

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

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
DATE 3/3/2015	SIGNATURE 

CASE NO: 8104/2014

DATE: 4/3/15

IN THE MATTER BETWEEN:

TSHWANE UNIVERSITY OF TECHNOLOGY

APPLICANT

AND

MBONISENI YSTER DLADLA

RESPONDENT

JUDGMENT

KOLLAPEN J:

1. On the 1st of February 2014, this Court on an urgent basis and at the instance of the respondent, granted an order in the following terms against the applicant:
 - i. It found that the evictions that were effected at the applicant's residences on the 31st of January 2014 were unlawful;
 - ii. It ordered the applicant to immediately allow all students who were evicted from its residences back into these residences;
 - iii. It directed the applicant to pay the costs of the application on a scale as between attorney and own client.

2. The applicant has launched these proceedings to seek the rescission and the setting aside of the order granted on the 1st of February 2014 and brings the

application in terms of the provisions of Rule 42(1) of the Uniform Rules of this Court. The stance of the applicant is that the order of the 1st of February 2014 was erroneously sought and erroneously granted.

THE BACKGROUND TO THE DISPUTES BETWEEN THE PARTIES AND THE ORDER OF THE 1ST OF FEBRUARY 2014

3. During January 2014, the campus of the applicant was plagued and seriously affected by student protests, some of which resulted in considerable violence and damage to property.
4. On the 31st of January 2014, the applicant approached this Court on an urgent basis and secured relief against the first respondent and various other individuals and student organisations. This effectively interdicted the respondents from protesting on any campus of the applicant. The order also interdicted the respondents from threatening, intimidating and / or harassing the staff of the applicant.
5. On the 30th of January 2014, the applicant caused a notice to be issued to all students on its campuses advising of the closure of the campuses and directing all residential students to vacate their rooms by 7:30a.m. on the 31st of January 2014 .
6. It is of interest that the written notice of the 30th of January 2014 was not part of the papers filed by the applicant in support of the order it obtained on the 31st of January 2014 nor was there any indication in the applicant's papers in those proceedings that the students would be required to vacate residences. In those proceedings the applicant had simply stated that 'the Pretoria West campus of the applicant had been closed indefinitely.'
7. When regard is had to the order of the 31st of January 2014, no relief is sought or granted relative to the closing of the campus or the vacating of residences.

The order read in its entirety is correctly characterised as an anti-protest order rather than one that seeks to effect the closure of the campus and ensure the residences are vacated.

8. Following the issue of the 'letter to vacate' on the 30th of January 2014, large numbers of students vacated the various residences of the applicant on the 31st of January 2014. While there appears to be some dispute as to whether they vacated the residences voluntarily or were compelled to do so, it must be evident that the notice of the 30th of January 2014 was the trigger for the residences being vacated and the letter indeed was peremptory in form and tone.
9. The respondent in his personal capacity as president of the Central Student Representative Council and on behalf of the students who were residents of the applicant's residences, then brought urgent proceedings which resulted in the grant of the order which is now the subject of this application.
10. Those proceedings came before this Court on Saturday the 1st of February 2014 at 1:00p.m. and it is necessary to set out the timeline and events that preceded the hearing of the application:
 - 10.1 During the evening of Friday the 31st of January 2014, counsel for the respondent, Advocate Jordaan called the Registrar of the applicant, Professor Mothatha informing him that an urgent application was being planned regarding the evictions and also seeking contact details of the applicant's attorneys. Professor Mothatha was unable to provide these;
 - 10.2 Professor Mothata was also requested to contact his colleagues in senior management to reconsider the evictions;

- 10.3 Professor Mothata states that he was unable to contact anyone who was part of the Executive Management Committee and later that evening he called Advocate Jordaan to inform him accordingly
- 10.4 At 1:23a.m. on the 1st of February 2014 the Notice of Motion and Founding Affidavit were e-mailed to three members of the Executive Management Committee, namely Professor Ogude (Vice Chancellor), Professor Moroka (Deputy Vice Chancellor) and Professor Mothata (Registrar). The respondent relies on an e-mail read receipt dated the 1st of February 2014 at 8:10a.m. which suggests that the e-mail was read at that time by Prof Ogude. Professor Ogude denies reading the email.
- 10.5 On the 1st of February 2014, Miss Jacobs, the attorney of the respondent, called and left messages on the phones of Professor Ogude and Professor Moroka. She called Mr Tlhabadira, the Deputy Vice Chancellor for Institutional Support, who referred her to the Registrar, Professor Mothatha.
- 10.6 Ms Jacobs then spoke with Professor Mothatha at about 11:00a.m. and informed him that the matter was to be heard at 1:00p.m., enquired as to whether the applicant intended opposing the application, and whether it had appointed legal representatives to act on its behalf. Professor Mothatha was unable to provide any information to her and his stance was that there was very little he could do as he did not have contact details of the applicant's attorneys. Professor Mothatha does not appear to have attempted to contact any of his colleagues in senior management on the 1st of February 2014 to share and / or discuss the implications of his conversations with Ms Jacobs and his discussion the night before with Advocate Jordaan.

- 10.7 Both Prof. Mothatha and Mr Tlhabadira are members of an eight person Executive Management Committee.
11. The application was then heard at 1:00p.m. and the order in question was granted in favour of the respondent. The applicant was not present nor was it represented when the order was granted.

BASIS FOR THE RELIEF SOUGHT

12. The applicant contends that the order of the 1st of February 2014 was erroneously sought and granted in two respects:
- i. To the extent that the application was brought as a class action there was no prior certification of the action and the Court erred in entertaining it as a class action when it was not competent to do so; and
 - ii. The Court erred in concluding that there was proper service and notification to the applicant when it granted the final interdict.
13. Rule 42(1) provides that a Court may rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.
14. In *LODHI 2 PROPERTIES INVESTMENTS CC & ANOTHER v BONDEV DEVELOPMENTS (PTY) LTD 2007 (6) SA 87* the Court captured the following principles relevant to the application of Rule 42(1) and some of them are that:
- i. A judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously;
 - ii. Where notice of proceedings to a party is required and judgment is granted against such a party in their absence without notice of proceedings, such a judgment is granted erroneously;

- iii. In order to determine whether proper notice had been given regard could also be had to evidence external to the record which existed at the time the order was granted; and
 - iv. An order is erroneously granted when it is not legally competent for the Court to have made such an order.
15. It is against the above principles that one proceeds to examine the challenge of the applicant:

▪ **PRIOR CERTIFICATION REQUIRED**

16. The respondent in his founding affidavit states that he brings proceedings on his own behalf and on behalf of other students who are residents of the first respondent's residences. He also then goes on to state he acts in terms of the provisions of Sections 38(c), (d) and 9(e) of the Constitution. In considering the challenge based on the absence of prior certification, it may be necessary to consider whether the proceedings of the 1st of February 2014 constituted a class action in the ordinarily understood sense of the phrase.
17. In ***CHILDREN'S RESOURCE CENTRE TRUST AND OTHERS v PIONEER FOOD (PTY) LTD AND OTHERS 2013 (2) 213 SCA***, the Court in dealing with the nature and utility of class actions, characterised the action as being considerably wide in scope. However when one has regard to how the Court dealt with the rationale for prior certification then it becomes evident that not every action is rendered a class action simply because it is styled as such:

'All of the parties accepted that it is desirable in class actions for the court to be asked at the outset, and before issue of summons, to certify the action as a class action. This involves the definition of the class; the identification of some common claim or issue that can be determined by way of a class action; some evidence of the existence of a valid cause of

action; the court being satisfied that the representative is suitable to represent the members of the class; and the court being satisfied that a class action is the most appropriate procedure to adopt for the adjudication of the underlying claims. In my view they were correct to do so and we should lay it down as a requirement for a class action that the party seeking to represent the class should first apply to court for authority to do so. My reasons for adopting that requirement are the following.

Most jurisdictions around the world require certification either before institution of the class action or at an early stage of the proceedings. The exception is Australia. The justifications are various. First, in the absence of certification, the representative has no right to proceed, unlike litigation brought in a person's own interests. Second, in view of the potential impact of the litigation on the rights of others it is necessary for the court to ensure at the outset that those interests are properly protected and represented. Third, certification enables the defendant to show at an early stage why the action should not proceed. This is important in circumstances where the mere threat of lengthy and costly litigation may be used to induce a settlement even though the case lacks merit. Fourth, certification enables the court to oversee the procedural aspects of the litigation, such as notice and discovery, from the outset. Fifth, the literature on class actions suggests that, if the issues surrounding class actions, such as the definition of the class, the existence of a prima facie case, the commonality of issues and the appropriateness of the representative are dealt with and disposed of at the certification stage, it facilitates the conduct of the litigation, eliminates the need for interlocutory procedures and may hasten settlement. Lastly the Australian experience has not proved entirely satisfactory, with numerous interlocutory applications and significant costs and delays being experienced.' (at 226H-227F)

18. In the light of the above I would have considerable doubt as to whether the interdictory relief sought and granted in this matter was in the nature of a class action. An interdict was sought on behalf of a defined group of people. No damages were sought and the relief sought and the duration of the matter were destined to be limited in extent. Indeed the respondent also purported to act in terms of Section 38(d) and Section 38(e) and on the facts it could hardly be said that the application, concerning as it did the eviction of number of students from their residences, was not of the kind that brought it into the realm of an action in the public interest. I would therefore take the view that there was no need for reliance to be placed under those circumstances on standing in terms of Section 38(c) and to the extent that it was done, it was superfluous.

19. However if I am wrong in that assessment and conclusion then when one has regard to *MUKADDAM v PIONEER FOODS 2013 (5) SA 89 CC*, the Court in dealing with what it described as the requirements for certification laid down in *CHILDREN'S RESOURCE CENTRE*, elected not to see them as requirements that a party was obliged to meet but rather as factors to take into account in determining where the interests of justice would lie, the latter being the guiding principle that would guide the Court. It surely must follow that both the interests of justice requirement as well as those factors set out in the *CHILDREN'S RESOURCE CENTRE* case were more than evident from the papers before the Court, even if they were not pertinently identified and tabulated as such. These factors are:
 - i. A common claim that can be determined by way of class action – the eviction of students from residences;
 - ii. Evidence of the existence of a valid cause of action – the assertion that there was an eviction that was not authorised by law;
 - iii. Suitable representative to represent the class – the respondent as President of the Student's Representative Council;

- iv. Class action the most appropriate procedure to adopt for the adjudication of the claim.
20. The Court was clear in *MUKADAM* that when it came to the enforcement of a right in the Bill of Rights, prior certification was not required before bringing a class action. It, however, left open the question as to whether the institution of a class action against a private litigant requires prior certification and for the reasons already given that question need not be determined in the context of adjudicating this application.
 21. Clearly prior certification in the context of an urgent application to vindicate a right may well have the effect of creating a significant procedural obstacle for parties seeking relief under circumstances where time is of the essence.
 22. For these reasons I am not convinced that this was a class action, alternatively if it was then all the requirements for certification were met and the Court was procedurally competent to deal with it as such. I would not uphold the challenge on this basis.

THE QUESTION OF WHETHER THERE WAS PROPER SERVICE AND NOTIFICATION

23. From the background facts it is clear that there was considerable tension and conflict on the applicant's campus and that its decision to close its Pretoria West campus may well have been understandable and possibly justifiable. However it was evident to the applicant that such closure would carry with it the need to vacate the residences. I find it quite unusual that the Court dealing with the urgent application at the instance of the applicant was not asked to deal with this issue nor was the existence of the letter to vacate brought to its attention. I will say no more on that aspect.

24. When it became evident that an application was being prepared and when one examines the actions of the applicant and the respondent, the following emerges:
- i. The respondent sought on Friday the 31st of January to contact the applicant's attorney, but without success as it was late in the day;
 - ii. The respondent advised the Registrar, a member of the Executive Management Committee, of its intention to bring an urgent application. Even though no final date and time was given, the Registrar must have been aware of the urgency of the situation;
 - iii. The following day two members of the Executive Committee were informed about the application but neither appeared to do anything about it by way of informing other members of the Executive Committee;
 - iv. It is indeed remarkable that the applicant, faced with violent and militant conduct on its campus, was unable to respond to the various notices it received regarding the urgent application;
 - v. From Friday evening at about 7:30p.m. when there was already notice of a pending application, until the following day, Saturday, the Registrar was simply unable to reach members of the Executive Committee. It is difficult to conceive how this was possible in the context of an institution that was facing a serious crisis.
25. My view is that from the record of the proceedings before the Court on the 1st of February 2014, the presiding Judge was indeed concerned about service of the application and notification to the applicant. The affidavit deposed to by Ms Jacobs of the 1st of February 2014 sets out the various steps taken by the respondent to bring the application to the attention of the applicant and those appear to be reasonable in the circumstances .
26. The applicant, with respect, dealt with the notifications it received in a cavalier fashion. On Friday the 31st of January 2014, the Registrar was simply unable to

get hold of the members of the Executive Management Committee – this on the same day that the applicants secured an order in their favour and under circumstances where the tension and conflict on its campus persisted.

27. On Saturday and even after two members of the Executive Management Committee received notification of the time of the application, nothing was done to share the information with other members, or to attempt to instruct attorneys or at least to respond in some substantive manner to the application.
28. Under such circumstances my view is that the respondent acted reasonably in the circumstances and the non-appearance of the applicant during the proceedings, which resulted in the grant of the order, was largely due to its own inaction after being alerted that the application was being brought.
29. I am accordingly not satisfied that the applicant has made out a case that it did not receive proper notification of the application. Regard must not be lost of the fact that the application was by its very nature urgent and in such instances the Court is justified in dispensing with the ordinary rules. The affidavit of Ms Jacobs is not disputed in any significant aspect save that it was not possible to convene a meeting of the Executive Committee over the weekend - such a stance can never justify the failure to respond to the urgent application.
30. In my view the application falls to be dismissed with costs and I make the following order:

ORDER

31. The application is dismissed with costs.

N KOLLAPEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

8104/2014

HEARD ON: 29 JANUARY 2015

FOR THE APPLICANTS: ADV. B H SWART SC

INSTRUCTED BY: JARVIS JACOBS RAUBENHEIMER INC (ref:
Raubenheimer/YVV/MAT2059)

FOR THE RESPONDENTS: ADV. D W JORDAAN

INSTRUCTED BY: LAWYERS FOR HUMAN RIGHTS (ref: LHR/NEJ/TUT)