



NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

CASE NO. EL 500/2022

In the matter between:

NANISE AYABULELA

Applicant

and

LILITHA COLLEGE OF NURSING

First Respondent

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH, EASTERN CAPE PROVINCIAL
GOVERNMENT**

Second Respondent

JUDGMENT

HARTLE J

[1] The applicant is a third year nursing science student at the Lilitha College of Nursing (“the College”).

[2] Although she has practically reached her fourth year of study her current registration status as a third year student is due to the fact that she failed a major module, to wit, Psychiatric Nursing Science 1 (PNS 1), which examination was written on 9 November 2021.

[3] She was afforded a remark of her script and due to an unfortunate error, which the first respondent evidently regrets, she was wrongly informed that her mark had changed to a pass which entailed that she could progress to her fourth year. The mistake in communicating the wrong outcome to her was compounded by the fact that she missed out on the option to rewrite the failed module in February 2022.

[4] The applicant lodged a grievance which was referred to SENEX, a committee consisting of affiliated universities, to investigate the matter.

[5] The committee resolved in her favour that she be granted a “special re-assessment opportunity for the PNS module adhering to all the re-examination rules as per the institution’s assessment policy”.

[6] The decision taken was recorded as follows:

“1) The student needs to be granted a special re-assessment opportunity for the PNS module adhering to all the re-examination rules as per the institution’s assessment policy. It needs to be clear that should the student not pass this assessment with 50% or more she will need to redo her third-year modules as per the institution’s rulings.

- a) The special re-assessment paper will be compiled by Ms J. Muller from Fort Hare using a variety of previously moderated PNS papers.
- b) Once (the) paper is set all processes will be followed as per the institution’s policies for examinations.
- c) It is advised that this special assessment is written by end of next week (13.05.2022) at the latest.
- d) It is advised that the student has at least one full week notice in writing of the date of her special assessment.
- e) Ms J. Muller will mark the paper and Ms N. Mafani will be the second marker. Their decision regarding the results will be final.”

[7] The applicant wrote the special examination on 13 May 2022 having been given sufficient time to prepare herself.

[8] The final result was produced on 8 June 2022. The outcome stated that all examination processes were followed as per the College's assessment policy and that she "remains as failed".

[9] Despite what the first respondent's Policy provides, namely that students are entitled to view the examination script of their main summative exams only, and explicitly further prohibits the re-marking of special exam papers, the applicant pushed the envelope by insisting that she have access to her special exam script and that she be afforded a re-write option once again.

[10] When she was not shown her exam script she approached her current attorneys of record who demanded it from the College.

[11] Not yielding to the demand (the College adverting to its firm policies in this respect as well as the special examination conditions), she approached this court on the basis of urgency, two months after the result was released.

[12] A certificate of urgency was provided by the attorneys to the duty judge on 22 August 2022.

[13] Although permitting the matter to be enrolled for hearing before me on 6 September 2022, and suggesting timeframes for the exchange of papers and the filing of heads, my colleague, Laing J, was astute to qualify that the directions given by him were without any final determination of the urgency of the matter.

[14] The urgency professed by the applicant, and which was still maintained by her in arguing the matter before me as a fully opposed urgent application in the

midst of a busy unopposed motion court roll, is that the fourth year practical exams are commencing on 26 September 2022 and that she will be unable to participate in these exams unless she is in effect promoted to a fourth year status, assuming the re-mark goes in her favour that is.

[15] I point out, however, that it is common cause that she is not registered as a fourth year student, so the target of 26 September 2022 is irrelevant and or contrived.

[16] The purported rights she claims to assert by the *mandamus* relief sought (on a final basis) are to have her script furnished to her, and to insist on a remark before 26 September 2002.

[17] She also alludes to her need to make an informed decision and election in respect of whether to request a remark or review the decision of the first respondent or not as the case may be.

[18] Whilst the latter reason is inclining towards a supposed entitlement to fair and just administrative action, it is abundantly plain from the first respondent's version given in opposition to her founding affidavit (which must prevail on the basis of the Plascon-Evans rule)¹ that the applicant has no right in this respect. Indeed, the College has done exactly as it was both obliged and entitled to do in terms of its examination rules and policies. As a student of the College, it is expected of the applicant to subscribe to these.

[19] Mr. Mdunyela who appeared on her behalf argued that having been hard done by it is “in the interests of justice” that the college be ordered to remark her

¹ Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints [1984] 2 All SA 366 (A).

script. Whilst I have empathy for her situation, this does not however provide an actionable basis upon which to assert that she is entitled to an interdict.

[20] As an aside she has in the meantime been advised of her mark obtained in the special exam, which is that she obtained 49%, a clear fail.

[21] Notwithstanding the College's answering affidavit, the applicant persisted in her view that she did well in the exam and claims that she wants (still) to satisfy herself that the processes outlined in clause 11 of the Student Assessment Policy that the College put up in its answering affidavit "were duly followed", this based on her personal distrust of the College.

[22] In my view the applicant's fate has been sealed and she needs to accept that she has failed PSN 1 and that it is for this reason that she cannot progress to fourth year level as she has not yet met the minimum requirements for her third year. How she thought she might persuade this court to promote her is quite astonishing.

[23] Whilst she seems to have been afforded sympathy and sensitive support in her predicament, the College is correct in its stance that it has a duty to act in the best interests of all the students and to maintain minimum academic standards.

[24] As was sagely noted by the first respondent in its answering affidavit "It would be prejudicial to the rest of the students to allow the applicant to have a third bite of the cherry by allowing her to write a third exam, when such an exam is not permitted in terms of the Policy".

[25] In the premises the applicant has not made out a case for any relief sought² and quite frankly it is my view that she has abused the urgent process to obtain yet another preferential benefit, namely that of being heard before other litigants waiting in the queue.

[26] It is indeed a sad set of circumstances but the applicant needs to focus her energies on changing her stars and getting back into the academic program.

[27] It is hoped that the College will continue to counsel the applicant and to encourage her to develop a winning spirit rather than remaining in the quagmire of her despair and sense of being a hapless victim.

[28] The costs must unfortunately follow the result.

[29] I issue the following order:

1. The application is dismissed, with costs.

B HARTLE

JUDGE OF THE HIGH COURT

² It is trite what the requirements are for a final interdict. On the evidence there is simply no clear right to speak of and no injury actually committed or reasonably apprehended. There is further a remedy which actually exists, namely that the applicant accepts that she has failed and sits for the requisite PSN module again.

DATE OF HEARING: 6 September 2022

DATE OF JUDGMENT: 8 September 2022

APPEARANCES:

For the applicant: Mr. Mdunyelwa Instructed by Mase & Mukoyi Inc. Attorneys, East London (ref. Mr. Mase).

For the respondents: Mr. D Maduma instructed by The State Attorney, East London (ref. Ms Mosia).