



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 919/2017

In the matter between:

UNIVERSITY OF THE FREE STATE

Applicant

and

ASIVE DLANJWA

First Respondent

MOITSHEPI THEMBALETHU LIPHOLO

Second Respondent

**STUDENT REPRESENTATIVE COUNCIL
(QWA QWA CAMPUS)**

Third Respondent

**ALL OTHER INDIVIDUALS OR LEGAL PERSONS
ACTING UNDER OR ON BEHALF
OF THE 1ST AND/OR 2ND AND/OR 3RD RESPONDENTS
OR OTHERWISE DIRECT OR INDIRECT SUPPORT
OF THE ACTIVITIES TO
WHICH THIS MATTER APPLIES**

Fourth Respondent

HEARD ON:

08 JUNE 2017

DELIVERED ON: 18 SEPTEMBER 2017

MHLAMBI, J

- [1] On 22 February 2017 a *Rule Nisi* was issued of which paragraphs 2.1, 2.2, 2.3 and 2.4 mentioned hereunder served as an interim interdict with immediate effect. The *rule nisi* has already been confirmed against the 2nd, 3rd and 4th respondents. The applicant seeks confirmation in respect of the 1st respondent.
- [2] Paragraphs 2.1-2.4 of the *Rule Nisi* read as follows:
- 2.1. The respondents be prohibited from doing anything which directly or indirectly obstructs, impedes, disrupts, postpones, delays or interferes with the academic functioning of the applicant, as well as any and residential registration of students and all welcoming and other functions at the applicant's campuses, as well as tests or examination processes and/or the orderly academic education, administration and ordinary student activities of the applicant and/or blockading of entrances, roads and buildings and/or damaging any property situated on the applicant's campuses, whether movable or immovable and regardless of who the owner thereof may be;
- 2.2. The respondents be prohibited from barricading of entrances or buildings, molesting, assaulting, threatening or intimidating any student, member of staff, employee, contractor or official

of the applicant, including any person present on the applicant's property who may not fall into one of these categories;

2.3. The respondents be prohibited from in any manner whatsoever inciting, taunting, encouraging, instigating, prompting and/or provoking other individuals or students to perform any of the acts described in paragraphs 2.1 and 2.2 above;

2.4. The Sheriff of this Honourable Court and/or the South African Police Services be authorised and directed to remove and expel from the property and premises of the applicant any respondents who refuse to comply with paragraphs 2.1, 2.2 and 2.3 above.

[3] The relief sought against the first respondent is based on the following:

3.1 He is not cited and singled out as being solely responsible for the unlawful protest action or to intimidate him but merely because he appeared to be the chief proponent of the FEM (Free State Education Movement) and/or has been identified on security footage of the protests¹;

¹ Founding affidavit, page 13 para 8.9

3.2 The first respondent is a portfolio holder of the TSC who is purportedly believed to be in the leadership of the FEM and signed a Memorandum containing a list of demands submitted to the applicant's management². He is also suspected to be associated with the FEM³.

3.3 Even though it is uncertain whether the first respondent effected the handwritten amendments to the memorandum, it was the applicant's view that by handing over the amended memorandum, the first respondent clearly aligned himself with the contents. In so doing, the first respondent must also have been representing the FEM in presenting the amended memorandum to the applicant's management⁴.

BACKGROUND/FOUNDING AFFIDAVIT

[4] The applicant and various other Higher Education Institutions across the country experienced student protest actions as a result of dissatisfaction with University fees and the government's perceived failure to deliver free education. The protests were led by student representative councils and other student formations. During 2016 the Student Representative Council (SRC) elections could not be held on the applicant's campus due to protests. In its stead, a Transitional Student Council (TSC), having the same

² Founding affidavit, page 14 para 8.11

³ Founding affidavit, page 19 para 8.37 and 8.39

⁴ Replying affidavit, page 113 para 3.15,3.16 and 3.17

powers and duties as the SRC, was established pending the election of SRC members by the general student body.

- [5] In 2017 a number of prospective students experienced difficulty in applying for student funding from NSFAS. Prospective learners were required to register for their course of choice in order to become the applicant's students, provided that they had been provisionally accepted based on admission requirements. On Thursday, 16 February 2017, a meeting was held between representative of the FEM, SASCO, the TSC and the management of the applicant at which a request was made to grant a further extension of registration⁵. The applicant did not accede to the request which led to some students entering various lecture venues and laboratories to disrupt classes and intimidated students and lecturers on Monday 20 February 2017⁶.
- [6] On Tuesday, 21 February 2017, the applicant arranged an urgent meeting with the TSC to get them to engage with the student body and use their influence to calm the situation and prevent further uprising and it was decided to reconvene at 17h00 to discuss the progress⁷. When the meeting reconvened, a memorandum, on the letterhead of the SRC, was handed to the applicant's management containing a list of demands. The applicant's response to the demands was not accepted by the TSC and the FEM and almost immediately fresh protest action sprung up with a large group of

⁵ Founding affidavit, page 16 para 8.25

⁶ Founding affidavit, page 18 para 8.30 and 8.31

⁷ Founding affidavit, page 19 para 8.33

protestors gathering at Thakaneng and moving in the direction of the Sasol library. This was at about 14h00 on 22 February 2017⁸.

OPPOSING/ANSWERING AFFIDAVIT

- [7] In the answering affidavit, the first respondent stated the following⁹:
 “I submit that the situation on campus was diffused before this order was granted and since then no protests followed. On 22 February 2017, the day that the *Rule nisi* was granted and before we were aware that the Applicant approached court with this application, I consulted with the students at about 16h00 and we agreed on a proposal to be made to the applicant. The said proposal was made to the applicant at about 18h30 on the said day. A copy of the proposal is attached hereto, marked annexure “AD2”. The applicant accepted the proposal with a few recommendations and the applicant never made mention of the *Rule nisi*. The following day on the Thursday, I was shown a copy of the *Rule nisi* by the Dean Student Affairs and he informed me that they will not pursue application as an agreement was reached. I also consulted with Vice Rector, Professor Lis Lange, who confirmed that they will not pursue the application. I was then informed on the following day, the Friday that the attorney of the Applicant advised that the application cannot be withdrawn and that service will be effected. I received the application on Monday 27 February 2017. No protest followed, not because of the *Rule*

⁸Founding affidavit, page 21 para 8.47

⁹ Answering affidavit, page 12 para 2.36

nisi, but because of the agreement that was reached with the applicant.

It is my submission that the applicant is not entitled to relief against me in my personal capacity. The TSC is properly constituted in terms of a document drafted and accepted by the applicant. The applicant was able to join the TSC and there was no need to join me in my personal capacity. The applicant admitted to me that it was never their intention to join me personally and I was even offered public apologies for the said joinder. These were made by Vice Chancellor and Rector, Professor Lis Lange. About a week thereafter I was also apologized to by the Registrar, Dr. Gift Vinger. Professor Lis Lange also promised to offer a written apology and also that they would pay for my legal representation. This never materialized and the Friday prior to the return date I was informed that they would only pay for one consultation with a legal representative. The email confirming same is attached hereto, marked annexure "AD3". I ended up having to approach Legal Aid for assistance. As mentioned above earlier, I never enticed any protests but was, in fact the person who diffused the situation on various occasions. This will be evident from the footage of the protests. The Dean of Student Affairs approached me when the protests started and requested me to address the students. At that stage I was in my office working when he requested same. I managed every time to calm the students down and to make proposals, thus preventing them from pursuing the protests. During the protests in front of the Sasol Library all the protesters intended

entering the library and I advised them that it would disrupt the students who were busy studying. I advised them to send in only a few students who would then invite the students in the library to join the protests. They accepted my advice and sent in a few students. They returned peacefully without any incidents.”

- [8] Parts of annexure AD2 dated 24 February 2017, titled Response to the Transitional Student Council in relation to the agreement entered with the UFS management on 22 February 2017, read as follows:

“Introduction

On the evening of 22 February 2017, professor Nicky Morgan, Lis Lange and Prakash Naidoo, together with the Dean of Students, Pura Mgolombane, and Vhugala Nthakheni met with Sekese Rasephei and Asive Dlanjwa as members of the Transitional Student Council; and with Siyabulela Lufele as a member of the Free Education Movement met off campus to discuss students’ concerns with registrations and funding for the 2017 academic year.

The following was agreed upon:

- *Members of Rectorate and the Finance department staff will stop their daily operation and functions and focus on students’ concerns on registration and funding.*

Through this process of engagement with the Transitional Student Council the UFS has been able to help 55% of the students in the list in order to register. We thank the students’ representatives for their constancy and dedication.”

- [9] Sekese Rasephei’s email on annexure AD3 dated 16 March 2017 reads as follows:

“Dear Colleagues,

Prof. Nicky Morgan and I had a brief conversation with regards to legal assistance for Mr Dlanjwa for the upcoming court appearance next week on March 22nd.

We agreed that Mr Dlanjwa can seek the service of a legal counsel of which Management will pay for the legal fees of that particular counsel that will have been sought for such purpose.

Through this email, on behalf of Mr Dlanjwa who is part of the TSC, we ask for a written commitment that the aforementioned is in order and that Management commits to handing the legal fees of Mr Dlanjwa's counsel."

The response from Prof Nicky Morgan reads as follows:

"This was a follow up of the discussion held with Rectorate colleagues.

I am in favour on providing financial support for legal advice. Dr Vinger can assist.

I have also pointed out the fact that we will avail the footage the UFS has in support of the request for the order to be made final and that our support for legal advice should not be construed as support for the cancellation of the order."

Replying affidavit

- [10] Paragraphs 3.79 to 3.85 of the applicant's replying affidavit read as follows: "During the meeting of the 1st of March 2017 the 1st respondent displayed dissatisfaction that he was cited in the proceedings. I took time to explain the circumstances and reasoning therefore, which is mainly related to the fact that he was seen as the leader of the protests. There were Management members who had great sympathy with the 1st respondent; however it must be stated that those members did not have sight

of the footage nor were they involved in the consultations as I have been. He was still not satisfied and requested that the University should pay his legal costs. It was explained that the University will assist by him (*sic*) paying for one consultation for a legal representative to explain the contents of the interim Court Order and the effect thereof. The University did this only in an attempt to assist the 1st respondent and for no other reason. The 1st respondent was further shown the footage by Mr Masalesa and was the Management members who had sympathy with the 1st respondent satisfied that 1st respondent was the leader of the protests. Confirmatory affidavits of Prof. Lange and Dr. Vinger will also be attached in support of this. The emails to which the first respondent refers are taken out of context deliberately. It was made very clear that the decision to provide support for legal fees should not be construed as support for the cancellation of the order. Finally, there is no truth to the averment that the first respondent was found in his office by the Dean of Student affairs, whose confirmatory affidavit in this regard will also be attached.”

Applicant's Supplementary Affidavit

[11] Further affidavits having been allowed, the applicant's supplementary affidavit reads as follows: “I depose to this affidavit to supplement the replying affidavit as filed before the above honourable court on 5th May 2017. I hereby supplement the applicant's replying affidavit with specific reference to paragraph 3.85 of the applicant's replying affidavit when I confirmed that Mr

Mgolombane did not attend the first respondent's office personally and found him to be working is indeed correct, however subsequent to the filing of my replying affidavit Mr Mgolombane brought certain aspects to my attention which the applicant deems appropriate be placed before the Honourable Court. Mr Mgolombane advises that although he did not attend the first respondent's office personally he did request his office to contact the Transitional Student Council on 22nd February 2017 before the protest embarked and before the handing over of the memorandum. Mr Mgolombane indicated to me that the first respondent did in fact attend his office where they had discussion where Mr Mgolombane requested the first respondent to address the students and establish the reason for their unhappiness. That was the extent of the discussion between the first respondent and Mr Mgolombane."

Opposing Affidavit to the supplementary affidavit

- [12] The first respondent filed an opposing affidavit, extracts of which read as follows¹⁰: "I did not make the amendments to the memorandum and I only signed the memorandum in my capacity as a member of the TSC. The Chairperson of the TSC and I drafted the memorandum but the amendments thereto were made by the said Chairperson of the TSC. At the time that the memorandum was amended the protest was underway and I was tasked with addressing students, signing the memorandum and negotiating

¹⁰ Para 3.1-3.7, page 148 and 149

with the Applicant. It was not a calm situation where I was afforded the luxury of perusing the document at my leisure. I only realised after signature of the memorandum by myself and the Acting Vice Chancellor while we were making copies of the memorandum that “& FEM” was included in the memorandum. I obviously could not one-sidedly amend a document already signed by not only me but also a member of the Applicant. I am not sure why the Chairperson, Sekese Rasephei, made amendment to include the words “& FEM” but I assume it was because of the fact that the situation was volatile. The amendments were made in an effort to manage students. I attach hereto the confirmatory affidavit of Sekese Rasephei, marked Annexure “AD A”. Regarding my attendance of the meeting held on 23 March 2017, I wish to state that I attended this meeting solely in my capacity as member of the TSC. I want to reiterate that I have never been part of the management of FEM. There was never an established leadership of the FEM although there was a Facebook page that I am aware of. I do not currently have a Facebook profile and have never been part of the said Facebook page. The page is administered by other students. I am not involved in the management, decision making or administration of the FEM. One of my TSC functions includes overseeing the registration of students, as well as all financial and NSFAS issues. The meeting of 23rd of March was convened by the Black Lawyers Student Association as a dialogue for the student community. They attempted to clarify the issues of NSFAS. This meeting fell in my mandate as stipulated above. Also I was invited there by the Black Lawyers Student Association.

Submissions

It was contended on behalf of the applicant that the first respondent's defences that he had acted in an official capacity and diffused the situation were far-fetched and implausible. By signing the memorandum and handing it over to the applicant he aligned himself with its contents especially the contents of its paragraph 5 (the paragraph was hand written and stated that the student body demanded that there be a campus shutdown until the above-mentioned demands are fulfilled). He made inflammatory statements calling students to engage in protest action.

It was contended on behalf of the first respondent that the applicant failed to show that the first respondent incited the students. A mere gathering did not render the meeting violent. The unrest started on 20 February 2017 when student frustrations "boiled over"¹¹ and they started disrupting classes. The memorandum was handed over on 21 February 2017 after the protest had already started. After the intervention of the TSC and the first respondent, peace and calm prevailed on the campus. The applicant failed to prove that the first respondent was a member of the FEM and that he furthered its objectives. There was no basis to regard him as such. Annexure AD2 clearly showed that he was a member of the TSC and acted as such while one Siyabulele Lufele was a representative of the FEM.

¹¹ Founding affidavit, page 18 para 8.30

On being taxed by the court to indicate where on the papers was it stated that the first respondent made inflammatory statements, applicant's counsel said that one had to look no further than the hand written words in the memorandum calling for a shutdown of the campus. The first respondent should have distanced himself from the contents of the memorandum. The counsel conceded that it was strange that the applicant offered to pay legal costs for the first respondent against whom it took legal steps. The applicant, according to its counsel, could not deny that the first respondent assisted in quelling the students' riotous behaviour and normalised the situation in the library. Despite allegations in the founding affidavit and twenty-four photographs on annexure "C", nowhere did the first respondent appear on the footage or photographs which led to the concession by the applicant's counsel that the only physical conduct on which the applicant held the first respondent responsible for the protest was the handing over of the memorandum by the first respondent to the applicant. In my view, this submission is, in itself, not sufficient or serves as adequate grounds to grant a final interdict as prayed for.

Conclusion

Applying the test and principles in **Plascon-Evans Paints Limited v 1984 (3) SA 623 (A) and Van Riebeeck Paints (Proprietary) Limited** having considered the applicant's case against the first respondent, I accept the latter's version as credible and not so far-

fetches that it can be rejected on the papers alone. The application for the granting of the final relief must therefore fail.

[13] I make the following order:

Order

The rule nisi is discharged with costs.

JJ MHLAMBI, J

Counsel for Applicant: Adv. Johnson
Instructed by: Phatshoane Henney
BLOEMFONTEIN

Counsel for Respondents: Ms De Wet
Instructed by: Justice Centre Bloemfontein
BLOEMFONTEIN