



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

Case Number: 7641/21

In the matter between:

ECONOMIC FREEDOM FIGHTERS STUDENT COMMAND

APPLICANT

and

MINISTER OF HIGHER EDUCATION, SCIENCE & TECHNOLOGY

1ST RESPONDENT

UNIVERSITY OF SOUTH AFRICA

2ND RESPONDENT

EXECUTIVE COUNCIL: UNIVERSITY OF SOUTH AFRICA

3RD RESPONDENT

COUNCIL OF THE UNIVERSITY OF SOUTH AFRICA

4TH RESPONDENT

SENATE OF THE UNIVERSITY OF SOUTH AFRICA

5TH RESPONDENT

SOUTH AFRICAN HUMAN RIGHTS COMMISSION
(Amicus Curiae)

6TH RESPONDENT

REASONS FOR JUDGMENT

KUBUSHI J,

Delivered: These reasons for judgment were transmitted electronically by circulation to the parties' legal representatives by e-mail and uploading on Caselines.

INTRODUCTION

[1] Two review applications, one by the Economic Freedom Fighters Student Command ("EFFSC") and the other by the Black Lawyers Association Student Chapter ("BLASC"),¹ were set down for hearing on the urgent court roll during the week of 1 to 5 March 2021. The two applications were instituted against the same respondents and the facts and issues pertaining to the applications were similar, thus, it was prudent that they serve before the same Judge. Due to their sheer volume, the applications were allocated for a special hearing before me.

[2] The review applications were brought in terms of the Promotion of Administrative Justice Act No 3 of 2000 ("PAJA")² and in the alternative, on the principle of legality. Both applications, which are opposed, concerned the review of two impugned decisions. The first decision is that of the first respondent, the Minister of Higher Education, Science & Technology ("the Minister") wherein the Minister directs the second respondent, University of South Africa ("UNISA") ultimately the third to fifth respondents, to reduce the 2021 intake of first-time-entering ("FTEN") students by 20 000 from a planned 57 857 to 37 857 ("the Minister's decision"); and the second decision is that of UNISA when, through the third respondent, UNISA's Executive [Committee of] Council ("EXCOC"), it consequently took the decision to acquiesce to the Minister's decision ("UNISA's decision").

[3] Initially, the application for EFFSC was to be heard on 2 March 2021 and due to the truncated timeframes which affected the filing of papers, I made a ruling that the matter be stood down for hearing to 4 March 2021. Whilst busy with EFFSC's application I was allocated the BLASC's application, in which I also directed that it be heard on 4 March 2021 together with that of EFFSC. I gave a directive, in both applications respectively, for the filing of papers and

¹ Case Number: 9388/2021.

² Sections 6 (2) (a) (i), 6 (2) (d), 6 (2) (e), 6 (2) (f) and 6 (2) (i).

heads of argument and that the applications be decided on the papers filed on Caselines, dispensing with the hearing of oral argument.

[4] The applications were purported to be urgent because of the fact that the registration of students for the 2021 academic year with UNISA, was due to close on 12 March 2021. Having considered the applications, I, on 11 March 2021, granted order(s) in both applications, without providing reasons therefor. The respondents in both applications have, in terms of Uniform Rule 49, requested the reasons for such order(s). Even though the facts and issues in the two applications are similar, the applications were not consolidated, as such I granted separate orders, and I shall provide reasons thereto, separately.

[5] In this instance, the Minister filed his answering affidavit out of time and applied for condonation. The condonation application was not opposed. Having read and considered the condonation application, I decided that it ought to be granted.

[6] The second to fifth respondents are represented by the same legal team and have filed a composite answering affidavit. I shall, for convenience, in these reasons for judgment, refer to them collectively as UNISA.

[7] The sixth respondent, the South African Human Rights Commission ("SAHRC") has been admitted into these proceedings as *amicus curiae* ("*amicus*") for the reasons that shall appear later in the judgment. SAHRC filed its papers late and applied for condonation. For the reasons I will refer to later in this judgment, I decided to grant SAHRC's condonation for the late filing of the application for admission as *amicus* and for truncating the time periods prescribed in Rule 16A (2) of the Uniform Rules of Court.

THE IMPUGNED DECISIONS

[8] The Minister is alleged to have made a decision when on 28 December 2020 he addressed a letter to the Chairperson of UNISA's Council wherein he

gave Council notice of his intention to direct UNISA to reduce the number of FTEN students by 20 000 in the 2021 academic year.

[9] The letter noted that in 2018 UNISA had been warned that it must adhere to its enrolment planning targets and that it would be penalised in the 2020/21 financial year should it fail to adhere. Despite the penalty imposed, UNISA over-enrolled its FTEN students. The letter also read that:

"The approved enrolment planning target for first-time entering (FTEN) students in 2020 for the University of South Africa (UNISA) was 57 703. It has come to my attention that according to UNISA's first submission of HEMIS data the university has enrolled 77 840 FTEN students in 2020. It is noted that this is a preliminary and not audited data. Nevertheless, this is an over enrolment of 20 137 students (i.e. 35 % over the approved target). Furthermore, I have been informed by my officials that many of the over-enrolments occurred in Higher Certificate qualifications. This over-enrolment will have a significant impact on the sustainability of the National Student Financial Aid Scheme (NSFAS) and the higher education sector as a whole.

....

In the light of the current fiscal constraints and the impact that over-enrolment has on the whole sector, I am now issuing a notice of my intention to issue a directive to UNISA to reduce its 2021 FTENs by 20 000 in 2021 to accommodate the over-enrolment in 2020 and the impact this will have on NSFAS over the next few years until those students complete their qualifications. This reduction would mean an FTEN intake of only 37 857 students in 2021 instead of the 57 857 planned."

The Minister further reaffirmed his position on this issue on 18 January 2021 during a media briefing.

[10] It is this alleged decision and/or notice issued by the Minister that EFFSC submitted, is *ultra vires*, procedurally unfair, irrational and unreasonable.

[11] The UNISA decision, on the other hand, was taken by EXCOC when it decided to accede to the Minister's notice of intention by decreasing the

number of FTEN students by 20 000 in the 2021 academic year. The decision was announced on 5 January 2021 when EXCOC made a statement that it met on 2 January 2021 to deliberate on the Minister's letter and UNISA's shape and size and the effective support for students to succeed in the pursuit of their studies, and consequently, took the decision.

[12] EFFSC sought in these papers to review and set aside the Minister's decision and EXCOC's decision to accede to the Minister's decision.

THE RELIEF SOUGHT

[13] In the notice of motion, EFFSC sought relief in the following terms:

- 13.1 That the time periods, forms and manner of service provided for in the rules are dispensed with and the matter is heard as one of urgency in terms of Uniform Rule 6 (12).
- 13.2 Reviewing and setting aside the Minister's decision of 28 December 2020 to direct UNISA to reduce its 2021 FTEN students' intake by 20 000, as unlawful and invalid
 - 13.2.1 In the *alternative*, reviewing and setting aside the Minister's decision of 28 December 2020 to issue a notice of intention to direct UNISA to reduce its 2021 FTEN students' intake by 20 000, as unlawful and invalid.
- 13.3 Reviewing and setting aside EXCOC's decision to accept the decision by the Minister to reduce UNISA's 2021 FTEN students' intake by 20 000, as unlawful and invalid.
- 13.4 That the costs of this application be paid, jointly and severally, by the respondents that oppose it.

[14] Before I deal with the merits of the application, it is apt that I set out the factual background that necessitated the institution of these proceedings and to give context to the issues raised in these papers.

THE FACTUAL MATRIX

[15] It is common cause that periodically, the Minister and institutions of higher learning, engage in bilateral discussion for enrolment planning. The purpose of the enrolment plan is to ensure transparency and to achieve a balance between the institutional capacity and funding. The process is not only aimed at financial planning as such, but designed to ensure that certain post school priorities are also met. The process is, thus, said to be complex and involved, and takes time to complete.

[16] During 2012 the Department of Higher Education, Science & Technology ("the Department") invited all institutions of higher learning in the Republic to submit their institutional enrolment and output plans including proposed targets. In this regard certain priorities informing the need for the plans were identified, which culminated in a Departmental National Enrolment Plan.

[17] On the basis of the targets and plans reached in the National Enrolment Plan, the Department concludes agreements with individual institutions in relation to institutional enrolment plans for FTEN students, of the institution concerned. The enrolment planning for FTEN students is a product of discussion and engagement between the Department and the institution concerned, culminating in a six-year plan agreed upon with the institution, taking into account several factors like the status of planned and built infrastructure, the human and financial resources available to the institution. These plans form the foundation of sector planning, specifically funding of the institutional subsidy and NSFAS funding for students' support, and are reviewable every six months.

[18] The process of planning for the enrolment plan for FTEN students commences at the institutional level before it is agreed with the Department. At the institutional level, the process is said to involve the approval of a number of structures within the institution. Specifically, the plan, firstly serves before the Academic Enrolments and Academic Human Resources Planning Committee ("the AEHRPC"), a sub-committee of Senate, responsible for, among others, overseeing academic enrolments, including the planning of the enrolment plan. *Per* its terms of reference, the AEHRPC recommends the plan to Senate, which in turn recommends the plan to the Academy and Student Affairs Committee of Council ("ASACOC"). The latter then recommends the plan for approval by Council. The six-year Council approved plan is then submitted to the Minister for consideration in conjunction with those of other institutions of higher learning. These plans form the foundation of sector planning, specifically funding of the institutional subsidy and NSFAS funding for students' support.

[19] UNISA's institutional enrolment plan was arrived at through the same process and by agreement with the Department, its enrolment plan for FTEN students for the 2021 academic year, was capped at 57 857. It is not in dispute that on the strength of this enrolment plan for FTEN students, UNISA sent out offers to potential students advising them of their provisional offers to pursue their studies through UNISA for the 2021 academic year.

[20] With effect from 2018, UNISA is said to have failed to keep to the agreed numbers and over- enrolled its FTEN students. As a result of this over enrolment the Department punished UNISA by withholding a certain portion of the funding due to it (R66 million). It appears that despite this penalty, UNISA continued to over-enrol its FTEN students.

[21] During 2020 whilst addressing the Enrolment Efficiency targets for 2020 -2025 the Department became aware that UNISA has again over-enrolled during its 2020 intake of FTEN students. From the deliberations between the Department and UNISA it was found that UNISA had for the 2020 academic

year, enrolled about 81 620 FTEN students, which represented an over enrolment of about 41.05%. This presented an addition to the over enrolment that was identified during the 2018 academic year.

[22] On 5 October 2020 the Director-General of the Department ("the Director-General") addressed a letter to UNISA in which he notified UNISA that the Department was aware that UNISA has over-enrolled its 2020 FTEN student intake. The Director-General also notified UNISA of the impact of such over enrolment, in particular, on the NSFAS budget and generally on the budget of the country which, at this time, was facing a pandemic. The Department had earlier in the year advised UNISA to utilise the mid-term review of the enrolment planning cycle to adjust its enrolment figures, but UNISA failed to do so.

[23] It is on this basis that as a final resort, the Minister issued the notice to UNISA as contained in the letter of 28 December 2020. The notice consequently led to the decision taken by UNISA to implement the Minister's intended directive. Aggrieved by these two impugned decisions, EFFSC approached court for relief in these proceedings.

PRELIMINARY ISSUES

[24] There are a number of points *in limine* which were raised by the respondents. The preliminary issues raised by the Minister are in respect of urgency, *locus standi*, failure to comply with the State Liability Act 20 of 1957 as amended ("the State Liability Act"), unauthorised institution of proceedings and that the letter on which EFFSC relies does not constitute a decision. UNISA, on the other hand, raised *in limine* points on urgency and non-joinder of the Student Representative Council ("SRC") and NSFAS. I deal, hereunder, with each of the points in turn and shall deal with the points of urgency raised respectively by the Minister and UNISA, together.

The Alleged Lack of Urgency

[25] Both the Minister and UNISA contended that this matter was not urgent and that if it was found that the matter was urgent, the court should find that the urgency is self- created and as a result the application ought to be struck off from the urgent court roll.

[26] Having already granted the relief sought by EFFSC, it means that I found the matter urgent enough to serve in this court. I was inclined to agree with EFFSC on its point that this matter is inherently urgent for the various reasons EFFSC raised in its argument, as appears hereunder.

[27] The first ground on which EFFSC relied on urgency, was that, it would not be afforded substantial redress in due course. In support of the argument on this ground, EFFSC referred me to the judgment in the case of *Mogalakwena Municipality v Provincial Executive Council, Limpopo and Others*,³ wherein the court explained that the primary investigation in determining urgency should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. It is only if an applicant cannot establish prejudice in this sense that the application cannot be urgent.

[28] There is no dispute that the absence of substantial relief at a later stage is clear in this matter. The reality, as correctly argued by EFFSC, was that the academic year was about to commence on 12 March 2021 and if the matter was not heard urgently, 20 000 FTEN students might not have a place at UNISA. All parties accepted that registration for the 2021 academic year at UNISA was set to close on 12 March 2021. Unlike previous years, UNISA had intended to have only one registration period throughout the entire year. This meant that any person not registered by 12 March 2021 would not be able to study with UNISA in 2021.

³ (35248/14) [2014] ZAGPPHC 400; [2014] 4 SA 67 (GP) (19 June 2014).

[29] EFFSC's second ground that this matter be heard in the urgent court was that the issues involved in this application were of great public interest. In this regard, EFFSC relied on the judgment in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma*,⁴ wherein the Constitutional Court held that public interest will always weigh heavily in favour of a matter being heard urgently and that the public interest should not suffer at the altar of the litigant's ineptitude.

[30] The public interest of this matter is self-evident and UNISA has conceded as much in its papers. As per EFFSC's argument, it is undeniable that this matter is of great public importance impact, necessitating an urgent hearing. The right to further education of 20 000 FTEN students was at stake which meant that this case required to be heard as a matter of urgency so that the students would not lose their right to be considered for enrolment at UNISA before the closing date of registration of 12 March 2021. Conversely, the respondents stood to suffer no prejudice if the application was heard in the urgent court.

[31] Lastly, that the matter had been specially allocated did away with the issue of whether the urgency was self-created or not.

[32] This preliminary issue is dismissed.

The Alleged Lack of Standing

[33] The Minister argued that EFFSC had failed to establish the requisite *locus standi* to bring this application, in the circumstances where EFFSC had brought the application under the following subsections of the Constitution:

33.1 In terms of section 38 (a), acting in its own interest;

⁴ (CCT 295/20) [2021] ZACC 2 (28 January 2021).

- 33.2 In terms of section 38 (b), in the interests of all persons in the country that would be affected by the enrolment planning and denied access to higher education because of the decision;
- 33.3 In terms of section 38 (c), in the interests of FTEN applicants who would be denied access to UNISA as a result of the Minister's decision; and
- 33.3 In terms of section 38 (d) in the public interests as the decision had far reaching consequences not for UNISA but other institutions of higher learning.

[34] The Minister's submission was that none of the grounds sought to be relied upon by EFFSC were sufficient to clothe it with, or establish EFFSC's *locus standi* within the context of this case. The Minister in turn raised the following defences:

- 34.1 That none of the applicant's rights, as an organisation, were adversely affected by the letter addressed to UNISA.
- 34.2 That the Minister's letter did not constitute a decision on enrolment planning. The submission was that the enrolment planning was decided upon with all the affected institutions in 2018 and it was determined by the available resources or projected available resources within the institutions over a period of four to six years. Accordingly, FTEN applicants or members of the public could only be admitted to institutions where the available resources permit so. Otherwise, they have no right to be admitted and their right was only limited to a right to have their applications considered and decided upon depending on such resources.
- 34.3 That the letter addressed to UNISA had no bearing on the other institutions of higher learning as the letter was only meant to address a situation created by and happening at UNISA.

[35] In his heads of argument, the Minister approached his defence of EFFSC's lack of standing, by firstly, arguing that EFFSC has failed to establish any right that had been infringed or threatened to be infringed. The contention by the Minister was that there was no right that had been or threatened to be infringed by his letter of 28 December 2020. According to the Minister any right that might have been or threatened to be infringed is that contained in section 29 of the Constitution which provides for the right to further education. He argued further that unlike the right to basic education, the right to further education is not immediately realisable but subject to reasonable means and must be progressively made available and accessible. Consequently, so the argument ran, the right of aspiring students to further education was subject to the availability of infrastructural, human and financial resources. The aspirant students have no right to be admitted to UNISA when there are no resources. Their right is only limited to a right to have their applications considered and decided upon depending on availability of resources.

[36] The Minister further argued that EFFSC's case is based on pure speculation without any tangible evidence of any infringement or likely infringement of any person's right. This, according to the Minister was so because there was no evidence that UNISA had refused to consider the applications of or admit any FTEN students that have applied to UNISA. There was also no evidence of how many students have been admitted or even applied to UNISA for 2021.

[37] It is trite that the applicant's right to approach court must be determined in accordance with whether the applicant has established any right that is affected by the alleged decision or administrative action. Failure to establish this right must lead to the application being dismissed for lack of *locus standi* on the part of the applicant.

[38] There is no dispute that the right to be infringed or threatened to be infringed in the circumstances of this case is that contained in section 29 (b) of the Constitution, which is the right to further education. In terms of this sub

section the right to education is subject to reasonable measures and must be progressively made available and accessible by the state.

[39] In accordance with the Minister's argument above, reasonable measures are translated into the availability of infrastructural, human and financial resources. In making this right progressively available and accessible at UNISA, the state, through the Department, agreed together with UNISA on a six-year enrolment plan for FTEN students ("the enrolment plan"), taking into account several factors like the status of planned and built infrastructure, the human and financial resources available to UNISA. In terms of the said plan the intake for FTEN students in the 2021 academic year was set at 57 857.

[40] When the enrolment plan was approved, the understanding was that the built infrastructure, human resources and financial resources would during the 2021 academic year, accommodate the intake of 57 857 FTEN students. It is worthy to note that the Minister in his letter of 28 December 2020 does not complain about the built infrastructure, the human and/or financial resources at UNISA. He is more concerned about the impact on the sustainability of NSFAS and the higher education sector as a whole. He does not say in the letter that the over enrolment will put strain on the built infrastructure and/or the human resources and/or financial resources at UNISA. In the circumstances, by intending to reduce the number on FTEN students' intake to 37 857, the Minister threatened to infringe on the right to further education of 20 000 aspirant FTEN students.

[41] A further challenge to the Minister's argument was that it was said that he issued the letter in terms of section 42 of the Higher Education Act 101 of 1997 ("the Act"). Section 42 of the Act provides as follows:

*42. Action on failure of council to comply with this Act or certain conditions

- (1) If the council of a public higher education institution fails to comply with any provision of this Act under which an allocation from money appropriated by Parliament is paid to the institution, or with any

condition subject to which any such allocation is paid to such institution, the Minister may call upon such council to comply with the provision or condition within a specified period.

- (2) If such council thereafter fails to comply with the provision or condition, the Minister may withhold payment of any commensurate portion of any allocation appropriated by Parliament in respect of the public higher education institution concerned. . . ."

[42] It is, thus, evident that the Minister, in his intention to direct UNISA to reduce its FTEN students' intake of the 2021 academic year by 20 000, acted in contravention of the stipulations in section 42 (2) of the Act. The sub-section empowers the Minister, on failure by UNISA to comply with any condition placed on it – in this case over enrolment, to withhold payment of any commensurate portion of any allocation appropriated by Parliament to UNISA. The section does not entitle the Minister to cut the student enrolment which, he, in his letter of 28 December 2020, intends to do.

[43] The Minister's argument that his letter does not constitute a decision on enrolment planning, but the impact of the over enrolment on the finances of the whole sector and NSFAS, may be correct. The challenge he faces, however, is that he did not act as empowered by section 42 of the Act to withhold UNISA's funds as punishment for UNISA's failure to comply with the condition of over enrolment. Instead his intention is to direct UNISA to reduce its intake of FTEN students.

[44] Therefore, the Minister's action of contravening the provisions of section 42 of the Act, threatens to infringe on the right to further education of 20 000 aspirant FTEN students.

[45] The Minister's argument that EFFSC's case is based on speculation without any tangible evidence of any infringement or likely infringement of any person's right, has no merit as well. The converse is the case. In his letter dated 28 December 2020 there is no indication where the Minister got the figure of 20 000 students that should be reduced from the 2021 academic year intake

of FTEN students, from. In his own version in the said letter, he states that "*It is noted that this is preliminary and not audited data.*" Even if it can be accepted that his argument that the over enrolment has a financial impact on UNISA, it is not evident from the said letter.

[46] His concerted argument that there is no evidence of how many students have been admitted or even applied to UNISA for 2021, applies equally to him, in that, he intended to direct UNISA to reduce its intake by 20 000 when he had no clue how many aspirant students had applied and would be admitted. The intention to reduce the intake of 20 000 aspirant FTEN students without any valid data, threatens to infringe the right to further education of those students.

[47] I find the further argument of the Minister that EFFSC has no standing because it failed to show that it is acting in the interest of a group, that has legal interest in the matter, as EFFSC has not attached its constitution to the founding papers, to have no merit.

[48] The Constitutional Court In *Ferreira v Levin; Vryenhoek v Powell NO*,⁵ has clearly stated that a more generous approach to legal standing be applied to all constitutional cases and not only in cases where an infringement, or a threat to, any right entrenched in the Constitution is alleged. The court emphasised the discretionary powers of courts in relation to standing and stated that it is for the court to decide what a sufficient interest is in such circumstances. It is clear from this that in constitutional cases, and thus in administrative cases too – because of the reliance on section 33 of the Constitution - courts are required to adopt a broad approach to standing, rather than a narrow one. What is further required is that the link between the applicant's interest and the requested remedy must not be too tenuous, abstract or hypothetical.

⁵ 1996 (1) SA 984 (CC) para 38 and 165 to 167.

[49] Four factors that a court can consider to ensure that the applicant has the requisite standing to bring the application for review of administrative action, were formulated in *Kolbatschenko v King*⁶ as:

- 49.1 the applicant must have an adequate interest in the subject matter of the litigation;
- 49.2 the interest must not be too far removed;
- 49.3 the interest must be actual, not abstract or academic, and
- 49.4 the interest must be a current issue and not a hypothetical one.

The question whether these requirements have been met depends on the facts of each case. From the facts of this application, it is undoubtedly evident that EFFSC meets the requirements set out in *Kolbatschenko*, above.

[50] Besides, the Constitution empowers any person in a matter where constitutional rights are infringed or alleged to be infringed to bring a matter to a competent court. It is sufficient for a person to show that a right contained in the Constitution has been infringed or is threatened to be infringed. If this is shown it matters not whether that person is the victim.⁷

[51] In *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza*,⁸ the court stated the following:

"It is precisely because so many in our country are in a "poor position to seek legal redress", and because the technicalities of legal procedure, including joinder, may unduly complicate the attainment of justice, that both the interim Constitution and the Constitution created the express entitlement that "anyone" asserting a right in the Bill of Rights could litigate "as a member of, or in the interest of, a group or class of persons"."

⁶ 2001 (4) SA 336 (C).

⁷ See Ferreira at para 166.

⁸ 2001 (4) SA 1184 (SCA) para 6.

[52] By his conduct, in threatening to direct UNISA to reduce the number of FTEN students by 20 000 in the 2021 academic year, the Minister has in fact threatened to infringe the right of further education of 20 000 FTEN students.

[53] Thus, it is in that sense that I have to rule that EFFSC has *locus standi* to institute this application.

Failure to comply with the State Liability Act 20 of 1957, as amended

[54] It was contended on behalf of the Minister that the non-compliance with the provisions of the State Liability Act by EFFSC, is fatal to these proceedings and that the application deserves to be dismissed with costs on this basis alone. According to the Minister, for EFFSC to have complied fully with the provisions of the State Liability Act, EFFSC should have served the application on both the Minister and the State Attorney in accordance with the provisions of section 2 of the State Liability Act.

[55] The salient provisions of the State Liability Act on which the Minister relied for his argument, reads as follows:

"2. Proceedings to be taken against executive authority of Department concerned

- (1) In any action or other proceedings instituted against a department, the executive authority of the department concerned must be cited as nominal defendant or respondent.
- (2) The plaintiff or applicant, as the case may be, or his or her legal representative must—
 - (a) after any court process instituting proceedings and in which the executive authority of a department is cited as nominal defendant or respondent has been issued, serve a copy of that process on the head of the department concerned at the head office of the department; . . ."

[56] 'It is a cornerstone of our legal system that a person is entitled to notice of legal proceedings against such person'.⁹ Similarly, the Minister, as the executive authority of the Department, was entitled to notice of the review application instituted against him. The provisions of section 2 of the State Liability Act set out the mechanism as to how such notice should be brought to the knowledge of the Minister.

[57] It is common cause that even though the provisions of the State Liability Act require service of the application to have been served on the Minister, this was not done. The application was instead served at the office of the Director-General. The fact that the Minister filed his notice to oppose the application is indicative of the fact that he received and had knowledge of the application.

[58] Dealing with the effectiveness of service of summons in terms of Uniform Rule 4, the court in *United Reflective Converters (Pty) Ltd v Levine*,¹⁰ stated the following:

"The rules, set out procedural steps. They do not create substantive law. Insofar as the substantive law is concerned, the requirement is that a person who is being sued should receive notice of the fact that he is being sued by way of delivery to him of the relevant document initiating legal proceedings. If this purpose is achieved, then, albeit not in terms of the rules, there has been proper service."

[59] Although the above decision dealt with the Rules of Court, the principle enunciated therein is apposite in this instance. Section 2 of the State Liability Act sets out the procedure to be followed for the service of legal proceedings taken against the executive authority of a Department (the Minister), it does not create substantive law.

[60] The objective of section 2 of the State Liability Act, like that of Uniform Rule 4 is to provide for a mechanism by which relative certainty can be obtained

⁹ *Steinberg v Cosmopolitan National Bank of Chicago* 1973 (3) SA 885 (RA) at 892B – C.

¹⁰ 1988 (4) SA 460 (W).

that service has been effected upon the executive authority and the Department. If the Minister received the application or came to know of it through the Director-General, as is the case in this instance, and acted on the application, the purpose for which service is required has been fulfilled.

[61] The courts have considered prejudice suffered in order to render service of legal proceedings to be defective. In *Investec Property Fund Limited v Viker X (Pty) Ltd*,¹¹ the court when considering the effectiveness of a summons on the defendant, concluded that if service of summons was not effected according to the letter of the rule, but was still effective in that the defendant received the summons, and suffered no prejudice, service will be good.

[62] Even though the application was not served directly on the Minister, what he fails to mention in his argument is whether or not he suffered prejudice by the failure of EFFSC to serve the application on him. If the Minister was in any way prejudiced, he ought to have stated what prejudice he suffered. In the present circumstances, it is apparent that the Minister suffered no prejudice.

[63] In this instance, the non-compliance with the provisions of section 2 of the State Liability Act, in failing to serve the application on the Minister, does not result in prejudice to the Minister since the purpose of the section was fulfilled.

[64] The point *in limine* falls to be dismissed.

The Unauthorised Institution of Proceedings

[65] In this regard, the submission by the Minister was that in the present case EFFSC has not attached its constitution to prove its authority to litigate in its name. It has also failed to attach a resolution authorising the institution of the proceedings. In the circumstances, the contention was that this application falls to be dismissed with costs.

¹¹ unreported GJ case number 2016/07492 dated 10 May 2016 paras 7 -19.

[66] The Minister relied for support of his argument, on the judgment in *Gaines v Telekom Namibia*,¹² wherein the Supreme Court of Appeal established the principle that the institution of proceedings must be authorised. What the Minister failed to state was that that court also confirmed that Uniform Rule 7 is the only mechanism in which authority of a person to act may be challenged.

[67] The Supreme Court of Appeal in *Unlawful Occupiers of the School Site v City of Johannesburg*,¹³ when dealing with the challenge to authority of an attorney in relation to Uniform Rule 7 (1), expressed itself as follows:

"[13] Based on these facts the appellants raised the argument that Lefatola had failed to prove that he had been duly authorised, because he did not say whether or not the Director of Legal Services agreed with him that the application should be brought. . .

[14] At the hearing of the appeal, counsel for the appellants conceded that she could not support this ground of appeal. I think the concession was fairly made. The issue raised had been decided conclusively in the judgment of Flemming DJP in *Eskom v Soweto City Council* 1992 (2) SA 703 (W), which was referred to with approval by this court in *Ganes and another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) 624I-625A. The import of the judgment in *Eskom* is that the remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant, is provided for in rule 7(1). The *ratio decidendi* appears from the following *dicta* (at 705D-H):

The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney.

¹² 2004 (3) SA 615 (SCA) at 642B.

¹³ 2005 (4) SA 199 (SCA) paras 13 to 16.

The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority. As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1).¹ And (at 706B-D):

'If then applicant had qualms about whether the 'interlocutory application' is authorised by respondent, that authority had to be challenged on the level of whether [the respondent's attorney] held empowerment. Apart from more informal requests or enquiries, applicant's remedy was to use Court Rule 7(1). It was not to hand up heads of argument, apply textual analysis and make submissions about the adequacy of the words used by a deponent about his own authority.'

- [15] These remarks by Flemming DJP must be understood against the background that rule 7(1) in its present form was only introduced by way of an amendment in 1987. Prior to the amendment an attorney was obliged to file a power of attorney whenever a summons was issued in an action, but not in motion proceedings. The underlying reason for the distinction, so it was said, was that in motion proceedings there is always an affidavit signed by the applicant personally or by someone whose authority appears from the papers (see e.g. *Ex Parte De Villiers* 1974_(2) SA 396 (NC)). On the basis of this reasoning it is readily understandable why, before 1987, the challenge to authority could only be directed at the adequacy of the averments in the applicant's papers and pre-1987 decisions regarding proof of authority should be read in that light.

[16] However, as Flemming DJP has said, now that the new rule 7(1)-remedy is available, a party who wishes to raise the issue of authority should not adopt the procedure followed by the appellants in this matter, i.e. by way of argument based on no more than a textual analysis of the words used by a deponent in an attempt to prove his or her own authority. This method invariably resulted in a costly and wasteful investigation, which normally leads to the conclusion that the application was indeed authorised. After all, there is rarely any motivation for deliberately launching an unauthorised application. In the present case, for example, the respondent's challenge resulted in the filing of pages of resolutions annexed to a supplementary affidavit followed by lengthy technical arguments on both sides. All this culminated in the following question: Is it conceivable that an application of this magnitude could have been launched on behalf of the municipality with the knowledge of but against the advice of its own director of legal services? That question can, in my view, only be answered in the negative."

[68] It is common cause that in this instance the Minister did not follow the Rule 7 (1) mechanism but opted to raise the issue in his answering affidavit and heads of argument. It can be accepted that this process was followed due to the urgency of the matter. This, however, does not regularise the wrong process followed by the Minister.

[69] The deponent to EFFSC's founding affidavit who is the President of UNISA's Student Representative Council ("SRC") and a member of EFFSC, a student political movement, alleges that he brings the application on behalf of EFFSC. In support of this allegation he attaches a confirmatory affidavit deposed to by the General Secretary of the EFFSC authorising him to bring the application in the EFFSC's name.

[70] The question, as raised by Brand JA in *Unlawful Occupiers of the School Site*, as to whether it is conceivable that an application of this magnitude could have been launched without the knowledge of EFFSC, stands to be asked in

this instance, as well. That question, as Brand JA also concluded, can only be answered in the negative.

[71] Nonetheless, the confirmatory affidavit of the General Secretary of EFFSC was enough to confirm that the institution of this application was authorised.

[72] The point *in limine* falls to be dismissed, as well.

Whether the Letter of 28 December 2020 is a Decision

[73] The Minister submitted that the letter in question does not constitute a decision or administration action reviewable under PAJA nor does it fall foul of the principle of legality.

[74] As regards the decision's reviewability under PAJA, the Minister submitted that the letter does not constitute a decision or administration action envisaged in section 1 of PAJA. The contention was that in insisting on compliance with the enrolment plan, he was exercising a control function as a member of the executive over state organs which are accountable to him. It was further contended that by so doing the Minister was developing and implementing a national policy or coordinating the functions of his department and administration.

[75] The Minister found support for his argument, on the judgments in *Bhungwan v JSE Pty*,¹⁴ and *South African National Roads Agency Ltd v Cape Town City*.¹⁵ In *Bhungwan*, when analysing the elements for the purpose of determining whether a decision was exercised by the relevant authority the court concluded that whether a decision that constitutes administrative action within the context of PAJA was taken in a particular case cannot be decided in the abstract but should be more informed by the circumstances of each case.

¹⁴ 2010 (3) SA 334 (GSJ).

¹⁵ 2017 (1) SA 468 (SCA).

[76] The Supreme Court of Appeal explained in *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Sneller Digital (Pty) Ltd and others*,¹⁶ that

'Generally speaking, whether an administrative action is ripe for challenge depends on its impact and not on whether the decision-maker has formalistically notified the affected party of the decision or even on whether the decision is a preliminary one or the ultimate decision in a layered process.... Ultimately, whether a decision is ripe for challenge is a question of fact, not one of dogma.'

[77] It is indeed so that whether a decision was exercised by the relevant authority should not be decided in the abstract but should be more informed by the circumstances of the case. The facts in this instance are clear. A decision was exercised by the Minister when he, in the letter in question, notified the Chairperson of Council, UNISA of his intention to direct UNISA to reduce its 2021 intake of FTEN student by 20 000. The reduction of the intake stands to prejudice the FTEN students and not UNISA, as such.

[78] PAJA¹⁷ defines a decision as

"any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision."

For purposes of administrative action under PAJA, it is not necessary that the action actually affects rights. Our highest courts have repeatedly confirmed that it is enough that the action has the capacity to affect legal rights. It is thus enough, for purposes of PAJA review that the Minister intended to act in the manner in which he suggested in his letter of 28 December 2020.

¹⁶ 2012 (2) SA 16 (SCA) para 21.

¹⁷ Section 1.

[79] In the circumstances of this case, the Minister's argument that he was exercising a control function is not sustainable. In order to come to a conclusion that the Minister was exercising a control function as a member of the executive over a state organ which is accountable to him, the effect of the decision contained in the letter must impact on UNISA and not on the FTEN students, as it does. It follows that the Minister should have sought, in that letter, to compel UNISA to comply with the enrolment plan, instead of directing that the intake of FTEN student be reduced.

[80] The Minister's argument in respect of the principle of legality is also not sustainable. As argued by EFFSC, a lower bar applies under the principle of legality, as was made clear by the court in *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others*,¹⁸ when the following was stated –

"review under the principle of legality does not require, as PAJA does, that the decision has direct, external, legal effect for it to be reviewable." For purposes of legality review, the only question is whether the review is ripe. This is a question primarily of prejudice — whether prejudice has already resulted or is inevitable."

[81] This *in limine* point does not avail the Minister under the circumstances.

The alleged non joinder of the SRC and NSFAS

[82] It was UNISA's submission that the failure by EFFSC to join the SRC and NSFAS as parties to the application was fatal to the proceedings.

[83] It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience, – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned.¹⁹

¹⁸ 2017 (9) BCLR 1108 (CC) para 122.

¹⁹ *Judicial Service Commission v Cape Bar Council* 2013 (6) SA 170 (SCA) para 12.

[84] The rule is that a person is a necessary party and should be joined if such a person has a direct and substantial interest in any order that the court might make, or if such order cannot be sustained or carried out into effect without prejudicing that party, unless the court is satisfied that he has waived his right to be joined.²⁰

[85] The argument by EFFSC that UNISA conflates a joinder of convenience with one of necessity, proved persuasive. As indicated above, the joinder of necessity is where the subject matter cannot be decided in such party's absence, nor can an order be sustained, or carried out without negatively interfering on such party's rights. To the contrary, a joinder of convenience is where on the ground of equity, the saving of costs, or the avoidance of multiplicity of actions, a party is joined to the proceedings.

[86] From the evidence proffered in these proceedings, there is no relief specifically sought against the SRC and/or NSFAS, nor is there an issue canvassed on the papers that necessitates the involvement of either of them. The order granted on 11 March 2021 is in no way prejudicial to the rights of the SRC and/or NSFAS. The relief sought by EFFSC was against the Minister and UNISA and the order granted relates specifically to them. The order against the Minister and UNISA can be carried out into effect without prejudicing the rights of either the SRC or NSFAS.

[87] The non-joinder of the SRC and/or NSFAS is not fatal at all to these proceedings, nor was their joinder necessary. This point is, therefore, without merit and falls to be dismissed.

[88] All the points *in limine* having been dismissed, I turn now to the merits of the application.

²⁰ Erasmus: Superior Court Practice 2nd ed Volume 2 pD1-125.

THE MERITS

The Grounds of Review

[89] EFFSC in its case relied on the following grounds of review:

- 89.1 The impugned decisions are *ultra vires* in that neither the Minister nor EXCOC may exercise powers beyond those conferred on them by the law.
- 89.2 The impugned decisions were taken in a procedurally unfair or irrational manner.
- 89.3 The rationality of the impugned decisions.
- 89.4 EXCOC failed to apply its mind.
- 89.5 The impugned decisions are unreasonable.
- 89.6 The impugned decisions are disproportional.
- 89.7 The decision of UNISA is a fruit of a poisonous tree.

The Issues for Determination

[90] On the substantive issues the following were required to be determined by this court:

- 90.1 Whether the Minister has the power to direct UNISA to cut its FTEN students' enrolment numbers by 20 000;
 - 90.1.1 If so, did the Minister reach that decision in a procedurally fair manner?
 - 90.1.2 If so, is the Minister's decision rational, reasonable and proportional?
- 90.2 Whether EXCOC has the power to acquiesce to that decision on behalf of Council and the University.

90.3 If UNISA is wrong on any of the above decisions, what would be just an equitable in the circumstances?

I deal hereunder with the said issues in turn.

Whether the Minister has the power to direct UNISA to cut its FTEN students' enrolment numbers by 20 000

Argument by the Economic Freedom Fighters Student Command

[91] EFFSC's case was that the Minister's decision is *ultra vires* and thus unlawful; it was taken in a procedurally unfair and/or unlawful manner, and is, thus, irrational, unreasonable and disproportional. EFFSC's further contention was that the Minister does not have the authority and power to dictate to universities how many students they may take. It, furthermore, submitted that even when a university strains beyond a condition attached to state funding, the Minister is not empowered to cut down the number of potential students to be enrolled.

The Argument by the Minister

[92] The Minister, on the other hand, submitted that the over enrolment at UNISA puts a strain on the infrastructural, human and financial resources of the Department and on the budget of NSFAS. This, according to the Minister, is so because the Department operates on a Block grant determined in accordance with teaching inputs for all the institutions. If there is a continued over enrolment over time this reduces the amount available to other institutions from the Departmental budget. Furthermore, more than fifty percent of the funding of institutions comes from NSFAS budget and NSFAS has been complaining to the Department about these over enrolments that result in NSFAS exceeding its budget on a yearly basis.

[93] It was the Minister's argument that whilst UNISA is over enrolling its FTEN students, its infrastructure and the human and financial resources are not increasing. UNISA is, as a result, taking a serious strain which may result

in disastrous consequences for the institution and the Department. According to the Minister, once UNISA has enrolled a student, it has an obligation to provide quality tuition to the student for the duration of the degree or diploma term. In turn this creates a corresponding obligation on the Department and NSFAS to finance the student for the entire period.

[94] The Minister contended, further, that the withholding of financial support to UNISA, contended for by EFFSC, offers no solution to the problem. In fact, the Minister argued that it is negligible and at some point in time it appears very much unreasonable and harsh not only to the institution but to the students. This will be especially so should UNISA fail to honour its contractual obligations to its staff and other creditors as a result of the financial punishment. He submitted that, in the circumstances, it is clear that a solution to the problem does not lie in punishing UNISA financially for the over enrolment but lies in insisting on UNISA complying with the enrolment plan. In particular, UNISA must, according to the Minister, in the remaining years of the plan ensure that it enrolls in accordance with the projected numbers in the plan. In short, it is irrational to allow UNISA to continue with its conduct in the hope that the Minister or the Department is, going to impose a financial penalty. It is tantamount to allowing a person to commit a crime hoping to punish him thereafter. It is simply not consistent with good governance. It was for that reason that the Minister contended that he addressed the letter dated 28 December 2020 to the Chairperson of Council, UNISA in which he gave notice of his intention to issue a directive against UNISA to reduce its 2021 FTEN students by 20 000 in 2021.

[95] The Minister continued to lament, that the said letter was issued after several attempts and engagements with UNISA Council on the matter. EFFSC is said to have, all this time, offered no other solution to the problem facing the Department and UNISA.

[96] The Minister, furthermore, contended that from the content of the letter dated 28 December 2020 he had not yet taken any decision. He only notified

UNISA of his intention to issue a directive and gave it seven (7) days to make representations in that regard. According to the Minister, it was up to UNISA, EFFSC included, to offer another solution to the problem, if they had any.

[97] The Minister argued that the contents of the letter specifically refer to both the fiscal constraints and the impact that the over enrolment has on the entire sector (the Higher Education Sector). He argued further that, he was, within that context, responsible for taking policy decisions that affect the entire Higher Education sector. He is also responsible for ensuring that there are sufficient resources to keep the sector functioning and delivering within its constitutional mandate.

[98] His argument was that, it, will defeat the aforesaid purpose to allow any of the institutions to depart from an agreed plan which was adopted in line with relevant policies and available resources. The contention being that that the Minister can withhold financial support to an institution must not and cannot be a reason for him to allow such a departure which has serious impacts on the Department's mandate.

[99] According to the Minister, the letter issued to UNISA was issued in terms of section 42 (3) of the Act. Section 42 (1) of the Act empowers the Minister, to issue a directive to the Council of a public higher education institution after complying with subsection (3), if the Minister has reasonable grounds to believe that the institution has committed any of the transgressions referred to therein. He submitted, as such, that on that basis it accordingly follows that, on the wording of section 42 (3) of the Act, the letter dated 28 December 2020, is neither a decision nor a directive.

The Applicable Law

[100] It is said that the letter issued by the Minister to UNISA was issued in terms of section 42 (3) of the Act. Section 42 of the Act provides as follows:

⁴² 42. Action on failure of council to comply with this Act or certain conditions

- (1) If the council of a public higher education institution fails to comply with any provision of this Act under which an allocation from money appropriated by Parliament is paid to the institution, or with any condition subject to which any such allocation is paid to such institution, the Minister may call upon such council to comply with the provision or condition within a specified period.
- (2) If such council thereafter fails to comply with the provision or condition, the Minister may withhold payment of any commensurate portion of any allocation appropriated by Parliament in respect of the public higher education institution concerned.
- (3) Before taking action under subsection (2), the Minister must –
 - (a) give notice to the council of the public higher education institution concerned of the intention so to act;
 - (b) give such council a reasonable opportunity to make representations; and
 - (c) consider such representations.”

[101] To give it context, section 42 of the Act should be read together with section 39 of the Act which provides as follows:

³⁹ 39. Allocation of funds by Minister

- (1) The Minister must, after consulting the CHE [Council of Higher Education] and with the concurrence of the Minister of Finance, determine the policy on the funding of public higher education, which must include appropriate measures for the redress of past inequalities, and publish such policy by notice in the Gazette.
- (2) The Minister must, subject to the policy determined in terms of subsection (1), allocate public funds to public higher education on a fair and transparent basis.
- (3) The Minister may, subject to the policy determined in terms of subsection (1), impose –

- (a) any reasonable condition in respect of an allocation contemplated in subsection (2); and
- (b) different conditions in respect of different public higher education institutions, different instructional programmes or different allocations, if there is a reasonable basis for such differentiation. . . "

[102] Section 39, in turn, should be read with the provisions of section 12 of the Higher Education Amendment Act, 2015, which amended section 39 of the Act by the insertion after subsection (3) thereof, of the following subsections:

- "(3A) If the council of a public higher education institution fails to comply with any—
 - (a) provision of this Act under which an allocation from money appropriated by Parliament is paid to the institution; or
 - (b) condition subject to which any such allocation is paid to such institution, the Minister may in writing request such council to comply with the provision or condition within a specified period.
- (3B) If such council thereafter fails to comply with the provision or condition within the specified period as contemplated in subsection (3A), the Minister—
 - (a) may withhold payment of any commensurate portion of any allocation appropriated by Parliament in respect of the public higher education institution concerned; and
 - (b) must in writing inform the council concerned of his decision.
- (3C) Before acting under subsection (3B), the Minister must—
 - (a) give notice in writing to the council of the public higher education institution concerned of the intention so to act;
 - (b) give such council a reasonable opportunity to make representations; and
 - (c) consider such representations.
- (3D) The Minister must table a report in Parliament, regarding any action taken under subsection (3B), as soon as reasonably practicable after such action."

The Discussion

[103] Section 39 of the Act empowers the Minister to impose a reasonable condition regarding the allocation of public funds to a University. Non-compliance with such a condition may then lead to the Minister withholding funding to the non-compliant University.

[104] Thus, section 42 (1) read with section 39 (3A) of the Act empowers the Minister to issue a directive to the Council of a public higher education institution, if the Minister has reasonable grounds to believe that the institution has committed any of the transgressions referred to therein. The transgressions are stated in the subsections as 'failure to comply with any provision of this Act under which an allocation from money appropriated by Parliament is paid to the institution, or with any condition subject to which any such allocation is paid to such institution'.

[105] The Minister's contention that the letter was issued in terms of section 42 in an attempt to compel UNISA to comply with the agreed enrolment plan acted in contravention of this subsection as the subsection does not empower the Minister to temper (in this instance to reduce) or to instruct an institution to temper with its agreed enrolment plan.

[106] Even if it can be deduced that the over enrolment has financial implications as the Minister seemed to suggest in his argument, the Minister is still, not empowered to instruct an institution to temper with its students' enrolment plan. Subsection 42 (2) read with subsection 39 (3B) of the Act provides that 'if the council, having been notified in terms of subsection (1) thereafter fails to comply with the provision or condition, the Minister may withhold payment of any commensurate portion of any allocation appropriated by Parliament in respect of the public higher education institution concerned'.

[107] In terms of this subsection, the Minister is authorised to punish the institution for transgressions in terms of subsection (1) by withholding payment of any funding to be allocated to the institution concerned. Nowhere does any

of the sub-sections in sections 42 and/or 39 of the Act authorises the Minister to direct an institution to temper with its student enrolment plan or to reduce its intake of FTEN student as punishment for the infringement.

[108] Given that the Minister might have characterised his decision in relation to the conditions of state funding, sections 42 (2) and 39 (3B) of the Act set out what powers the Minister has in relation to non-compliant institutions. Instructing an institution to reduce its students' intake is not one of them.

[109] To the extent that the Minister sought to use the directive in terms of section 42 of the Act to compel UNISA to stick to the enrolment plan as agreed, and did not want to withhold funds as punishment, the Minister is constrained by the principle that there must be a rational connection between the decision taken and the purpose sought to be achieved. Put differently, the Minister cannot rely on section 42 to design a solution that transcends the bounds of the problem sought to be fixed.

Conclusion

[110] It is trite that if an act or conduct falls beyond the parameters of the authorisation granted, such conduct is *ultra vires*. A decision that exceeds the bonds of legal authorisation is a violation of the rule of law. As an administrator, the Minister may not exercise any power or perform any function beyond that conferred upon him or her by law.

[111] Therefore, the Minister in issuing the letter in terms of section 42 of the Act, informing UNISA of his intention to direct it to reduce its FTEN student intake by 20 000 in the 2021 academic year, acted *ultra vires* the provisions of the said section. On this ground alone, the Minister's decision ought to be reviewed and set aside.

Whether EXCOC has the power to acquiesce to the Minister's decision on behalf of Council and the University.

EFFSC's Argument

[112] In respect of UNISA's decision, it was contended that the decision taken by EXCOC is

- 112.1 Firstly, *ultra vires* and, thus, unlawful in that EXCOC acquiesced to the directive of the Minister when it also did not have the authority to do so;
- 112.2 Secondly, to the extent that it had the requisite authority, EXCOC took the decision without acting independently, reasonably and impartially and, as such, did not properly apply its mind; and
- 112.3 Thirdly, to the extent that the decision is based on the Minister's decision which is alleged to be unlawful, then the consequent decision of EXCOC itself is unlawful and must be set aside.

The Argument by the University of South Africa

[113] UNISA opposed this application on the ground that when UNISA received the compliance notice from the Minister, it was mindful of the consequences of its funding being withheld ultimately if it did not comply, given the legislative powers that the Minister is endowed with. It was also mindful of the discussion between its own officials, led by the Vice Chancellor, and the officials of the Department, for UNISA to reduce its FTEN students' intake. It was aware that based on these discussions, UNISA had already held deliberations internally to reduce the FTEN students' intake from 57 857 to 43 300. Given the above, and the fact that the Minister's notice gave UNISA

only seven (7) days to respond, EXCOC considered that it had to respond urgently on behalf of Council. Given the urgency, this was not a decision that required Senate's recommendation. It was in any event impractical to obtain one within seven (7) days deep into the festive season. Consequently, EXCOC took the decision to accept the Minister's instruction to reduce the intake of the FTEN students by 20 000.

Discussion

[114] It is my finding that UNISA's decision ought to be reviewed and set aside on the grounds provided hereunder:

[115] Firstly, it is trite that acts performed on the basis of the validity of a prior act are themselves invalid if and when the first decision is set aside. Having found that the Minister's decision is unlawful, any consequent decision, thereafter, including that of UNISA, falls to be reviewed and set aside.

[116] UNISA's decision, as it has been shown, is based on the Minister's decision which was found to be *ultra vires* and, thus, unlawful. Consequently, UNISA's decision falls to be reviewed and set aside, as well.

[117] It is evident that in the absence of the Minister's decision, UNISA would not have reduced the number of FTEN students in the 2021 academic year but it would have accepted all 57 857. In other words, but for the Minister's decision, EXCOC would not have taken the decision to reduce the 2021 academic year's intake even though the issue had been considered. In its own version, UNISA's reason for departing from the Enrolment Plan is that it believed, that the Minister had the power to give it instructions and that the letter of 28 December 2020 was an instruction over which it did not have any option but to comply. On this basis alone, UNISA's decision stands to be reviewed and set aside.

[118] Secondly, EXCOC acquiesced to the directive of the Minister when it does not have the authority to do so. One of the functions of Council in terms of section 37 of the Act read with section 7 (2) (j) of the University Statute, is to

determine the student admission policy of the University, after consultation with Senate. The salient provisions of section 37 of the Act reads as follows:

*37. Admission to public higher education institutions

- (1) Subject to this Act, the council of a public higher education institution, after consulting the senate of the public higher education institution, determines the admission policy of the public higher education institution.
- (2) . . .
- (4) Subject to this Act, the council may, with the approval of the senate –
 - (a) determine entrance requirements in respect of particular higher education programmes;
 - (b) determine the number of students who may be admitted for a particular higher education programme and the manner of their selection; . . ."

[119] Section 37 of the Act requires Council to consult the Senate on admission policy and may only determine the number of students to be admitted into a programme with the approval of Senate. In this instance, EXCOC, even though it was acting *qua* Council, did not consult Senate on the Minister's directives nor did it obtain the approval of Senate to reduce the number of FTEN for the 2021 academic year. This consultation is also a requirement in terms of the University's Guidelines for Good Governance Practice. Whilst EXCOC is empowered to act on behalf of Council in urgent matters, it cannot make a decision that Council is required to consult the Senate on. By deciding to acquiesce to the Minister's decision on behalf of Council and without the necessary approval of Senate, EXCOC acted unlawfully. The unlawful decision ought to be reviewed and set aside.

[120] Lastly, UNISA, through EXCOC, failed to, meaningfully and extensively, consider the decision of the Minister before taking the decision it did. The

Minister gave Council only seven (7) days within which to consider the matter. That seven (7) days is said to have been deep into the festive season and straddled a long weekend that included New Year's Day. The letter was written on 28 December 2020 and EXCOC was able to meet on 2 January 2021 with only two (2) days before the expiry of the period of seven (7) days set by the Minister. There was just no adequate time to give it proper consideration.

[121] For instance, if EXCOC had properly considered the Minister's decision, it would have written back to the Minister and made him aware that

- 121.1 he was not giving UNISA adequate time to call a meeting, which according to the relevant prescripts, required at least seven days' notice. Meetings of Council of UNISA and its EXCO are required to be held on seven (7) days' notice.
- 121.2 UNISA had already considered the matter and has come to the conclusion that the reduction of FTEN students to 43 000 would be reasonable.
- 121.3 the Minister has no authority to direct UNISA to reduce the number of FTEN students, in terms of section 42 read with section 39 of the Act.

[122] Having hurriedly taken the decision as it did and, thus, not properly considering the Minister's decision, EXCOC failed, as such, to make the Minister aware of the considerations that might have persuaded him to opt for a different solution to its problems. The urgency which UNISA uses as justification for having taken the decision it took, does not validate its action. The decision is, as a result, unlawful, invalid and ought to be reviewed and set aside.

Other Issues to be Determined

[123] Having come to the decisions I have on the impugned decisions, I find it not necessary that I deal with the other issues raised for determination, like for instance, whether the Minister reached that decision in a procedurally fair

manner; or whether the Minister's decision is rational, reasonable and proportional; and the just and equitable remedy proposed by UNISA if the impugned decisions are found to be wrong. The remedy was, in any event, to be sought in case the Minister's decision was found to be lawful and the decision of UNISA was found to be unlawful for lack of the Senate's approval.

AMICUS CURIAE

[124] As earlier stated, in the order I granted, I made an order admitting SAHRC as *amicus*.

[125] Before launching the application for admission as *amicus*, SAHRC had sought consent from the parties in the application which consent was granted by EFFSC. The attorneys for UNISA, citing practical reasons such as timeframes for filing the answering or replying papers and heads of argument, refused to grant such consent. It is on that basis that SAHRC had to institute an application for its intervention as *amicus* in these proceedings.

[126] It is trite that

'An amicus curiae assists the Court by furnishing information or argument regarding questions of law or fact. An amicus is not a party to litigation, but believes that the Court's decisions may affect its interest . . . An amicus joins the proceedings, as its name suggests, as a friend of the Court. It joins in the proceedings to assist the Court because of its expertise on or interest in the matter before the Court. It chooses the side it wishes to join unless requested by the Court to urge a particular position'.²¹

[127] SAHRC as an expert in the protection of human rights of all citizens approached court with the intention to present evidence and submissions which relate to the EFFSC's challenge of the decision of the Minister. In essence SAHRC did not seek any specific relief in respect of the substantive and procedural attacks on the impugned decisions. It wanted only to place information that is material and relevant to the issues at stake in the EFFSC's application which information would assist the court when making its decision.

²¹ Hoffman v South African Airways 2001 (1) SA 1 (CC) at 27H – 28B.

[128] The respondents on the other hand disputed SAHRC's entitlement to be admitted as *amicus* in these proceedings. The Minister contended that SAHRC was raising issues that fall outside the permissible bounds as SAHRC's issues were not raised by EFFSC in these papers, hence it should not be admitted as *amicus* in these proceedings.

[129] The information sought to be placed before the court is the recommendations as contained in a Report on Transformation at Public Universities in South Africa which was compiled by SAHRC after it conducted public hearings ("the Transformation Report").

[130] The information submitted by SAHRC is in my view relevant because it provides additional facts which placed a complete picture of the Minister's alleged failure to act rationally and to disregard relevant factors. I found the Minister's decision to be a direct contradiction to the transformation objectives in the Higher Education Sector as it continued to entrench the existing inequalities, patterns of systematic exclusion, marginalisation and subtle forms of discrimination that still exist in institutions of higher learning.

[131] UNISA on the other hand, objected to the admission of SAHRC as *amicus* on the basis that the Transformation Report sought to be placed before the court was dated and did not take into account the most recent statistics on state funding particularly following the #Fees Must Fall movement. Accordingly, UNISA argued that the Transformation Report raised factual disputes that go much wider than the relief sought by EFFSC, entitling UNISA to respond thereto.

[132] For the reasons stated in paragraph [130] of this judgment, I allowed SAHRC to intervene as *amicus* in these proceedings. The statistics that UNISA sought to respond to are not relevant to these proceedings when considered against the reasons for the decisions I have taken in regard to the two impugned decisions.

COSTS

[133] UNISA opposed the prayer for costs against it on the basis that when EXCOC took its decision of 2 January 2021, it did so *bona fide* and in line with Council's fiduciary duties to act in the best financial interests of UNISA; and in opposing this application, UNISA was concerned of the consequences that may befall it if its decision is set aside, but the Minister's decision is not. The suggestion was that even if UNISA's decision was to be set aside, UNISA should not be mulcted with costs.

[134] It is my view that EXCOC acted *mala fide* when it failed to bring to the attention of the Minister considerations that could have persuaded the Minister to reverse or amend the decision that he was contemplating or had resolved to take. On this reason alone, UNISA should be held liable for costs.

[135] When it comes to whether the scale should be that of attorney and client, the court in *Cook v Seabush Investments (Pty) Ltd*,²² opined as follows:

"9.2 "4.09 Attorney and client costs are not readily granted

The ordinary rule is that the successful party is awarded costs as between party and party. An award of attorney and client costs is not lightly granted by the court: the court leans against awarding attorney and client costs, and will grant such costs only on "rare" occasions. It is clear that normally the court does not order a litigant to pay the costs of another litigant on the basis of attorney and client unless some special grounds are present. Where the court would in the light of the other facts not have hesitated to make an award of attorney and client costs, it refused to do so where there were faults on both sides, as it considered itself not justified in penalising one side only.

In *Van Wyk v Millington* it was pointed out that the court's reluctance to award attorney and client costs against a party is based on the right of every person to bring his complaints or his alleged wrongs before the court

²² [2018] ZAECHC 36.

Appearance:

Applicant's Counsel	: Adv. T. Ramogale Adv. M. Ka-Seboto Adv. T. Pooe
Applicant's Attorneys	: Ian Levitt Attorneys
1 st Respondent's Counsel	: Adv. Z.Z Matebese SC
1 st Respondent's Attorneys	: The State Attorney, Pretoria
2 nd to 5 th Respondent' Counsel	: Adv. J Motepe Adv. S. Manganye
2 nd to 5 th Respondent's Attorneys	: Diale Mogashoa Attorneys
For the Amicus Curiae	: Adv. K. Van Heerden : SAHRC
Date of hearing	: 04 March 2021
Date of judgment	: 11 March 2021

to get a decision, and he should not be penalised if he is misguided in bringing a hopeless case before the court. If, however, the court is satisfied that there is an absence of bona fides in bringing or defending an action it will not hesitate to award attorney and client costs."

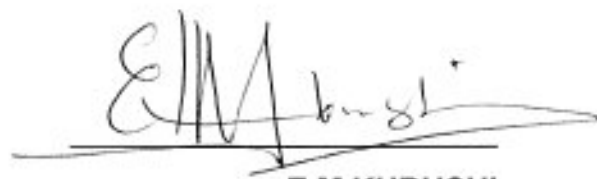
[136] In defending the proceedings against it, there were no *mala fides* on UNISA's part. The lack of *bona fides* is only in regard to UNISA's failure to inform the Minister as alluded in paragraph [121] of this judgment. Therefore, costs should not be awarded on an attorney and client scale.

[137] Similarly, I did not think that EFFSC had made out a case for costs on an attorney and client scale against the Minister. An order for costs on a party and party scale against the Minister and UNISA was properly granted.

[138] Ordinarily, the *amicus* is neither awarded costs nor ordered to pay costs of the successful opposing party. I decided to follow that principle here, as well.

THE ORDER

[139] It is for these reasons that I granted the order on 11 March 2021.

A handwritten signature in black ink, appearing to read 'E.M. Kubushi', is written over a horizontal line.

E.M KUBUSHI

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA