IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

CASE NO.484/2016

In the matter between:

ZOLILE GODFREY MADLONGOLWANA	**1st Applicant**
GCINABANTU SIVUYISE MADLONGOLWANA	**2nd Applicant**

And

WALTER SISULU UNIVERSITY	**1st Respondent**
PROF KHAYA MFENYANA	**2nd Respondent**
MR MAKHAYA MAPHINDA	**3rd Respondent**
PROF PATTERSON MAKIWANE	**4th Respondent**

JUDGMENT

BROOKS AJ:

INTRODUCTION

[1] The first applicant is an employee of Walter Sisulu University (the first respondent). The second applicant is his son, who seeks admission to the first respondent as a student in its faculty of humanities, social science and law.

THE FORM OF THE APPLICATION

[2] This matter comes before the court as an urgent application, as envisaged in the provisions of Rule 6 (12) of the Uniform Rules of Court. Before dealing with the substance of the application, something should be said about the form in which it was initially presented.

[3] The applicants approached the duty judge in chambers on 12 February 2016, presenting a certificate of urgency in which were set out reasons why the matter should be permitted to proceed as an urgent application and seeking a directive in terms of Rule 12 of the Joint Rules of Practice for the High Courts of the Eastern Cape Province regarding the hearing and further conduct of the matter. A directive was issued to the effect that the matter may be set down for hearing on 18 February 2016 at 09h30 and requiring service of the application papers on or before 15 February 2016.

[4] The first observation which must be made is that it was not necessary for the applicants to approach the duty judge for a directive regarding the hearing and further conduct of the matter. The reason is that the targeted

date, 18 February 2016, was a motion court date. A careful reading of Rule 12 (d) of the Joint Rules of Practice for the High Courts of the Eastern Cape Province reveals that the purpose of that rule is to provide a mechanism whereby an applicant can approach a judge in chambers for a directive in circumstances in which the applicant wishes to move the court for relief on a day which is not ordinarily a day on which a motion court sits. Given that the applicants wished to move for relief on a motion court day, they were at liberty to do so by the issue of a notice of motion accompanied by a certificate of urgency and supported by a founding affidavit in accordance with the provisions of Rule 6 (12) of the Uniform Rules of Court. It was not necessary for the applicants to obtain a directive before issuing and serving their application.

[5] Secondly, an observation must be made about the content of the notice of motion which was issued and served. The introductory portion of the notice of motion informed the respondents that an application would be made on 18 February 2016 as a matter of urgency at 10h00. The terms of the order to be sought were then set out. One of the prayers referred to a punitive order for costs which would be sought against the respondents "in the event they oppose this application" (sic). Nowhere in the notice of motion were the respondents told what they must do in the event that they wished to oppose the application.

[6] Invevitably, on 18 February 2016, when the matter was called, a legal representative appeared on behalf of the respondents, noting their opposition. The matter had to be postponed, with an order setting the time frame within which answering and replying affidavits had to be

served and filed and directing the date upon which heads of argument would have to be filed. The matter was postponed to 3 March 2016, a date two weeks thereafter, to accommodate the exchange of affidavits.

[7] In the founding affidavit, the first applicant sets out the recent history of the second applicant's application to become a student of the first respondent in 2016. A reading of that recent history leaves no room for a conclusion that there were doubts in the minds of the applicants that this application would be opposed by the respondents. I fail to understand why, in such circumstances, the applicants elected to craft their notice of motion in a manner which failed to inform the respondents what must be done in the event of their deciding to oppose the application. Not only is no date or time given for the filing of a notice of opposition, but the very notion of opposition finds no expression other than in the prayer seeking a punitive costs order.

[8] Moreover, the longer form of the notice of motion [1] which, in compliance with the provisions of Rule 6 (5) of the Uniform Rules of Court, is customarily used to commence application proceedings which are likely to be opposed contains specific portions which deal with the requirement that a respondent who wishes to oppose the application must do so within a specified period of time and must appoint an address for service within a specific radius of the court, then giving a time period within which any answering affidavits must be filed. The provisions of Rule 6 (12) of the Uniform Rules of Court permit an applicant to deviate from the normal time periods set out elsewhere in that rule. What is desirable is for an

[1] Form 2 (a) of the First Schedule to the Uniform Rules of Court.

applicant to issue a notice of motion in which the time periods expressed have been truncated in such a manner as meets the exigencies dictated by the urgency in the matter but still permit a respondent who wishes to oppose the application a realistic opportunity to do so. It is not of assistance to either party if an applicant issues a notice of motion in which the customary portions intended to regulate the further conduct of the matter have been omitted. Had the applicants structured their notice of motion in this matter in accordance with the long form but on truncated time periods, the matter would have been before court as a fully developed opposed application at least one week earlier than has occurred and the inconvenience and cost of the appearances in court on 18 February 2016 would have been avoided. That date ought to have been specified in the notice of motion as the date upon which the matter would be enrolled for hearing in the event that no opposition was noted within the time period nominated by the applicants.

THE NATURE OF THE RELIEF

[9] In the notice of motion the applicants seek an order in the following terms:

> "*1. That the Applicants' non-compliance with the normal procedures, form and time frames for instituting this Application in terms of Rule 6 of the Rules of this Honourable Court be condoned and the Applicants be granted leave to bring this Application as a matter of urgency in terms of Rule 6 (12) (a).*

2. *That a rule nisi be and is hereby issued calling upon the Respondents' to show cause, if any, on Tuesday, 22nd March 2016 at 10h00, why the following order should not be made final:-*

   2.1 *The decision of the 4th Respondent of the Department of Law in refusing the 2nd Applicant into LLB Program during the 2016 academic year be and is hereby declared as unlawful and is set aside.*

   2.2 *That the decision of the 4th Respondent of the Department of Law in increasing the rating points for admission into LLB Program from 27 laid down by the 1st Respondent's Council as reflected in its **2010** Prospectus to 34 points, or any higher point than 27, without the approval of Council, be and is hereby declaring ultra vires the powers of the Department of Law, unlawful, arbitrary, unreasonable and is reviewed and set aside as of no legal effect ab initio.*

   2.3 *That the conduct of the 4th Respondent Department of Law is selectively admitting some students who do not have the minimum rating points of 34, while refusing to admit others, including the 2nd Applicant in particular, be and is hereby declared to be discriminatory, unconstitutional, malicious, arbitrary, unlawful and is set aside.*

   2.4 *That the Respondents be and are hereby ordered and directed to admit the 2nd Applicant into the LLB Program during the current 2016 academic year with effect from February 2016, forthwith.*

2.5 *That the Respondents in the event they oppose this application, pay costs jointly and severally on a punitive scale on the scale as between attorney and client in order to demonstrate this Honourable Court's displeasure at their arbitrariness and abuse of power, otherwise such costs be on a party and party scale of costs.*

3. *That paragraph 2.4 above shall operate as an interim relief and mandamus pending the finalisation of this Application; and*

4. *That the Respondents pay costs for the granting of the interim relief.*"(sic)

[10] Mr MATYUMZA, who appeared on behalf of the applicants, agreed that since the application is opposed and a full set affidavits has been exchanged by the parties, no purpose would be served by a consideration of the applicants' entitlement to interim relief. Rather, it would be appropriate to determine the matter on the basis that it is an application for final relief.

THE LEGAL REQUIREMENTS

[11] The requirements for a final interdict are well established. [2] The applicants must demonstrate:

- a clear right;
- an injury committed or reasonably apprehended;

[2] VAN DEVENTER v IVORY SUN TRADING TRADING 77 (PTY) LTD 2015 (3) SA 532 (SCA) 540 C.

- the absence of any satisfactory alternative remedy.

[12] The availability of a final mandatory interdict in appropriate circumstances is also well established in our law.[3]

[13] Consequently, the evaluation of the affidavits filed of record must occur in accordance with the *Plascon-Evans* rule which has been restated recently [4] in the following terms:

> "*Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon–Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.*"

[14] In assessing whether a real, genuine and *bona fide* dispute of fact exists, the court will only come to the conclusion that it does if it is satisfied that the party who purports to raise the dispute of fact has in his or her affidavit seriously and unambiguously addressed the fact said to be disputed. Where the facts alleged are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer

[3] TRANSET BPK h/a COACH EXPRESS EN 'N ANDER v VOORSITTER, NASIONALE VERVOERSOMMISSIE, EN ANDERE 1995 (3) SA 844 (T) 847 F.
[4] NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v ZUMA 2009 (2) SA 277 (SCA) par [26].

or countervailing evidence if they be not true or accurate but instead of doing so, rests his or her case on a bare or ambiguous denial, the court will generally have difficulty in finding that the test is satisfied.[5]

LOCUS STANDI OF THE FIRST APPLICANT

[15] The answering affidavit filed on behalf of the respondents in this matter is deposed to by the Interim Vice Chancellor of Walter Sisulu University (the second respondent). It raises a preliminary objection to the participation by the first applicant in this application, the argument raised being that the first applicant has not established a direct and substantial interest in these proceedings and as a result has no *locus standi.*

[16] It is common cause that the second applicant is an adult male of full legal capacity. The relief claimed in the notice of motion has been crafted to address squarely his desire to become enrolled as a student of the first respondent. He did not need the legal assistance of his father to bring the application.

[17] Mr MATYUMZA defended the joinder of the first applicant in these proceedings with the argument that as a *paterfamilias* the first applicant is possessed of rights to ensure that members of his family progress in their studies. Moreover, the second applicant is potentially the beneficiary of a study subsidy which would accrue to him if he were to become a student of the first respondent by virtue of the employment by the first respondent of his father, the first applicant.

[5] WIGHTMAN t/a J W CONSTRUCTION v HEADFOUR (PTY) LTD AND ANOTHER 2008 (3) SA 371 (SCA) par [13].

[18] Mr BODLANI, who appeared on behalf of the respondents, countered these submissions with the argument that the interest in the matter demonstrated by the first applicant in his founding affidavit was purely a financial interest. No relief is sought *vis ả vis* the study subsidy and nothing in the papers suggests that the study subsidy is at stake.

[19] In my view, in the circumstances of this application there is no merit in the submission that as a *paterfamilias* the first applicant has a direct and substantial interest in these proceedings born of rights to ensure that members of his family progress in their studies. At best for the first applicant, the founding affidavit demonstrates that he has a mere financial interest in the outcome of his application. This is an indirect interest which does not require his joinder.[6]

[20] In his argument on the point *in limine* Mr Bodlani drew attention to the fact that the confirmatory affidavit deposed to by the second applicant and included in the founding papers was deposed to on 12 February 2016 and purports to confirm the correctness of the content of the founding affidavit deposed to by the first applicant insofar as the content thereof refers to the second respondent. A difficulty arises when cognisance is taken of the fact that the founding affidavit deposed to by the first applicant was deposed to only on 15 February 2016. One cannot accept that the affidavit to which reference is made by the second applicant in his confirmatory affidavit is the one included in the founding papers. Quite simply, on 12 February 2016 that affidavit did not exist.

[6] HARTLAND IMPLEMENTE (EDMS) BPK v ENAL EIENDOMME BK EN ANDERE 2002 (3) SA 653 (NC) 663 E-H.

[21] No specific relief was sought pursuant to the argument on the point *in limine*. Mr BODLANI referred to the position in which the respondents found themselves as a conundrum. If the matter were to be determined simply upon the basis that the application fell to be dismissed on the findings that the first applicant has no *locus standi* and that the deficiencies in the confirmatory affidavit of the second applicant meant that he had placed no material under oath before the court upon which to consider his application, no findings would have been made on the merits and the respondents may experience the inconvenience and expense of facing a second application in due course.

[22] In my view, these being urgent proceedings in which it is readily apparent that all the parties are desirous of achieving a determination of the main issues as expeditiously as possible, Mr BODLANI is correct in not pursuing a specific order relating to the *locus standi* of the first applicant. Notwithstanding the finding that his interest in the proceedings is a financial interest and therefore indirect and not requiring his joinder, the founding affidavit of the first applicant remains before court. It is in the interests of justice that cognisance be taken of its content within the context of the *Plascon–Evans* rule in the determination of whether or not the second applicant is entitled to relief.

ENTITLEMENT TO RELIEF

[23] The following allegations made in the first applicant's founding affidavit are not disputed by the respondents in their answering affidavit and in the circumstances must be deemed to be admitted:

- In 2009 the second applicant passed and obtained the National Senior Certificate with an endorsement that he had met the minimum requirements for admission to a bachelor's degree or to study for a diploma or a senior certificate;

- In 2010 the second applicant registered as a B.Sc. Computer Science student on a four year extended programme with the first respondent;

- The second applicant failed the 2010 year end examinations;

- For financial reasons the second applicant did not register again with the first respondent in 2011 and 2012;

- The second applicant registered again with the first respondent in 2013 but failed all his courses. In the result, the second applicant was suspended and excluded from his B.Sc. studies on academic grounds for a period of one year;

- On 6 January 2016 the second applicant completed application forms seeking his admission to the first respondent as a law student;

- On 8 January 2016 the first respondent made enquiries and was told that the second applicant's application had been refused because he had less than the minimum requirement of thirty-four points needed to study towards an LL.B.

[24] The second respondent makes the following allegations in the answering affidavit on behalf of the first respondent which are germane to the issues with which this application is concerned:

- The first respondent's council determines the first respondent's admissions policy;

- On 2 October 2009 the first respondent's admissions policy was reviewed. The following details of that policy are relevant to the resolution of the current dispute between the second applicant and the first respondent:

  - ❖ The admissions policy would become effective as of 1 January 2010;

  - ❖ Applications must comply with general admission requirements, as well as other specific requirements as prescribed by the relevant faculty and department;

  - ❖ The minimum legal requirement for admission to a degree programme is a National Senior Certificate or a Senior Certificate or a Matriculation endorsement, each at the applicable level for degree admission or a mature age exemption;

  - ❖ An applicant who attained the age of twenty-three years or more and is in possession of a Senior Certificate/National

Senior Certificate and has been granted a certificate of conditional exemption by the Matriculation Board/HESA respectively, on the grounds of mature age, may be admitted to a bachelor's degree;

- The University may at Senate's discretion, admit a student irrespective of educational qualification, who has been granted a certificate of conditional exemption by the Matriculation Board/HESA on the grounds of having attained the age of forty-five years on or before the year in which he or she intends to enrol for a bachelor's degree;

- An applicant who holds a Senior Certificate and a three-year recognised diploma and has been granted a Matriculation exemption by the Matriculation Board/HESA shall be admitted to a bachelor's degree irrespective of age. This will apply to the following categories:

  - a diploma obtained from a South African university; or
  - a teacher's diploma obtained from a South African college of education; or
  - a national diploma obtained from a South African technikon or university of technology; or
  - a nursing diploma obtained from a South African nursing college affiliated to a South African university; or
  - a teachers diploma awarded on the grounds of interrupted periods of study comprising

combinations of a two-year post-school certificate and a one-year upgrading diploma or a two-year post-school certificate followed by a two-year diploma;

- any other equivalent post-school qualification approved by the Matriculation Board/HESA;

❖ Notwithstanding having met one or more of the requirements above, a prospective student must have obtained an admission point score (APS) as specified by the faculty.

- At a practical level, the admissions point score specified by each faculty is presented to the Senate and thereafter referred to the Council for noting and concurrence. This becomes a continuous exercise whenever there are changes to an admissions point score;

- The currently applicable admissions point score in the department of law is thirty-four. This has been the position since 2014;

- The second applicant does not meet the currently applicable admissions point score of thirty four;

- In addition, the second applicant does not meet the criteria set out in the admissions policy;

- The second applicant has never been registered previously as a student in the first respondent's department of law;

- The entry requirements to the first respondent's LL.B. programme have been sanctioned by the first respondent;

- The admissions policy was formulated and approved by the first respondent and has been lawfully and correctly applied since it came into operation;

- The first respondent's prospectus of the year 2010 finds no application in 2016;

- If a student who was enrolled in a particular department in 2010 drops out of the first respondent and then in 2016 makes application for admission as a student in a different department, the application is dealt with in accordance with the current admissions policy criteria.

[25] It is against this factual matrix that the second applicant's entitlement to relief must be evaluated. A careful reading of the founding affidavit makes it clear that as far as the interdict is concerned, the applicants' primary complaint is that the first respondent's department of law had no authority to elevate the admissions point score from twenty-seven to thirty-four and that its action in doing so is unlawful. In my view, this challenge is more than adequately met in the answering affidavit where the second respondent demonstrates that the current admissions policy

approved by the first respondent's council permits individual facilities to specify an applicable admissions point score, that since 2014 this score has been thirty-four in respect of the department of law and that the current entry requirements for an LL. B. degree have been sanctioned by the first respondent. Nothing in the relevant portions of the answering affidavit can be criticised as a bald, vague or ambiguous denial or as an allegation which, through its inadequacy, fails to raise a genuine and *bona fide* dispute of fact. In the circumstances, I am of the view that Mr MATYUMZA'S submission that the first respondent has failed to prove the truth of the allegations made on its behalf is without merit.

[26] It is important to record that the applicants in no way challenge the legality of the first respondent's admissions policy itself. Indeed the provisions of s8 (i) (e) of the Statute of Walter Sisulu University[7] provide as follows:

> [the Council] "*must consider for approval the admissions and readmissions policy of the university as recommended by Senate*;"

The admissions policy which is accepted by the applicants as current and valid includes the important provision that "a prospective student must have obtained an Admissions Point Score (APS) as specified by the faculty".

[27] A less obvious ground of attack aimed at obtaining the interdict is hinted at in the founding affidavit but was relied upon strongly by Mr

[7] PROMULGATED ON 26 AUGUST 2008 IN GOVERNMENT NOTICE NO 900 PUBLISHED IN GOVERNMENT GAZETTE NO 31358 IN ACCORDANCE WITH THE PROVISIONS OF THE HIGHER EDUCATION ACT NO 101 OF 1997.

MATYUMZA in argument, namely that because the second applicant was first admitted as a student of the first respondent in 2010, to the extended B.Sc. programme, his application for admission to the first respondent in 2016, to the LL.B programme, should have been evaluated using the criteria which were relevant to the admissions policy which was current in 2010. To bolster this argument, the second applicant was referred to in the founding affidavit as "a returning student". That this would be an accurate description of the second applicant was specifically denied by the respondents. Indeed, the facts relating to the second applicant's movement in and out of the first respondent since 2010, set out in the founding affidavit, militate against any finding that he is "a returning student". The second respondent states unequivocally that in seeking his admission to a different faculty in 2016, his application for admission falls to be evaluated in accordance with the admissions policy criteria pertinent to that faculty currently. In my view, the flaw in the applicants' argument is easily exposed. Not only were there a significant number of years after the second applicant's unsuccessful attempt at a B.Sc. when, on his own version, he was not registered as a student of the first respondent, but his application in 2016 is for admission in a completely different faculty. Logic dictates that the 2016 application bears no resemblance to the 2010 application, save perhaps that the second applicant's name and secondary school qualification remain the same. The complete break with the first respondent between the two applications for admission and the specific circumstances in which it occurred further militate against any finding that the respondents are incorrect in making the allegation that the application is not that of a "returning student" and must be assessed in accordance with current admissions policy criteria, including the admissions point score applicable to the first respondent's department of law.

[28] To the extent that the applicants may have attempted to introduce other bases from which to attack the elevation of the admissions point score from twenty-seven to thirty-four in the replying affidavit, it is well established for good reason that an applicant cannot make out a case for relief in the replying affidavit.

[29] In my view, the applicants have failed to demonstrate a clear right which requires the protection or promotion of either a prohibitory or a mandatory interdict. They have failed to demonstrate that the decision of the fourth respondent in the department of law to increase the admissions point score with effect from 2014 is *ultra vires.* They have also failed to establish that the decision taken to refuse the second applicant's application for admission to the first respondent in 2016 as a student in the LL.B. programme is unlawful and must be set aside. Thirdly, the applicants have failed to demonstrate a clear right which would justify an order directing the respondents to admit the second applicant into the LL. B. programme during the 2016 academic year.

DECLARATORY ORDER OF UNFAIR DISCRIMINATION

[30] The relief claimed in prayer 2.3 of the notice of motion requires specific attention. It purports to address conduct alleged on the part of the fourth respondent as head of the department of law and/or the department of law itself. In describing that conduct as "discriminatory" and "unconstitutional" the prayer must be read as invoking the provisions of s9 of the Constitution[8]. Indeed after the commencement of the application proceedings the applicants issued a notice in terms of Rule

[8] Act No 108 of 1996.

16A of the Uniform Rules of Court indicating that they "have raised constitutional issues in their application" and in which they make a specific reference to the relief contemplated in prayer 2.3 of the notice of motion.

[31] In his argument on behalf of the respondents Mr BODLANI met this "constitutional challenge" with the following argument:

- Whilst the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act [9](the Act) prescribe that every high court is an equality court for the area of its jurisdiction[10], this court has not been designated as a presiding officer in terms of the Act[11];

- In terms of the provisions of the Act[12] no proceedings may be instituted in any equality court unless a presiding officer and one or more clerks are available;

- This court not having been designated as a presiding officer in terms of the provisions of the Act[13] and the jurisdiction of this court effectively having been ousted by the provisions of the Act, it is not competent for this court to entertain an application for the relief contemplated in prayer 2.3 of the notice of motion;

[9] Act No 4 of 2000
[10] S 16 (1) (a)
[11] S16 (1) (b)
[12] S 31 (1)
[13] S 31 (2) (a)

- Moreover, the applicants have failed to comply with the statutory procedural requirements of the Act[14];

- In addition, the principle of constitutional subsidiarity forbids the applicants from placing direct reliance upon the Constitution[15] in circumstances where legislation[16] has been enacted to give effect to a constitutional right.[17]

[32] In my view, there is merit in the submissions made by Mr BODLANI in respect of the relief contemplated in prayer 2.3 of the notice of motion.

[33] In all the circumstances, I am of the view that the application falls to be dismissed.

COSTS

[34] Mr MATYUMZA submitted that in the event that the application was dismissed, the court should direct that each party pay their own costs in recognition of the fact that the constitutional issue raised therein has been raised by the applicants "for the benefit of everyone". In my view there is no merit in this submission. The motives of the applicants are predominantly of a private nature. In the event of a failure on their part to

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[14] S 20 (2)
[15] Note 8 SUPRA
[16] Note 10 SUPRA
[17] MEC FOR EDUCATION, KWAZULU-NATAL, AND OTHERS v PILLAY 2008 (1) SA 474 (CC) par [40]; SALI v NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE AND OTHERS 2014(9) BCLR 997 (CC) par [4].

obtain the relief sought, no reason exists why costs should not follow the result.

ORDER

[35] The following order will issue:

"The application is dismissed with costs".

RWN BROOKS

JUDGE OF THE HIGH COURT (ACTING)

Counsel for the applicant:	**ADV M MATYUMZA**
Instructed by	**Mafungo Tshaka Inc.**
	MTHATHA
Counsel for the respondents:	**ADV A BODLANI**
Instructed by	**Fikile Ntayiya & Associates**
	MTHATHA
Matter heard on:	**03 March 2016**
Judgment delivered on:	**10 March 2016**