

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 7524/2023

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
	
	
DATE 24 MARCH 2025	SIGNATURE..... 

In the matter between:

MNGUNI PEACE NTHANDOMAYENZIWE

APPLICANT

-and-

THE UNIVERSITY OF LIMPOPO

1ST RESPONDENT

**THE DEPARTMENT OF HIGHER EDUCATION AND
TRAINING**

2ND RESPONDENT

COUNCIL FOR HIGHER EDUCATION

3RD RESPONDENT

SOUTH AFRICAN QUALIFICATION AUTHORITY

4TH RESPONDENT

STUDENT REPRESENTATIVE COUNCIL

5TH RESPONDENT

UNIVERSITY OF LIMPOPO

ECONOMIC FREEDOM FIGHTERS' STUDENT
COMMAND UNIVERSITY OF LIMPOPO BRANCH

6TH RESPONDENT

SOUTH AFRICAN STUDEN CONGRESS

7TH RESPONDENT

UNIVERSITY OF LIMPOPO

STUDENT UNION FOR CHRISTIAN ACTION

8TH RESPONDENT

Delivered : 24 March 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be **24 March 2025** at **10:00 am**.

Date heard : 6 November 2024

Coram : Bresler AJ

JUDGMENT

BRESLER AJ:

Introduction:

- [1] The Applicant applies in terms of the provisions of **Uniform Rules** 53 and 6 for the judicial review and setting aside of the decision taken by the First Respondent on the 30th of May 2023 in terms whereof the Applicant's registration and the conferral of Master's degree on the Applicant, was denied.
- [2] The Applicant furthermore applies for an order in terms whereof the First Respondent is directed to confer the appropriate Master's degree in Information Studies on the Applicant within 10 (ten) days from the date of granting of the order.
- [3] The Applicant submits that the review is premised on the principles of irrationality and misdirection. The First Respondent opposes the relief prayed for.

Factual synopsis:

- [4] The facts relevant to the determination of these proceedings, are fairly common cause. It can be briefly summarised as follows:

4.1 On or during October 2020, the Applicant applied, and was admitted to the Master's Program in Information Studies at the First Respondent.

4.2 Upon submission and verification, the Applicant was issued with an acceptance letter in April 2021. One of the admission requirements was that Applicant should comply with Rule G36 of the General Academic Rules of the First Respondent which states the following:

'A relevant honours degree or equivalent, or at least 60% obtained as an average final mark in the appropriate learning program.'

- 4.3 The Applicant was assigned a supervisor, Dr. Jane Monyela, and all the required course and research work were concluded within the stipulated time frames. The Applicant was informed by Dr. Monyela on or about the 16th of August 2022, that she successfully concluded the dissertation and should be graduating in April 2023.
- 4.4 Shortly hereafter, Dr. Monyela informed the Applicant that there are concerns about her Bachelor of Technology degree qualification.
- 4.5 Further correspondence ensued between the Applicant and the First Respondent and on the 2nd of February 2023, she was served with a notice of termination of her studies, which indicated that she failed to meet the admission requirements as stated in the General Academic Rules of the University.
- 4.6 The said notice furthermore indicated that the Applicant has the right to file and appeal.
- 4.7 On or about the 28th of February 2023, an internal appeal was lodged by the Applicant against the said decision. No response was forthcoming after the lodgement of the internal appeal.

4.8 On or about the 24th of April 2023, the Applicant's attorneys addressed correspondence to the First Respondent. On the 26th of April 2023, the Applicant received correspondence from the First Respondent stating that *inter alia* this is not an appeal case as it does not fall under Rule G10 of the First Respondent's academic rules.

4.9 A meeting was held between the Applicant, her legal representative and the First Respondent on the 23rd of May 2023. It was conveyed to the Applicant at the meeting that she should re-register for a further academic year and that the Masters program should be repeated for a period of 12 (twelve) months. This will enable the First Respondent to revisit their rules.

4.10 The Applicant was not satisfied with the outcome of the meeting and the current proceedings were instituted.

[5] Premised on the aforesaid facts, the Applicants argued that the decisions of the First Respondent are unlawful, irrational and unfair. The Applicant also argues that the First Respondent has created a legitimate expectation and is restrained by the doctrine of *functus officio*.

[6] The First Respondent in return argued that, as a public higher education institution, it owes a considerable duty to past, present and future students to ensure that its

degrees, diplomas and certificates are of the highest standard and are qualitatively comparable with degrees and qualifications of the other tertiary institutions.

[7] The First Respondent furthermore submitted that the Applicant's prior degree did not meet the criteria for admission, and as such she could not be conferred the said degree.

[8] It was furthermore submitted that the decision to terminate the studies was not final as the Applicant could have re-applied through the process of RPL (Recognition of prior learning).

Issues that require determination:

[9] This Court is called upon to determine if the decision of the First Respondent to terminate the studies of the Applicant and to refuse to confer the degree on her, must be reviewed and set aside. It must furthermore be determined if this Court is in a position to substitute the said decision with a decision to the effect that the degree must be conferred on the Applicant.

The Applicable Legal Principles:

[10] 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.

- [11] The **Promotion of Administrative Justice Act**, Act 3 of 2000 (PAJA) was promulgated to give effect to this constitutional right.
- [12] The Applicant submits that the First Respondent's unilateral termination and subsequent refusal to confer the Masters Degree on her was unlawful, irrational and unfair.
- [13] The procedural unfairness and unreasonableness are manifest:
- 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 entertain the matter at the internal appeal infringes the Applicant's right to fair administrative action that is lawful, reasonable and procedurally fair;
- 13.3 It is also apparent that the First Respondents proposal to resolve the matter, will entail that the Applicant must enrol for a further 12 (twelve) months. It is not clear what the aim of this further enrolment period is since the Applicant has fully complied with the academic requirements of the course.
- [14] The failure to have due regard to the *audi alteram partem* principle renders the decision procedurally unfair as contemplated in Section 3(2)(b) and 6(2)(c) of PAJA.

- [15] *In casu* it is also common cause that the original decision to approve the Applicant's enrolment for her Masters Degree was not revoked or reviewed by a court of law. In this Court's view, the First Respondent is therefore *functus officio* and cannot revisit the decision until same is set aside by a court of law.
- [16] This approach was confirmed in the matter of ***Member of the Executive Council for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd t/a Eye and Lazer Institute***¹ where the Constitutional Court confirmed that even where the decision of the state organ was defective, such organ must apply formally for a court order to set aside the defective decision, so that the court can properly consider its effects on those subject to it. The decision remains effectual until properly set aside. It could not be ignored or withdrawn by internal administrative fiat.
- [17] The Applicant also submits that the decision was irrational. This is premised on the fact that she was duly admitted and successfully completed the curriculum.
- [18] It is however not necessary for this court to consider the remaining grounds. In ***Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others***² the following was stated:

[25] *Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires*

¹ 2014 (3) SA 481 (CC) at [90] to [92]

² 2014 (1) SA 604 (CC)

the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under s 172(1)(b). Section 8 of PAJA gives detailed legislative content to the Constitution's 'just and equitable' remedy.'

- [19] In as far as grounds for review has been established, the impugned decision must therefore be declared unlawful and set aside and the Applicant is accordingly entitled to the relief set out in the Founding affidavit relating thereto.
- [20] The Applicant also prays for a substitution of the decision to the effect that the degree must be conferred on her within a period of 10 (ten) days from the date of this order.
- [21] Section 8(1)(c) of PAJA provides that a court or tribunal, in proceedings for judicial review in terms of Section 6(1) may grant any order that is just and equitable, including an order setting aside the administrative action and, in exceptional cases, substituting or varying the administrative action or correcting a defect resulting from the administrative action.
- [22] It is trite that PAJA does not pertinently identify circumstances that would constitute 'exceptional circumstances'. In the case of ***Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and another***³ the following was stated by the Constitutional Court at [47]:

³ 2015 (1) BCLR 1199 (CC); 2015 (5) SA 245 (CC)

'[47] To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.'

[23] The Constitutional Court then specifically analysed the concepts of 'in as good a position' and 'foregone conclusion' and inferred that these aspects are interrelated and interdependent. The nature of the decision may dictate that a court defer to the administrator for instance in respect of policy-laden and polycentric decisions.

[24] The appropriateness of granting a substituted order will thus depend on a consideration of the fairness to the parties in each individual case. In the well-known words of Ponnar AJ⁴:

⁴ *Louw and Others v Nel* 2011 (2) SA 172 (SCA) at [31]

'There is no rule of universal application as to what is fair. The fairness envisaged is fairness to both sides. The matter can never be conclusively determined until all of the facts of a particular case are known.'

- [25] Having regard to the factors identified by the Constitutional Court set out herein before, this Court is of the opinion that exceptional circumstances have not been shown to exist for the substitution of the order.
- [26] Fairness to all parties concerned will not be achieved if this Court substitutes the decision in the absence of an adequate enquiry into all the relevant facts. This court is, after all, not an academic administrator and the First Respondent will be in a better position to determine if the degree should be conferred immediately.
- [27] This does not mean that the First Respondent can simply take the decision against without due regard to the contents of this judgment.

Costs:

- [28] The Applicant is substantially successful in the relief prayed for. There is no reason to deprive her of the costs. Having regard to the nature of the relief prayed for, the complexity of the matter and the importance of the case to parties, costs to counsel on Scale B is warranted.

Order:

- [29] **In the result the following order is made:**

- 29.1 The decision taken by the First Respondent on the 30th of May 2023, in terms whereof the Applicant's registration and conferral of the Masters Degree was refused, is hereby reviewed and set aside.
- 29.2 The decision is hereby referred back to the First Respondent for redetermination.
- 29.3 The First Respondent is ordered to pay the costs of the Applicant on party and party scale, including costs to counsel on Scale B.



M BRESLER AJ

ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

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POLOKWANE HIGH COURT