



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

CASE NO: 38887/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

DATE: 11 March 2019

SIGNATURE

In the matter between:

ANIL ANIRUDHRA

Plaintiff

And

SEFAKO MAKGATHO HEALTH
SCIENCES UNIVERSITY

Defendant

JUDGMENT

STOOP AJ

1. Slightly more than a decade ago, the Plaintiff who was then enrolled as a student in the Department of Obstetrics and Gynaecology submitted a dissertation in partial

fulfilment of the requirements for an M Med degree at what was then known as the University of Limpopo (Medunsa Campus). According to the Defendant the Plaintiff failed the dissertation. The Plaintiff was differently minded and convinced that he had satisfied all the requirements for the M Med degree, he applied for relief against the then University of Limpopo. On 13 September 2016 that application was referred to trial. In terms of the Court Order, the founding affidavit stood as simple summons and the answering affidavit as notice of intention to oppose. The Plaintiff was ordered to file a declaration within 45 days.

2. It is common cause that the Medunsa Campus of the University of Limpopo, in terms of Section 24(1) of the Higher Education Act, Act 101 of 1997, was incorporated as part of the Defendant with effect from 1 January 2015. As a result, a reference in this Judgment to the Defendant includes a reference to the former University of Limpopo (Medunsa Campus).
3. Plaintiff based his main claim against the Defendant on contract alleging in the Declaration that, by admitting and enrolling the Plaintiff as a student, Plaintiff and the Defendant concluded a partly oral and partly written agreement with the written part, being the Defendant's Institutional Rules. The Defendant conceded in its Plea that the parties concluded an agreement but alleged that the agreement was in writing and comprised of the Academic Registration Form. That form contains a declaration by the Plaintiff and paragraph 4 thereof read as follows:
 4. *I will familiarize myself with the University rules and regulations and will subject myself to the same.*

4. The University's rules and regulations that are relevant for present purposes, are those contained in 2011 Calendar. Rule MM1.4.4 deals with the requirement to submit a dissertation. Students had a choice between submitting a research-based dissertation or to publish or have a peer-reviewed research article accepted for publication in the relevant discipline in an accredited journal as the primary author. Should the student choose to write a dissertation, Rule 1.4.4 (ii) provides as follows:

- (a) *The examiners who are to mark the dissertation are required to return the examiners' report within 8 weeks;*
- (b) *Should they not return the report within that time the faculty office will remind the examiners(s) of the requirements and report the matter to the Head of Department and the Executive Dean.*
- (c) *The supervisor who has to compile a single report reflecting the view of all the examiners, must return this single report within three weeks after receipt of the examiners report.*
- (d) *Should the report not be returned on time, the Executive Dean will take up the matter.*
- (e) *If the recommendation is that the degree be conferred after the revision of minor errors, then the Executive Dean may sign the HPCSA Form 19, enabling the student to become registered as a specialist. The University will however, only confer the degree after the three hard-covered properly bound copies have been submitted to the Office of the Registrar.*

5. Rule FHS47 deals with the awarding of marks. Rule FHS47.1 provides that the final mark achieved for the dissertation, is the average of the marks allocated by all assessors (internal and external). Rule 47.3 provides that where an external assessor awards a mark below 50%, the University Senate may seek a second external opinion once only.
6. The facts of the present matter are fairly uncomplicated. The Plaintiff was assisted in the writing of the dissertation not only by his supervisor (the Head of the Department Obstetrics and Gynaecology, Professor Monokoane) but also by the Defendant's Head of Research, Professor Towobola who is a specialist pathologist. With the assistance of the Head of Research and under the guidance of his supervisor, the Plaintiff conducted a clinical study and submitted the results in the form of a dissertation to his supervisor.
7. Satisfied that the Plaintiff's dissertation met with the Defendant's requirements, the Plaintiff's supervisor, Professor Monokoane on 25 May 2009 approved that the dissertation be submitted to the examiners. The dissertation was thereafter assessed by an internal and by two external examiners. The first external examiner (Professor PH Wessels) passed the dissertation with a mark of 55% on 14 September 2009. On 9 July 2009 the second external examiner (Professor EJ Buchman) failed the dissertation with a mark of 45% and recommended that the dissertation be revised extensively. The internal examiner (Dr Mashamba, who was the Plaintiff's co-supervisor) also awarded a pass mark of 54% on 30 August 2009.

8. In terms of the Defendant's Rules, the supervisor then had to compile a single report 'reflecting the view of all examiners' and he had to report the matter to the Head of Department and the Executive Dean. In this case, the supervisor was the Head of Department, and it follows that he had to forward the report to the Executive Dean.
9. The Supervisor did not compile the report as required by the Rules and on 28 September 2009, he simply wrote an email to Ms Besselaar in the Defendant's Examination Department wherein he notified the latter as follows:

'The dissertation has been marked and is failed. Final report on the areas of correction and major concerns will be highlighted.'

10. Rule FHS47.3 permitted the University to seek a second external opinion once only should an external examiner award a mark below 50%. This is apparently what happened when the Chairperson of the Higher Degrees Committee, Professor Hay on 7 October 2009 in a letter to the Head of Department recommended that the latter discuss his concerns as well as those of the external examiner with the Plaintiff and that the Plaintiff be permitted to submit a revised dissertation to the external examiner:

It is essential that the candidate address all the concerns to submit a revised dissertation that would be submitted to the external examiner for re-examination. This process should be supervised by you, but since you are busy, HDC would suggest that the task could be handled by the co-supervisor.

11. The reference to HDC in the letter by the Executive Dean is a reference to the Higher Degrees Committee of the University.
12. The Plaintiff thereafter revised the dissertation and it was resubmitted to Prof Buchmann who then on 5 April 2010 awarded the Plaintiff a mark of 60%. According to Prof Buchman, the Plaintiff's dissertation was satisfactory for an M Med, provided that certain minor corrections were made to the satisfaction of the Plaintiff's supervisor.
13. On 10 May 2010, the Chairperson of the HDC, Professor Hay, notified the Plaintiff in a letter that he had successfully completed the research requirements for the M Med degree and have passed the Final Examination. The letter concluded with the following:

"I am aware that you have spend sufficient time in training posts at other institutions but as you know our rules require you to spend a certain time in training to qualify for the M Med at our Institution. You will therefore have to wait for the graduation early in 2011 to formally graduate, although you have basically completed all the requirements for the M Med."
14. During cross-examination Professor Hay stated that the above letter was written at the request of the Plaintiff and that it was not intended to be an official communication from the University. I can accept this. It is nevertheless significant that, according to Professor Hay, the Plaintiff had passed the dissertation and that he had fulfilled all the requirements for the M Med-degree.

15. It is common cause that the Supervisor did not thereafter compile a report that reflects the views of the examiners. Instead, and because of concerns that he had concerning the raw data on which the clinical study done by the Plaintiff was based, he insisted that the Plaintiff should fail the dissertation.
16. The HDC was perplexed by the Supervisor's stance and during a meeting held on 27 May 2010, recommended as follows:

5.9 Supervisor Problem – Dr Aniruhdra – M Med (Obs & Gynae)

HDC considered the case whereby the candidate is failed by the Supervisor and passed by the co-supervisor and two external examiners.

HDC recommended that:

- (i) *the chairperson should write a letter to the supervisor, attaching a copy of his approval of submission letter to him, informing him that he therefore cannot retrospectively fail the candidate. His letter for approval for submission is regarded as a pass for this candidate's dissertation.*
- (ii) *It should be made clear to the supervisor that this action is not condoned and acceptable.*

HDC RECOMMENDED that:

- (i) *a letter should be written to the Head of Department to state that the candidate's dissertation is put on hold on, pending provision of evidence why the candidate's dissertation should not be approved;*
- (ii) *The candidate should submit evidence of his raw data.*

17. The Supervisor still insisted that unless the Plaintiff provides him with the raw data, he would not recommend that the Plaintiff pass the dissertation and eventually, during a meeting held on 1 November 2010, the HDC recommended that a third external examiner should be nominated to assess the Plaintiff's dissertation.
18. It appears as if the matter then received the personal attention of the Executive Dean who agreed with the Supervisor that the Plaintiff first had to provide the raw data to authenticate his findings. As a result, the HDC on 17 February 2011 resolved as follows:
- This matter was discussed at a special meeting of HDC held on the 1st of December 2010. The information presented at the meeting suggests that it is fundamental to the study that the patient files and operative notes are submitted to authenticate the findings. The Executive Dean will now handle the matter and can be off the agenda.*
19. The Head of Research, Prof Towobola and his co-supervisor, Dr Mashamba gave evidence for the Plaintiff. The Plaintiff did not testify. According to both Prof Towobola and Dr Mashamba there was no need for the Plaintiff to provide the University with the raw data since this was captured in data collection sheets that were handed over to the Supervisor. Both stated that because the studies were anonymised, it would in any event have been very difficult if not impossible to obtain the original records or the raw data.

20. Professor Hay, the Executive Dean, Professor Holland and the Plaintiff's supervisor testified on behalf of the Defendant. Professor Hay confirmed that, once a supervisor approves a dissertation for submission to the examiners, it may be accepted that the supervisor regards that dissertation of sufficient quality to achieve a pass mark. Professor Holland testified that the Plaintiff did not pass his dissertation because of serious anomalies that were present in the dissertation. He went so far as to label these anomalies as fraudulent. During cross-examination, he conceded that he might have erred in this assessment, however.
21. Professor Monokoane insisted that there were irregularities in the dissertation which made it necessary that the verify his results on the basis of the raw data.
22. It is clear that a sharp disagreement existed between the Plaintiff who contended that there were no anomalies in the dissertation and the Defendant who insisted that the results should be verified. Because of the view I take of the matter, it is not necessary to determine which of these contending positions are the truth.
23. It appears as if the relationship between an enrolled student and the University is based on contract (see: Schoeman v Fourie 1941 AD 125 at 133 and 136; Sibanyoni v University of Fort Hare 1985 (1) SA 19 (Ck) at 30D-31B; Mkhize v Rector, University of Zululand, and Another 1986 (1) SA 901 (D) at 904B; Lunt v University of Cape Town 1989 (2) SA 438 (C) at 444G-H; Tyatya v University of Bophuthatswana 1994 (2) SA 375 (BG) at 383B-D).

24. In the present instance, the terms of the contract were contained in the Academic Registration Form that incorporated the University rules and regulations as part of the contract. The relevant Rules were set out in paragraphs 4 and 5 above and in analysing and interpreting these rules, I am mindful of what was stated by the Supreme Court of Appeal in Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) par [18] at 603G-604B:

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 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 these 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.

25. Rule SMM1.4.4(c) should be seen against the background that, when a supervisor approves a dissertation for examination, he or she by necessary implication regards the dissertation of sufficient quality to achieve a pass mark. This is why the Defendant's Rules properly interpreted in my view, do not require or even permit a supervisor to examine the dissertation thereafter and in so doing, to supplement or to detract from the comments or marks awarded by the examiners.
26. The Plaintiff's dissertation was marked by one internal and two external examiners. In terms of Rule MM1.4.4(c), the supervisor was required to compile a single report

that reflected the views of all the examiners within 3 weeks after receipt of the examiners' report. The supervisor did not comply with this rule and it is clear that, but for his breach of the Rules, the HDC would have recommended that the degree be conferred after the revision of minor errors. In terms of Rule 1.4.4(e) the Executive Dean would then have been entitled to sign the HPCSA Form 19 which would enable the Plaintiff to become registered as a specialist.

27. In my view, Plaintiff is correct in his contention that the Defendant breached the terms of the contract. By all accounts, the Plaintiff was an outstanding student and he successfully completed all the required assessments and examinations. He obtained an average mark of 56% for his dissertation and was required to do minor revisions. He fulfilled all the requirements for the M Med degree and he is entitled to have the degree conferred. He is also entitled to have the form HPCSA 19 signed by the Dean of the Faculty which would enable him to become a specialist.
28. It is for this reason that I am of the view that the Supervisor's concerns concerning anomalies in the dissertation are of no consequence. The Supervisor raised these concerns after he had approved the dissertation for examination on 25 May 2009 (and by implication awarded a pass mark) and the examination procedure was in progress. The position would have been different had the Supervisor detected fraud on the part of the Plaintiff at that stage. However, the Defendant did not plead that there was fraud on the part of the Plaintiff and the evidence presented during the trial certainly did not warrant such a conclusion.

29. The Plaintiff in the alternative seeks the review and setting aside of the Defendant's refusal to confer the M Med degree on the Plaintiff. In my view, that alternative claim has no merit. Once a student is accepted the relationship between him or her and the University is governed by the law of contract. Although the Defendant derived its power to enter into the contract with the first respondent from the provisions of the Section 65(1) of the Defendant's Institutional Statute (published in *Government Gazette* No 40334 of 7 October 2016), its power to pass the Plaintiff's dissertation harks back to the terms of the contract and the common law. As was the case in Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC And Others 2001 (3) SA 1013 (SCA), the terms of the contract were not prescribed by statute and could not be dictated by the Defendant by virtue of its position as a public authority and in my view, no public interest is affected by the Defendant's exercise of its contractual powers.

30. As a result, in my view, when it decided not to award the Plaintiff a pass mark for the dissertation, the Defendant did not act from a position of superiority or authority or performed a public duty or implemented legislation. It was purporting to exercise a contractual right founded on the consensus of the parties. The Defendant's refusal to award a pass mark to the Plaintiff's dissertation in my view did not constitute a reviewable administrative action (See: Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd 2009 (1) SA 163 (SCA) par [18] at 168J-169A; South African National Parks v MTO Forestry (Pty) Ltd and Another 2018 (5) SA 177 (SCA) par [37] at 192D-E).

31. The Plaintiff is entitled to the relief set out in the Declaration in respect of the Main Claim. I make the following order:

ORDER:

1. The Defendant is ordered to take all steps necessary to award and confer the M Med-degree on the Plaintiff;
2. Costs of suit including the costs of two counsel where employed.



BC STOOP AJ
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing:

26 November 2018

APPEARANCES:

For the Plaintiff:

Adv SG Maritz

Adv JF van der Merwe

Instructed by:

Jarvis Jacobs Raubenheimer Inc,
Pretoria

For the Defendant:

Adv W Geyser

Instructed by:

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