable timelines therefore were from the applicant's attorneys, the applicants decided to launch the current application. They believed that the contemplated processes could result in the termination of their contracts of employment due to incapacity. If this were to materialise, they contended, it would mean that they would no longer be employees of the respondent and would therefore have no *locus standi* in the interim interdict and review applications (Part A and B of the main application). This is therefore what prompted the urgent interlocutory application *in casu*.

[10] The applicants view the matter as extremely urgent in that legal advice received from their attorneys indicates that dismissals due to incapacity need take no longer than two (2) to three (3) weeks.

[11] Regarding the status of the undertaking, the applicants contend that Lowe J's decision of 2 March 2022 did not dispose of the matter as the matter was simply struck off the roll. They therefore conclude that the interim relief has not been heard and as such the undertaking must survive the decision of 2 March 2022. The respondent, on the other hand, contends that the application for interim relief was heard and judgment was given on 2 of March 2022. Its view is that the undertaking was meant to facilitate the hearing of the matter on a date later than 15 of February 2022 (the initial set-down), so as to afford the respondent sufficient time to file its answering papers; the undertaking therefore ceased to exist after judgment was delivered on 2 March 2022.

[12] The applicants maintain that the said undertaking is extant and they therefore seek a ruling accordingly in these proceedings.

THE ISSUES

[13] The main issues for determination by this court are:

- (a) whether the undertaking by the respondent survived the judgment of 2 March 2022 by Lowe J;
- (b) whether the applicants have met the requirements for urgency as contemplated in rule 6(12) of the Uniform Rules of Court;
- (c) whether the applicants have made out a case for the interim relief sought.

APPLICABLE LEGAL PRINCIPLES

[14] It is common cause between the parties that the applicants' case stands or falls on the determination of whether or not the undertaking is still alive. If the court finds that it is not, then the applicants' case falls to be dismissed.

[15] It follows therefore that the interpretation attributed to the undertaking given by the respondent at the case flow management meeting of 8 February 2022 is central to the determination of this matter.

[16] The approach to the interpretation of documents was settled by the Supreme Court of Appeal in *Natal Joint Municipal Fund v Endumeni Municipality*,¹ where it was held:²

“Interpretation is the process of attributing meaning to the words used in a document, albeit legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions and the like of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision

¹2012(4) SA 593 (SCA).

²At paragraph 18.

appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all the factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

[17] In *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*,³ the SCA held:

“This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it.... A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.”

[18] From the above authorities it is clear that when interpreting a document, a court must consider the factual matrix which led to the said document being concluded, its purpose, the circumstances leading up to its conclusion and the knowledge of those who negotiated and produced the document at the time of the negotiations. To do this the parties will invariably have to adduce evidence to establish the context and purpose of the relevant provision. That evidence could include the pre-contractual exchanges between the parties leading up to the

³2016 (1) SA 518 (SCA) at paragraphs 27-28.

conclusion of the document and evidence of the context in which the contract was concluded.⁴

[19] In an effort to present evidence pertaining to the context in which the undertaking was made, the respondent has referred this court to a copy of the transcribed record of proceedings of the case flow management meeting which it annexed to its answering affidavit.⁵

[20] From the transcript the following interaction between the Judge President and counsel representing the parties in the matter is recorded:⁶

“Mr Louw: Number 4 I deal with the contents thereof; the application (sic) would prefer the matter to proceed on the 15th as originally arranged. Although we are on record that the applicant does not oppose the matter being heard on 01 March as suggested by the respondent’s attorneys, however, there are a few things that the respondent can do to make that meaningful. And I say that because if they do not relax the mandate that has been put in place, both as far as staff and students are concerned, then the urgency of the matter will be have become completely moot. And I say that because as far as staff is concerned, they are forced to be on and making use of their annual leave at the moment, although when the papers were filed the one deponent, the one staff member had in fact been refused even annual leave, that has since changed. But for the rest of the staff their annual leave does come to an end some time, or another and they all have commitments, so one can understand their family commitments, their financial commitments, etcetera, etcetera... As far as the students are concerned, unless they are allowed to register, if the matter is only heard on 1 March, even if the order is granted, the interim interdict, it will be too late because as you will see from one affidavit of Dr Steinke and I’m talking about a letter from Rhodes saying that she has to register by no later than 15 February without allowing students generally to register, irrespective of their status

⁴*University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021(8) BCLR 807 (CC); 2021 (6) SA 1 (CC) (11 June 2021).

⁵Marked as Exhibit ‘D’.

⁶Page 1, lines 7-25; page 2, lines 1-26, and page 3, line1.

as to whether, or not they have this experimental vaccine, or not, it will make the whole question of the urgency completely irrelevant...

Court: ... this is not a hearing so to speak, this is just a conference. It is facilitated by me in order to manage the future conduct of this application. So the long and short of it is you would love 15 February to be spent arguing the interim relief part of the application and then we can talk about part B at a later stage, is that what you are saying?"

[21] At page 10 of the transcript the following recording is reflected:⁷

"Mr Smuts: Judge President, we have set out our proposed timelines in our letter.

Court: Yes.

Mr Smuts: Which are reflected in our earlier correspondence with the applicant's attorney and my understanding was that Mr Louw indicated that those timelines, if the matter were to be heard then, or that 1 March seemed to be a feasible proposition, he said under specific circumstances. I do not understand that the timeline proposed is the problem, it was the specific circumstances. ..."

[22] The extracts referred to above give one a better perspective of the context in which the undertaking was given by the respondent. It is also clear from the above that the proposition for the change in dates from 15 February to 1 March came from the respondent who needed more time to file its answering papers given the voluminous papers it had received from the applicant, and that the JP was requested to manage the matter to ensure that the future conduct thereof was properly and efficiently facilitated.

[23] At page 11 counsel for the applicants states the following:⁸

"Mr Louw: Judge President, the timeline is not the problem. The problem really is what do we do with students that will not be able to register, what do we

⁷Lines 5-14.

⁸Lines 3-6.

do with staff members who are not too long from now going to have no income...”

[24] Responding to the above, counsel for the respondent states as follows at page 14:⁹

“Mr Smuts: He says and he is correct that at the moment no member of staff is not being paid and I have a mandate to advise that no member of staff’s salary will be withheld before the hearing of the matter and the decision on part A. So there is no immediate prejudice in respect of the issue of staff members at all.

...

And so may I say this as well, there is a provisional registration process in operation and students are registering in accordance with that provisional process. For registration to become final they need to attend upon the campus and confirm the course content. So that provisional process is in operation, people are applying in limited numbers for exemption. ...”

[25] At page 16 counsel for the applicants states the following:

“Mr Louw: Yes, Judge President, the way I understand my learned friend that the staff will not be prejudiced, their salaries will be paid until this application is finalised. And secondly all students can provisionally register. And the outcome of this matter will be decided whether their registration will be confirmed, or not.”

[26] To the above, counsel for the respondent responded:¹⁰

“Mr Smuts: No Judge President, that is not what we said. They are seeking, the applicants were seeking to have an urgent application for interim relief heard on the 15th. We said no time does not allow it, it is now urgent to be heard on the 15th, because the staff are currently, there are no staff whose salaries has been suspended and no staff, I gave the undertaking, will have salaries suspended, or reduced,

⁹Lines 1- 23.

¹⁰Page 17, lines 4-17.

*or interfered with until the urgent application is heard and disposed of. I am not waiting for part B which might be set down in September. I cannot give you that guarantee. **But certainly in terms of the urgency the hearing of the matter on the 15th rather than the 1st, we give the undertaking that salaries will continue to be paid until the urgent application is disposed of.***

[27] The portion highlighted above, in my view crystallises the intention and the context in which the undertaking was given. Firstly, as contended on behalf of the respondent, it had nothing to do with the employment of the applicants, but everything to do with payment of their salaries. In the second instance, it was meant to secure a later date of hearing than 15 February to afford the respondent sufficient opportunity to respond to the voluminous papers it had been served with and for all the papers to be properly exchanged before the urgent application could be heard. Thirdly and most importantly, it was meant to sustain until the urgent application was heard and disposed of.

[28] The applicants contend that the undertaking was intended to ensure the rights of the employee applicants to meaningfully participate and argue for the relief they seek in the interim interdict. They thus contend that the aim and intention of all the parties (including the respondent) was to preserve the right claimed on behalf of the applicants. This, however, is not supported by the evidence presented. As demonstrated in the extracts referred to above, both the language used and the context in which the undertaking was given present a different intention to what is being contended by the applicants.

[29] Further, the applicants contend that at the time of the undertaking the issue of termination of the employment contracts had not come to the fore. They contend that had the respondent taken steps to terminate the employment contracts of the applicants at the time, an undertaking in those specific terms - securing the rights of the applicants to meaningfully participate and argue for the relief they seek in the interim interdict would have been secured.

[30] I find this contention unsustainable at two levels. In the first instance, it amounts to a concession that at the time of the undertaking the issue of the employment contracts of the applicants did not arise. In the second instance, it loses sight of the fact that had the urgent application been heard on the original date of set down (15 February), the entire issue of the undertaking would never have arisen. It only came to be because the respondent wanted a later date for the hearing of the matter. I therefore find it quite fallacious of the applicants to contend that they could secure any kind of undertaking under those circumstances.

[31] The respondent made it quite clear that they were not willing to pay salaries until September where staff was not providing any service to the University. To therefore attribute an interpretation to the effect that the undertaking was meant to sustain until the interim interdict is heard in the normal roll, the earliest date of which is in September, would lead to an unbusinesslike and insensible interpretation. The insensibility of the interpretation becomes even more apparent if one considers the position of the student applicants. Such an interpretation would mean that student registrations could be finalised in September- when the academic year is headed towards the end.

[32] The respondent contends, in its answering papers, that the urgent application was heard and disposed of when judgment by Lowe J was handed down on 2 March 2022. I agree with this view. There are various ways in which a court can dispose of an application. It can either give judgment or an order in favour of the applicant or one of the parties, it can dismiss the application, or it can have the matter struck off the roll. The urgent application referred to *in casu* was struck off the roll for want of urgency in the judgment handed down on 2 March 2022. In my view, at that point the undertaking had served its purpose and therefore came to an end. The view contended by the respondent - that the application (for interim interdictory relief) currently being enrolled in the normal court roll by the applicants is in a different form - is therefore supported.

[33] As conceded by both parties in this matter, this then becomes dispositive of the matter. The entire thrust of the employee applicants' urgent application loses its

foundation and therefore cannot stand. It therefore serves no purpose for this court to deal with the other issues raised.

ORDER

[34] In the circumstances, the following order is made.

(a) The application is dismissed with costs, including costs of two counsel.

V P NONCEMBU

Acting Judge of the High Court

APPEARANCES

DATE OF HEARING : 12 April 2022

DATE OF JUDGMENT : 21 April 2022

Counsel for the Applicants : *S S Louw*

Instructed by : Wheeldon Rushmere & Cole Inc
Per: Matthew Fosi Chambers
119 High Street
Grahamstown

Counsel for the Respondent : *I J Smuts SC (together with M Somandi)*

Instructed by : Huxtable Attorneys
26 New Street
Grahamstown