

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 11854/2023

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
.....	
.....	
DATE <u>24-10-2024</u>	SIGNATURE <u>[Signature]</u>

In the matter between:

UNIVERSITY OF LIMPOPO

**APPLICANT FOR LEAVE
TO APPEAL**

-and-

DICKIEL KUSAINDA

RESPONDENT

In re:

DICKIEL KUSAINDA

APPLICANT

-and-

**JUDGMENT: APPLICATION
FOR LEAVE TO APPEAL**

BRESLER AJ:

Introduction:

[1] The Applicant (Respondent in the main application) applies for leave to appeal to the Supreme Court of Appeal, alternatively the Full Court against the judgment and order of this court delivered on the 7th of June 2024 in terms whereof the following was ordered:

1.1 The decision taken by the Executive Committee of the Senate of the Respondent on the 5th of June 2023 to withdraw from the agenda of its meeting, the Applicant's application for the review of:

1.1.1 The decision of the Post Graduate Appeal Committee on 26 April 2023 to uphold the decision not to approve the appointment of external assessors to evaluate the Applicant's doctoral thesis; and

1.1.2 The decision to terminate the Applicant's studies and registration with the Respondent

is hereby reviewed and set aside.

1.2 It is declared that:

1.2.1 The Applicant has a right to have his doctoral theses submitted to a panel of external assessors for their evaluation thereof; and

1.2.2 The Applicant has a right to continue his studies and to remain registered as a student of the Respondent pending the finalisation of the evaluation and examination of his doctoral thesis.

1.2.3 The Respondent's decision, alternatively the Respondent's failure to take a decision on the Applicant's internal review relating to the referral of his doctoral thesis to external assessors constitutes an infringement of the Applicant's constitutional rights.

1.2.4 The Respondent's decision to terminate the Applicant's registration as a student of the Respondent constitutes an infringement of the Applicant's rights.

- 1.3 The Respondent is directed to, within 30 (thirty) days from the date of judgment, take a decision on the Applicant's review application.
- 1.4 The Respondent is herewith directed to re-instate the Applicant's registration as a student with the Respondent pending the finalisation of the evaluation and examination of his doctoral thesis.
- 1.5 The Respondent is ordered to pay the Applicant's costs of the application including the costs of two counsel, where so employed, on Scale C.

[2] The Application for leave to appeal is premised on the following grounds:

- 2.1 The Court ignored the fact that the Respondent's (Applicant in the main application) acceptance for the PhD degree was subject to on-going and continues evaluation of the application and the Applicant reserved the right to review the Respondent's admission in the event that administrative irregularities were identified post enrolment;
- 2.2 The Court misdirected itself when it ignored the fact that the Respondent's admissions for a PhD degree was always susceptible to continuous review;
- 2.3 The Court erred by finding that the Applicant was, on acceptance of the Respondent and enrolling him for a PhD, *functus officio*.

2.4 The Court furthermore erred by:

- 2.4.1 Finding that the Executive Committee of the Senate failed and / or refused to entertain the Respondent's review;
- 2.4.2 Finding that once the Applicant took a decision to consider and accept as appropriate articulation of the Respondent's Master's degree, the decision stood until set aside;
- 2.4.3 Finding that the Respondent's acceptance for PhD studies has not been revoked.

2.5 The Court further erred by finding that:

- 2.5.1 The Applicant cannot revisit the Respondent's admission in the absence of a formal self-review when the acceptance letter, reserved the Applicant's right to self-review in appropriate circumstances.
- 2.5.2 A clerical error pertaining to the Respondent's MSc being in Development Studies and not in Strategic Management constituted a reviewable ground.

- 2.6 The Court also erred in failing to carefully consider the essential and or fundamental purpose of the evaluation of qualifications by the South African Qualifications Authority, which adjudged the Respondent's qualifications to be within the academic stream of Commerce and not International Relations.
- 2.8 The Court erred in prudently inspecting the said certification of evaluation by South African Qualifications authority whose provisions directs that the evaluation should be supplemented with a purpose assessment by the institutions concerned, accounting for content and learning outcomes.
- 2.9 The Court erred in failing to specifically note that having the Applicant's qualification certified as Master of Commerce: Strategic Management; NQF Level 9 means that the Respondent is only allowed to study towards a Doctoral Degree in Commerce as the cognate appropriate qualification in accordance with the admission requirements.
- 2.10 The Court erred in finding that the decision of the Applicant to terminate the Respondent's enrolment was procedurally unfair as contemplated in section 3(2)(b) of the **Promotion of Administrative Justice Act**, Act 3 of 2000 ('PAJA').
- 2.11 The Court erred in finding that both decisions discussed in the agenda of the meeting of 5 June 2023 are administratively unfair and reviewable.

2.12 The Court erred in finding that the Respondent needs to be enrolled as a student with the Applicant and that the declaratory relief was warranted.

2.13 The Court further erred in finding that the Respondent is liable for costs of the application on Scale C.

[3] An application for leave to appeal is governed by section 17(1) of the **Superior Courts Act**, Act 10 of 2013 which provides:

'17 Leave to appeal

(1) *Leave to appeal may only be given where the judge or judges concerned are of the opinion that -*

(a)(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard including conflicting judgments on the matter under consideration,

(b) the decision sought on appeal does not fall within the ambit of section 16

(2) (a), and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

- [4] . In **MEC Health, Eastern Cape v Mkhitha**¹ the Supreme Court of Appeal said the following (reference to other authorities omitted):

'[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."

- [5] Having regard to the Application for Leave to Appeal and the oral arguments submitted by the Applicant, it is clear that the Applicant requires leave to appeal only on the premise that there is a reasonable prospect of success on appeal, alternatively that there is a compelling reason to hear the appeal.

Application of law to the facts:

¹ **MEC Health, Eastern Cape v Mkhitha** (1221/15) [2016] ZASCA 176 (25 November 2016)

- [6] Section 33(1) and (2) of the **Constitution**, 1996 provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- [7] PAJA was promulgated to give effect to this constitutional right.
- [8] The Applicant persistently in its Application for Leave to appeal raised the issue that the Applicant had a right to self-review contained in its Acceptance letter. The said Acceptance letter² however states *inter alia* the following:

'The University of Limpopo reserves the right to review the status of an applicant where an applicant did not indicate one or more of the following:

- a. Details of previous studies undertaken prior to the application.*
- b. The correct matric type at the time of application.*
- c. Any other relevant and correct information and documentation that could have affected the decision process in respect of the application.'*

- [9] It is evident that the right to review is subject thereto that the student failed to disclose relevant information. Nothing therefore turns on this *proviso* as it is common cause between the parties that the Respondent made a full disclosure.

² Contained on page 51 of Bundle 1 (Annexure DK 1)

- [10] This specific term was in any event not raised in the Answering affidavit. The Applicant relied on the right to review the status of a student where the University establishes that there is an 'administrative oversight'. In such an instance the Applicant will rectify the error and communicate the change to the student within a reasonable time. This does not presuppose that the Applicant may unilaterally terminate a student's studies.
- [11] It also stands to be noted that the Notice of Termination³ does not refer to the alleged right of the Applicant to summarily terminate studies. It does make reference to Rule G2.1 that refers to 'general admission requirements' ... 'approved by Council'. In this Court's view the Termination letter does not substantiate the grounds for termination raised in the Answering affidavit.
- [12] Much has also been stated about the integrity of the University that should prevail. In the Applicant's view, this constitutes a compelling reason why the appeal should be heard. This court does not agree with the submission. The court order does not constitute a directive that the degree should be bestowed on the Respondent. The order merely ruled the procedure unfair, unreasonable and therefore reviewable.
- [13] The procedural unfairness and unreasonableness were manifest and succinctly addressed in the judgment in as far as:

³ Annexure 'DK 21' on page 121 of Bundle 2

13.1 The Respondent was merely informed that his studies were terminated without being afforded an opportunity to address the Applicant.

13.2 The failure to consider the decisions at the appeal meeting held on the 5th of June 2023 is tantamount to a failure to take a decision and infringes the Applicant's right to fair administrative action that is lawful, reasonable and procedurally fair.

[14] As to the declaratory relief, this Court has the power to grant any order that is just and equitable, including an order declaring the rights of the parties in relation to the decision.⁴ The original decision allowing the Applicant entry into the PhD program has not been reviewed or set aside. It follows that the Applicant is eligible to have his doctoral thesis examined by external assessors so that his degree can be completed. For purposes hereof, he needs to remain enrolled as a student at the Respondent.

[15] The declaratory relief was thus warranted under the prevailing circumstances.

[16] The Applicant during argument and with reference to its Heads of Argument also raised the issue that the Court misdirected itself on the character of the decisions. According to the Applicant, the said decisions do not constitute administrative action but is rather contractual in nature in as far as the relationship between the Applicant and the Respondent must be defined as a contractual one.

⁴ Section 8(2) of PAJA

- [17] These submissions are without merit. The Applicant has not raised the objection in its Answering affidavit nor was it raised in its Application for Leave to Appeal.
- [18] It was also recently reiterated by the Supreme Court of Appeal in the case of ***Mohuba v University of Limpopo***⁵ that the relationship between a student and a university is not straightforward. It contains elements of both contract law and administrative law. The Applicant should be aware of the decision having regard to its involvement therein. This Court views the Applicant's conduct as highly opportunistic and reprehensible. The principle of *stare decisis* or the *doctrine of precedent* is after all well established in our law. At the very least, Counsel should have informed the Court of this decision prior to taking the opposing view.
- [19] As to costs, it is trite law that the Court has a discretion to award a cost order that is justified having regard to the importance, value and complexity of the case.⁶ This was considered when costs to counsel was awarded on Scale C.⁷
- [20] In this Court's view, the Appeal therefore does not have a reasonable prospect of success and the Application for leave to appeal should therefore be refused.

⁵ See ***Mohuba v University of Limpopo*** 2023 JDR 4060 (SCA)

⁶ See ***Mashavha v Enaex Africa (Pty) Ltd and others*** 2024 JDR 1686 (GJ)

⁷ Paragraphs [51] to [55] of the judgment.

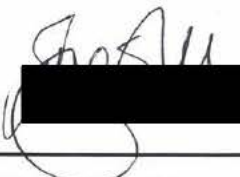
Costs:

- [21] There is no reason why the cost order should not follow the outcome of these proceedings. Likewise, having considered the nature of the proceedings, the complexity thereof, the volume of the record and the importance thereof to the parties, costs to counsel are warranted on Scale C and in respect of two counsels, where so employed.

Order:

- [22] In the result the following order is made:

22.1 Leave to Appeal is refused with costs including the costs of two counsel, where so employed, on Scale C.



M BRESLER
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

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DATE OF HEARING : **27 September 2024**

DATE OF JUDGMENT : **24 October 2024**