



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA**

REPORTABLE

Case No.: 2025-250145

In the matter between:

NELSON MANDELA UNIVERSITY

Applicant

and

YONELA MASHALABA

Respondent

JUDGMENT

EKSTEEN J:

[1] The respondent, Mr Mashalaba, is employed by the applicant, the Nelson Mandela University (the NMU), as an administrative assistant to the Chair for Human Settlements, housed in the university's Faculty of Engineering, the Built Environment and Technology. On 30 December 2025, the NMU obtained an order in the form of a rule nisi on an urgent basis calling upon the respondent to show cause, if any, why an order should not be granted that:

- ‘2.1 The respondent is interdicted and restrained from publishing any and all defamatory statements, posts, memes, comments, video clips, or sound clips, to or on any platform, referring to the applicant and/or its employees wherein he publicises, infers, or imputes racial discrimination, bullying, harassment, and non-payment for work done.
- 2.2 The respondent shall forthwith remove the publications attached to the founding affidavit ... and any or all previous publications relating to the applicant and/or its employees from his Facebook and LinkedIn accounts or any other social media or public platform.
- 2.3 The respondent shall publish a retraction and apology to the satisfaction of the applicant on his Facebook and LinkedIn accounts by **17h00** hours on **Friday, 2 January 2026.**’

[2] The court further ordered that paragraphs 1, 2 and 3 of the rule nisi, quoted above shall operate as an ‘interim interdict’ with immediate effect. On the return day the confirmation of the rule was opposed. I pause to record that, notwithstanding the form of the order, the ‘interim interdict’ issued in the terms of subparagraphs 2 and 3 of the rule nisi is final in effect, no longer susceptible to alteration, and have been fully complied with. I shall revert to this issue to the extent necessary.

Background

[3] During the latter half of 2025, the respondent lodged a number of complaints addressed to various employees of the NMU in respect of a range of issues. On 17 September 2025, he raised concerns relating to perceived procedural irregularities which he alleged had occurred in the appointment of the Head of Department: Building and Human Settlements Development. He held the view that there had been an attempt to discredit a highly qualified black woman in favour of a white male candidate who did not meet the requirements for appointment. He was not satisfied with the response received from the university and escalated his complaint to the chairperson of the NMU Council and to the Parliamentary Portfolio Committee on Higher Education. On 27 October 2025, the Vice-Chancellor of the NMU responded to the Portfolio Committee in which she recorded the history of the matter. She emphasised that the complaints of discrimination at the university were considered and processed promptly to ensure that the dignity of all involved was protected and asserted that the matter was receiving her attention, in accordance with the provisions of the university’s policy. The explanation

appeared to satisfy the Parliamentary Portfolio Committee, but it did not placate Mr Mashalaba. He again addressed the Parliamentary Portfolio Committee on 3 November 2025, in which he attacked the Vice-Chancellor's response as inaccurate, misleading, and dismissive of the substantive issue.

[4] During October 2025 Advocate Newton, who acts as the special advisor to the Vice-Chancellor, also referred the complaint to Mr Boqwana, the NMU's appointed independent ombud for his investigation. Mr Mashalaba contended that the ombud, Mr Boqwana, had been handpicked by Advocate Newton to prejudice him. The charge was unfounded and remains unexplained. There was some dispute on the papers about the extent of the interaction between Mr Mashalaba and Mr Boqwana, but it is not necessary for purposes of this judgment to resolve these issues. Suffice it to record that the dispute was not resolved.

[5] On 25 November 2025, the Executive Director of Human Resources at NMU received a letter of demand from an organisation called 'Legend Freedom'. The letter bears the heading: 'FORMAL DEMAND FOR REMEDIAL ACTION REGARDING UNFAIR LABOUR PRACTICE, PROCEDURAL IRREGULARITIES, DISCRIMINATION & ABUSIVE PROCESS AFFECTING MR YONELA MASHALABA'. As reflected in the heading, the demand now encompassed a range of accusations, including alleged 'institutional culture, inequality and biased decision-making', the illegitimacy of the Faculty Contracts Committee, unfair labour practices and the irrational recommendations of the Faculty Contracts Committee.

[6] I pause to record that the contractual issues raised in the letter of demand appear to relate to work which Mr Mashalaba alleged that he had performed for the university, and he contended that he was entitled to payment therefor. The issue has not been aired fully in the papers, and it cannot be resolved on the papers. However, as will appear from the impugned publication, this issue appears to have been the immediate trigger that gave rise to the publication.

The publications

[7] Against this background, on 18 December 2025, Mr Mashalaba posted a statement on his 'Facebook' and 'LinkedIn' accounts under the heading 'Public Statement: Urgent Call for Assistance Regarding Discrimination and Non-Payment at Nelson Mandela University'. In the statement, he accused the NMU of 'systemic racial discrimination' and of 'enabling practices that disadvantage and marginalise black staff and students'. He made reference to his complaint relating to the appointment of the Head of Department: Building and Human Settlements Development and asserted that, as a result thereof, he had experienced 'targeted retaliation spearheaded by our director, particularly through the Faculty Contracts Committee' which he said had ruled that he should not be paid for work already completed over the past seven months.

[8] In response thereto, the Legal Services Department of the NMU addressed a letter of demand to Mr Mashalaba to cease publishing the said statements and to remove and delete the said posts on the social media accounts, failing which, it threatened legal action. The demand was met with defiance, and on 19 December 2025, Mr Mashalaba again posted a letter on his 'Facebook' account with the caption: 'Instead of paying me my money, Nelson Mandela University is now threatening me with legal action as expected'. A further letter of demand followed, this time from JGS Attorneys, representing the NMU, again demanding that he stop publishing these statements and that he remove and delete the posts on his social media accounts. Both letters of demand had asserted that the statements published were false, unsubstantiated, malicious and defamatory against them, as they alleged racism, unfair discrimination and unfair treatment. Again, upon receipt of the demand, Mr Mashalaba responded on his 'LinkedIn' account. He stated:

'Nelson Mandela University is refusing to pay me my money for the DECIRE-WATER Project and Council for Scientific and Industrial Research (CSIR) project but has decided to hire their favourite bully, JGS Lawyers to harass me, (sic) you can't bully me silence (sic). Nelson Mandela Foundation, this is what your associates are doing, harassing employees with lawsuit instead of paying them.'

The application

[9] As I have said, the NMU sought an interdict in the terms set out in paragraph 1 of the rule nisi. They contended that they had employed all reasonable efforts at their disposal within their regulatory framework and prevailing policies to accommodate and ventilate Mr Mashalaba's grievances and that some of these processes were still ongoing. They iterated that the allegations of racial discrimination were unsubstantiated and false, and that they were made arbitrarily and maliciously to impair the good name and reputation of the NMU and its staff. Accordingly, the NMU contended that the statements were defamatory and that it had a clear right to protect its good name and reputation.

[10] Mr Mashalaba denied that the statements of discrimination and racism were defamatory, and he denied that the NMU were entitled to silence him when criticising them publicly to protect its good name and reputation. The issue was considered in the urgent application, and this court held that the statements were in fact defamatory. The argument was not renewed on the return day. Originally, before the urgent application, Mr Mashalaba had filed a brief affidavit, and he appeared in person. At the hearing he contended that the publications were 'Protected Disclosures'. The argument, too, was dismissed in the first hearing, has not been persisted in, and I do not address it again. In a supplementary answering affidavit Mr Mashalaba raised two issues to which he referred as points in limine. Firstly, he contended that the NMU, as an organ of state, does not have the right to sue for defamation, and accordingly has no right to interdict the publication of allegedly defamatory statements against them. To do so, he said, would amount to an infringement of his constitutional right to the freedom of speech. Secondly, he contended that the application had not been authorised by the NMU and that Professor Pottas, who attested to the founding affidavit, had not been properly authorised to institute the proceedings. Argument presented on the return day was confined to these two points of law.

Authority to institute proceedings

[11] It is convenient first to deal with the second point in limine which relates to the authority of Professor Pottas to have instituted the application on behalf of the NMU. In the founding affidavit Professor Pottas said that she had been duly authorised to represent the NMU in these proceedings and to depose to the founding affidavit. Mr Mashalaba, in his initial affidavit resisting the urgent relief, did not take issue with these averments. As I have explained, he was acting personally at the time, however, after the urgent relief had been granted he obtained legal representation and a substantial supplementary affidavit was delivered on 26 January 2026. In his supplementary answering affidavit, he alleged:

‘The deponent to the applicant’s founding affidavit alleges that she has authority to represent the applicant in the application. She does not allege that she has authority to institute the proceedings on behalf of the applicant.

The deponent, an acting executive dean of one of many faculties of the applicant, requires authority signed by the Vice Chancellor after consultation with the Chairperson of the Council to institute any legal proceedings on behalf of the applicant, in terms of the policy Document on the delegation of the decision authority-decision making on the institutional legal action.’ (Sic)

A copy of the policy was annexed to the applicant’s replying affidavit.

[12] Advocate Newton, who deposed to the replying affidavit on behalf of the NMU, responded to these averments. He said that the Vice-Chancellor had instructed him to proceed to ‘operationalise the institution of the ... application’. He said that this was customary in the institution of legal proceedings since the Vice-Chancellor is not directly involved in the running of legal services with the applicant. Such function is vested in the registrar of the university. Advocate Newton explained that to ‘operationalise the institution’ of an application, in practice, required him, as special advisor to the Vice-Chancellor, to make contact with the registrar. The registrar, in turn, would contact the head of the legal services department of the NMU, Professor van der Walt. Professor van der Walt, in his capacity as head of legal services, would ordinarily depose to the founding affidavit. However, he was abroad at the time, and accordingly, he instructed Ms Lee-Anne Groener, a legal advisor in the department, to take the lead in this matter. Professor Pottas, he said, deposed to the founding affidavit as she has personal and intimate knowledge of the factual matrix underpinning the matter.

[13] In addition, in March 2026, the NMU sought leave to file a further supplementary affidavit to present a letter received from the Vice-Chancellor by the NMU's attorneys of record on 12 February 2026. The application was not opposed and the supplementary affidavit was received in evidence. The Vice-Chancellor recorded in the letter:

'I hereby confirm that in my capacity as the Vice-Chancellor of the Nelson Mandela University and as I am empowered to do by virtue of the institution's Delegation of Decision-making Authority Policy, I authorized the institution of the urgent application ... against Yonela Mashalaba in the Gqeberha High Court during December 2025.

For this purpose, I authorized Prof. Dalenca Pottas, who has intimate knowledge of the matter to institute the application on behalf of the University and to depose to the founding affidavit.

Nevertheless, and to the extent that it may be necessary, I hereby ratify all actions taken by Prof. Pottas in respect of the said application and the Legal Services Department of the University who is authorized to appoint attorneys and counsel/s and to provide them with instructions ...'

[14] On the return day Ms *Sidlai*, on behalf of the respondent, persisted in the point that the applicant had failed to establish that the application had been properly authorised. She submitted that the application should be dismissed on this basis alone. The argument was two-fold. Firstly, it was argued that there was a fundamental contradiction between the version advanced by Advocate Newton on the one hand and Professor Pottas and the Vice-Chancellor on the other. Secondly, it was contended that neither Advocate Newton, in his affidavit, nor the Vice-Chancellor, in her letter, states that the authorisation was granted after consultation with the chairperson of council. Thus, so the argument went, the alleged authority was void for lack of compliance with the procedure laid down in the policy.

[15] I do not think that the first argument can be sustained. Professor Pottas said that she was authorised to 'represent' the NMU in the matter. In her letter, the Vice-Chancellor confirmed that she had authorised Professor Pottas to 'institute the application and to depose to the founding affidavit'. She proceeded to state that, 'to the extent that it may be necessary' she ratified the conduct of Professor Pottas.

[16] Advocate Newton, as his title suggests, is a lawyer who acts as the special advisor to the Vice-Chancellor. As adumbrated earlier, he explained that the Vice-Chancellor had instructed him to 'operationalise the intuition' of proceedings. This he did in the manner set out earlier. On a proper reading of his affidavit, it seems to me that he was instructed by the Vice-Chancellor to set in motion all the administrative processes to support Professor Pottas, who is not a lawyer, to institute the proceedings. There is no basis to find that any one of these witnesses may have been untruthful. Ms *Sidlai* submitted that it was inconceivable that the Vice-Chancellor would authorise the institution of proceedings and later ratify the decision taken under such authority. Thus, she urged me to hold that Professor Pottas did not have the authority to institute the proceedings. These submissions, too, cannot be sustained. The letter of the Vice-Chancellor sought to ratify the institution of the proceedings, 'to the extent that it may be necessary'. There is no ambiguity in the statement. Ratification was granted *ex abundante cautela*, not because the Vice-Chancellor had not given prior authorisation.

[17] I turn to the second leg of the argument. It is common cause that the respondent did not bring a challenge to the authority of Professor Pottas by notice in terms of rule 7(1) of the uniform rules of court. The challenge was raised in the supplementary answering affidavit more than a month after the delivery of the application. On behalf of Mr Mashalaba it was argued that the authority of a person instituting proceedings on behalf of a litigant may be challenged on the papers and that a litigant may elect not to make use of the benefit of rule 7(1).¹ On behalf of the NMU, on the other hand, Mr *Moerane* contended that a challenge to the authority of a deponent to institute proceedings may only be brought in terms of rule 7(1) of the uniform rules of court. Absent such an attack the deponent's authority to have instituted the application must be accepted.

¹ In support of the argument reliance was placed on *Minister of Water and Sanitation v Clackson Power (Pty) Ltd and Another* 2024 (5) SA 280 (WCC) at para 50 and 51.

[18] Before 1987, rule 7 related to action proceedings only and required of a plaintiff's attorney to file a power of attorney with the registrar before the issue of summons². In respect of application proceedings Watermeyer J in *Merino Ko-operasie*³ said:

'There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorised by the company to do so. This seems to me to be a salutary rule and one which should apply also to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence should be placed before the Court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance.'

[19] In 1987, the uniform rules of this court were considerably revised. The revised rule 7 is not confined to action proceedings and does not require a power of attorney to be filed at commencement of proceedings. Only if the authority to act on behalf of the parties is challenged in terms of rule 7, is the party required to satisfy the court that he is properly authorised to act on behalf of the litigant.⁴ The rationale for amendment and the effect thereof were explained in *Eskom*⁵ as follows:

'The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney.

...

The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether

² Rule 7(1) provided: 'Before summons is issued in any action at the instance of the plaintiff's attorney, the attorney shall file with the registrar a power of attorney to sue. Such power of attorney shall state generally the nature of the particular action authorised to be instituted, the nature of the relief to be claimed therein and the name of the party to be sued.'

³ *Mall (Cape)(Pty) Ltd v Merino Ko-operasie Beperk* 1957 (2) SA 347 (C) at 347G-H.

⁴ Rule 7(1) in the revised form provides: 'Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of any one acting on behalf of a party may, within 10 days after it has come to the notice of the party that such a person is so acting, or with the leave on the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.'

⁵ *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705D-H.

he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority.

As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1).'

[20] And later, in *Eskom*,⁶ Flemming DJP said:

'If the applicant had qualms about whether the "interlocutory application" is authorised by respondent, that authority had to be challenged on the level of whether [the respondent's attorney] held empowerment. Apart from more informal requests or enquiries, the applicant's remedy was to use Court Rule 7(1). It was not to hand up heads of argument, apply textual analysis and make submissions about the adequacy of the words used by a deponent about his own authority.'

[21] In *School Site*,⁷ the Supreme Court of Appeal (SCA) specifically approved the reasoning in *Eskom*. In *School Site*, the authority of an official in the employ of the City of Johannesburg to institute proceedings was challenged. In response, he produced a resolution of the municipal council which authorised them to launch proceedings of the present kind on behalf of the municipality 'in consultation with the Executive Director: Corporate Services' or the 'Director: Legal Services'. He said that he consulted with the applicant's Director: Legal Services in respect of the application but did not disclose the attitude of the Director: Legal Services.⁸ In the appeal, counsel for the unlawful occupiers was constrained to acknowledge that it was not open to her to raise the argument in the absence of a rule 7(1) challenge, by virtue of the decision in *Eskom*.⁹ The endorsement by the SCA of the reasoning of *Eskom* seems to me to be conclusive

⁶ At 706B-D.

⁷ *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at 206 para 14.

⁸ The challenge was similar in nature to that raised by Mr Mashalaba in this case.

⁹ *School Site* at para 14.

of the enquiry. Such a challenge can only be made in terms of rule 7(1). Thus, in *Du Rand NO*¹⁰ the SCA reiterated that:

‘[I]f the appellants seriously doubted whether the respondent had the authority to instruct an attorney to institute and conduct the proceedings on behalf of the respondent, the procedure in Rule 7(1) should have been invoked.’

[22] The same argument was raised in *Umvoti*¹¹ that rule 7 provides only one possible procedure that a litigant may follow to challenge the authority to litigate and that he was entitled, at his election, to challenge the authority on the application papers. Gorven J, writing for the full court, considered the argument and had regard to the well-established authority in *Merino Ko-operasie*.¹² He concluded thus:

‘I am therefore of the view that the position has changed, since Watermeyer J set out the approach in the *Merino Ko-operasie Bpk* case. The position now is that, absent a specific challenge by way of rule 7(1), “the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant” is sufficient. It is further my view that the application papers are not the correct context in which to determine whether an applicant which is an artificial person has authorised the initiation of application proceedings.’

[23] If any doubt remained, it was dispelled in *Limpopo Provincial Council*¹³ where the SCA held:

‘The position is now established that the manner to challenge the authority of a litigant is to utilise rule 7(1) of the Uniform Rules of Court. The original understanding of rule 7(1) was that it only applied to the mandate provided to attorneys. However, this Court in *Unlawful Occupiers, School Site v City of Johannesburg (Unlawful Occupiers)*, citing *Eskom v Soweto City Council* and *Ganes and Another v Telecom Namibia Ltd*, held that the remedy for a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant is provided for in rule 7(1).’

¹⁰ *Du Rand NO and Others v Faerie Glen Renaissance Scheme* [2010] 1 All SA 383 (SCA) at para 6.

¹¹ *ANC Umvoti Council Caucus and Others V Umvoti Municipality* 2010 (3) SA 31 (KZP) at para 28. See also *RML Lighting (Pty) Ltd v Vangiflash (Pty) Ltd* (13682/22) [2023] ZAKZPHC 118 (19 October 2023) at para 43.

¹² See fn 3 at para 28.

¹³ *Limpopo Provincial Council of the South African Legal Practice Council v Chueu Incorporated Attorneys and Others* (459/22) [2023] ZASCA 112 (26 July 2023) at para 21.

[24] As I have said, Ms *Sidlai* sought refuge in *Clackson Power*. In *Clackson Power*¹⁴ the court declined to follow *Umvoti*. It explained the reasons for doing so as follows:

‘I am mostly persuaded by the fact that in *School Site* the Supreme Court of Appeal did not even mention *Mall (Cape)*¹⁵ or *Tattersall*.¹⁶ In terms of the *sub silentio* principle *School Site* does not serve as precedent for the conclusion reached in *ANC Umvoti*.’

[25] Accordingly, the court held that *Mall (Cape)* and *Tattersall* were authority for the proposition that a person instituting proceedings on behalf of a litigant can be challenged on the papers. I am in respectful disagreement. Firstly, I doubt the authority of a single judge sitting in a Provincial Division of the High Court to decline to follow a decision of the SCA that has pertinently considered the import of the amended rule 7. Secondly, it is apparent from the report of *School Site* that the SCA had been referred to both *Tattersall* and *Mall (Cape)*. Although they did not consider it necessary to deal with these decisions, they chose to adopt the reasoning in *Eskom*. *Mall (Cape)* was decided prior to the amendment to rule 7(1) and does not assist in the interpretation of the amended rule. In *Tattersall* the argument relating to rule 7(1) was not raised. The matter was argued, and the judgment written, on the assumption that it was proper to raise a challenge to authority in application proceedings in the papers. The SCA held, on this assumption, that authority had been established. Accordingly rule 7 was not raised and it was not an issue before the SCA. The judgment of the SCA made no reference to *Mall (Cape)* and does not serve as confirmation of the approach. Thus, *Tattersall* is not authority for the proposition advanced. Moreover, it would appear from the judgment in *Clackson Power* that the court was not referred to, nor did it consider the judgment of the SCA in *Limpopo Provincial Council*.¹⁷

[26] In any event, it seems to me that the conclusion reached in *Clackson Power* is destructive of, at least part of, the intention of the amended rule. As I have said, in

¹⁴ See fn 1 at para 49.

¹⁵ See fn 3.

¹⁶ *Tattersall and Another v Nedcor Bank Ltd* 1995 (3) SA 222 (A).

¹⁷ See fn 13.

Eskom it was explained that the required proof of authority was inspired by the fear that a person may deny that he was party to litigation carried on in his name, hence rule 7(1) requires the challenge to be made within 10 days of becoming aware of the fact that a person was acting on behalf of a purported applicant, unless the leave of the court is obtained, on good cause shown. The rule seeks to determine the issue at the outset of proceedings, thus preventing the process from running its course, with the concomitant effect of mounting costs. Thus, in *Janse van Rensburg*¹⁸ a full court in the Western Cape explained that the subrule demands that the challenge be made within 10 days, because a delay in challenging the authority is 'inimical to the efficient administration of justice', and that challenges to authority, 'if they are to be raised at all, should be raised promptly and at the earliest opportunity'. To permit a party to raise the authority on affidavit in the main application, thus allowing the entire application to run its course before argument is presented on the authority, seems to me, at least to some extent, to defeat the purpose of rule 7(1). For these reasons I consider that it should now be accepted that the only means to challenge the authority of a litigant instituting proceedings on behalf of another is through rule 7(1). It follows that a challenge to authority must be dismissed.

University's right to protect its good name and reputation

[27] I turn to the second argument raised, whether the NMU as an organ of state, enjoys the right to a good name and reputation that would entitle it to sue for defamation. It was common cause that the NMU is indeed an organ of state as defined in s 239 of the Constitution. In *Harrielall*,¹⁹ the Constitutional Court considered a public university to be an organ of state because it is a public institution through which the state discharges its constitutional obligation to make access to further education realisable.²⁰

¹⁸ *Janse van Rensburg v Obiang and Another* (unreported WCC (A338/2018) [2019] ZAWCHC 3 (10 May 2019) at para 17.

¹⁹ *Niekara Harrielall v The University of KwaZulu-Natal* [2017] ZACC 38 (31 October 2017) at para 15.

²⁰ See also *Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch and Others* Case CCT311/17 [2019] ZACC 38; 2019 (12) BCLR 1479 (CC); 2020 (1) SA 368 (CC) (10 October 2019).

[28] On behalf of Mr Mashalaba it was argued that it is settled law that an 'organ of state' cannot be defamed and does not enjoy the locus standi to sue for defamation. Ms *Sidlai* referred to *LAWSA*,²¹ where they say:

'The state has no action for defamation. The principle does not only apply to central government, but includes provinces, municipalities and all juristic persons that are part of the governance of the country, that is, organs of state.'

The learned authors refer as authority for the latter proposition to *Modus Publications*.²² I shall revert to *Modus Publications*.

[29] However, Mr *Moerane*, for NMU, has urged me to hold that barring actions where the plaintiff is the national, provincial or municipal government, does not necessarily bar defamation actions by all corporations or legal entities owned or controlled by government or carrying out some governmental functions. He has referred me to s 8(4) of the Constitution, which provides for juristic persons to be entitled to the rights in the Bill of Rights 'to the extent required by the nature of the rights and the nature of the juristic person'. Thus, it was argued that not all organs of state can be, or should be, viewed through the same lens for purposes of determining whether a particular organ of state has the right to a good name and reputation deserving of protection. He contended that 'organs of state' are not always treated in the same manner.

[30] In *Botha*²³ it was held that *Eskom*, an organ of state, is not controlled by any national provincial department and that it is therefore not an extension of such a department. It is an independent entity created by legislation. It was further held that while *Eskom* is under a constitutional obligation to provide electricity for economic and social well-being of people, it does not perform its functions in terms of the Constitution, because the Constitution does not refer to *Eskom*, and it does not provide for its existence.

²¹ *LAWSA*, 3rd ed, vol 14, Part 2, 147, para 121.

²² *Posts and Telecommunications Corporation v Modus Publications (Pvt) Ltd* 1998 (3) SA 1114 (ZS).

²³ *Botha and Others v Eskom Holdings SOC Ltd* 2024 (2) SA 322 (FB) at para 21, after the argument on the return day the decision in *Botha* was confirmed by the SCA. See *Eskom Holdings SOC Ltd v Botha* [2026] ZASCA 48 (9 April 2026).

[31] There are other instances where ‘organs of state’ are treated differently. The legislature has provided that certain organs of state are excluded from the provisions of the Institution of Legal Proceedings against Certain Organs of State Act,²⁴ the Public Finance Management Act,²⁵ and the Preferential Procurement Policy Framework Act.²⁶ So it has been held that procurement decisions of universities are not regulated by s 217(1) of the Constitution because universities ‘are not department[s] of state or administration in the national provincial or local sphere of government’ and none of them is an institution identified for the purpose of s 217 of the Constitution in national legislation.²⁷ Thus, it was submitted that universities, having specialised functions and identities distinct from that of government itself, ought to be allowed to bring a defamation action.

[32] It is now widely accepted that ‘the state’ has no action for defamation, and by necessary implication, is not entitled to an interdict to prevent defamatory statements about its conduct. This, the courts have held is so because it does not enjoy a right to a good name and reputation (*Fama*). At the hearing on the return day of the application, it was common cause that the principle strikes at central, provincial and local government. It may be further accepted that where government, at national, provincial or local level seeks to discharge its governance functions through separate entities or corporations under its control, such corporations are also subject to the principle. Accordingly, as I shall explain, the issue which arises for decision is not whether the NMU is an ‘organ or state’ as defined in the Constitution, but rather whether public universities form part of the governance of the country, as envisaged in the authorities to which I shall refer. Mr *Moerane* argued that they do not and that they have specialised functions and identifies distinct from that of government itself.

²⁴ Act 40 of 2002. See also *Botha* above.

²⁵ Act 1 of 1999.

²⁶ Act 5 of 2000.

²⁷ *Ma-Afrika Hotels (Pty) Ltd v Cape Peninsula University of Technology* 2023 (3) SA 621 (WCC) at para 25.

[33] As explained earlier, the NMU relies on its right to dignity²⁸ and to its good name and reputation for a final interdict. As adumbrated earlier, Mr *Moerane* relied, amongst other things, on the provisions of s 8(4) of the Constitution, a provision contained in the Bill of Rights. In this context he has referred me to s 39 of the Constitution which permits the court, when interpreting the Bill of Rights, to consider foreign law. I shall, accordingly, refer, to the extent necessary, to significant judgments in other common law jurisdictions that may offer guidance in deciding the issue.

[34] That brings me to the development of the common law principle. It has its origin in a decision in *Die Spoorbond*²⁹ which was decided in 1946. At the time it was unsettled whether the law of defamation permitted a trading or business corporation to claim damages for injury to its reputation³⁰. In *Die Spoorbond*, an action was brought in the name of South African Railways and Harbours on account of a newspaper article alleging that the railway administration had caused or permitted trains to be dangerously overloaded and operated at excessive speeds, endangering the lives of travellers. Although the named plaintiff was the South African Railways and Harbours, which operated the railways of South Africa, the court of appeal held that it was in fact part of the national government, and it identified the actual plaintiff as ‘the Crown’ or ‘the Governor-General-in-council’.³¹ The Appellate Division held that ‘the Crown’ had no right to sue for defamation. However, it did not decide whether a government-owned corporation that was distinct from the government itself should have a defamation action.

[35] In the minority judgment Schreiner JA said:

‘I am prepared to assume, for the purposes of the present argument, that the Crown may, at least in so far as it takes part in trading in competition with its subjects, enjoy a reputation,

²⁸ Section 10 of the Constitution.

²⁹ *Die Spoorbond and Another v South African Railways; Van Heerden and Others v South African Railways* 1946 AD 999.

³⁰ South African Law of Defamation is now settled. All corporate entities, incorporated or not, both trading and non-trading, for profit and not; non-profit organisations, as well as political parties, are entitled to protect their reputation. See *Reddell and Others v Mineral Sands Resources (Pty) Ltd and Others* 2023 (2) SA 404 (CC) at para 49 and 98.

³¹ At 1004-1005 (Watermeyer CJ, for the majority), 1010 (Schreiner JA).

damage to which could be calculated in money. On that assumption there is certainly force in the contention that it would be unfair to deny to the Crown the weapon, an action for damages for defamation, which is most feared by calumniators. Nevertheless it seems to me that considerations of fairness and convenience are, on balance, distinctly against the recognition of a right in the Crown to sue the subject in a defamation action to protect that reputation. The normal means by which the Crown protects itself against attacks upon its management of the country's affairs is political action and not litigation, and it would, I think, be unfortunate if that practice were altered. ... [A]ny subject is free to express his opinion upon the management of the country's affairs' without fear of legal consequences. I have no doubt that it would involve a serious interference with the free expression of opinion hitherto enjoyed in this country if the wealth of the State, derived from the State's subjects, could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the country. ... Quite a number of Government departments, as appeared in the course of the argument, indulge in some form of trading on a greater or a lesser scale. Moreover, the Government, when it raises loans, is interested in the good or bad reputation that it may enjoy among possible subscribers to such loans. It would be difficult to assign any limits to the Crown's right to sue for defamation once its right in any case were recognised.'³²

[36] Thus, it seems that Schreiner JA would have rejected the defamation action by a trading corporation owned and controlled by the national government even if the plaintiff was distinct from 'the Crown'.

[37] However, Watermeyer CJ, writing for the majority said:³³

'[T]he Crown's main function is that of Government and its reputation or good name is not a frail thing connected with or attached to the actions of the individuals who temporarily direct or manage some particular one of the many activities in which the Government engages, such as the railways or the Post Office; it is not something which can suffer injury by reason of the publication in the Union of defamatory statements as to the manner in which one of its activities is carried on. Its reputation is a far more robust and universal thing which seems to me to be invulnerable to attacks of this nature. No one who reads the alleged defamatory statements

³² At 1012-1013.

³³ At 1009.

would regard the reputation or good name of the Crown (regarded as a perennially existing legal *persona* whose function is that of carrying on all the multifarious activities of Government in the Union) as having been lowered or injured by these publications, He knows that, though the railways are vested in the Crown, the Crown is only a legal conception and takes no part in the management of the railways.'

[38] Integral to the reasoning of the majority was the assumption that South African Railways was simply a part of government and that it merely carried out government functions. In my view, the reasoning of the majority in *Die Spoorbond* does not exclude the acceptance of a cause of action for defamation if the plaintiff is not in substance 'the Crown', carrying out government functions.

[39] *Die Spoorbond* left open whether a defamation action could be maintained by a local government body, or a government owned corporation that was not legally part of government itself. The issue was resolved, at least in England, by the House of Lords in *Derbyshire County Council*³⁴ where they decided, unanimously, after referring to *Die Spoorbond*, that a local authority had no right to seek damages in a defamation action. The House of Lords reasoned that there were 'features of a local authority which may be regarded as distinguishing it from other types of corporation, whether trading or non-trading'. Lord Keith noted:

'The most important of these features is that it is a government body. Further, it is a democratically elected body, the electoral process nowadays being conducted almost exclusively on party political lines. It is of the highest public importance that a democratically elected government body or indeed any governmental body should be open to uninhibited public criticism. The threat of civil action for defamation must inevitably have an inhibiting effect on freedom of speech.'³⁵

[40] The decision re-enforced the principle that democratic accountability requires that citizens must be free to criticise government without the chilling effect of potential defamation actions. It held that at common law, local authorities, and by analogy, other

³⁴ *Derbyshire County Council v Times Newspapers Limited* [1993] AC 534 (HL).

³⁵ At 547.

governmental entities, have no cause of action for defamation. It was, however, concerned with governmental bodies.

[41] The decision in Derbyshire County Council was followed in South Africa in *Bitou Municipality*³⁶. Traverso DJP, referred to *Die Spoorbond* and she quoted with approval from *Derbyshire County Council* in holding that a municipality cannot sue for defamation. She said:

‘The underlying ratio in all these decisions (and the authorities cited therein) remains constant, namely that it will be contrary to public policy or public interest for organs of government, whether central or local, to have the right to sue for defamation.’ (My emphasis)

What emerges from these matters is that democratically elected governments, at any level of government, or ‘organs of government’, whether central or local, have no right to sue for defamation.

[42] In *Modus Publications*, McNally J, acknowledged that the principle extended to a wider body than only the central government. He proposed that a right to sue for defamation is not available to those artificial persons which are part of the governance of the country. In deciding what is meant by ‘part of the governance of the country’, the question of whether the entity is a legal persona separate from national or local government may play a role, but only small one.³⁷ McNally J afforded greater weight to other criteria, namely, the degree of ministerial control over the entity, the extent of its financial autonomy, whether the entity provided essential services traditionally provided by government, and whether it effectively was a monopoly provider of the services. Under these criteria, he concluded that the *Post and Telecommunications Corporation* was an ‘organ of state’ for purposes of defamation.

[43] *Modus Publications* was a Zimbabwean decision. The term ‘organ of state’ had nothing to do with the definition in s 239 of the Constitution in South Africa. As I have explained, not all organs of state are always treated in the same way. McNally J

³⁶ *Bitou Municipality and Another v Booysen and Another* 2011 (5) SA 31 (WCC).

³⁷ *Modus Publications* at 1120H-I.

explained that the phrases ‘alter ego of the state’ and ‘organ of state’ are not terms of art which have a specific legal definition. They must be defined in their context.

He said:

‘In the context of defamation, I do not consider it wise or desirable to attempt an exhaustive definition of the category of artificial persons which should be denied the right to sue for defamation because they are “the state”, “the alter ego of the state”, and “an organ of state”, “an instrumentality of the state” or “an instrument of governance”.’³⁸

I am in agreement with these comments. Accordingly, in my view, it does not follow that every entity defined as an ‘organ of state’ in the Constitution would necessarily be an ‘organ of state’ for purposes of the law of defamation.

[44] I have been referred to the decisions in *Lackay*³⁹ and *Silvermoon*⁴⁰. In *Lackay* the court rejected a claim for defamation by South African Revenue Services, exclusively on the basis that SARS was an ‘organ of state’ in the context of the Constitution.⁴¹ But the principle in issue does not derive from the Constitution. It requires, in my view, a contextual enquiry in each case to determine whether it may rightly be said that the body is an organ of government. While the ultimate outcome of the matter was probably correct, for the reasons set out earlier, I do not think that the approach to ‘organs of state’ adopted in *Lackay* accords with the common law principle developed over an extensive period. In *Silvermoon* a similar approach was adopted to the concept of an ‘organ of state’. To that extent, I disagree with these decisions. I prefer to adopt the approach set out in *Modus Publications*.

[45] That brings me back to the facts of the present matter. The governing bodies of public universities in South Africa are not democratically elected bodies and to that extent differ materially from local government. Ms *Sidlai* argued that I should find that universities are controlled by government and should accordingly be considered to be

³⁸ At p 1122I-J.

³⁹ *Moyane and Another v Lackay* [2017] ZAGPPHC 1262 (24 November 2017).

⁴⁰ *Minister of Police and Others v Silvermoon Investments 145 CC and Others* 2020 [6] SA 586 (KZD).

⁴¹ *Lackay* paras 9 and 13.

‘organs of state’ for purposes of defamation. In terms of the Higher Education Act⁴² the Minister appoints a council of higher education to advise him in respect of education, from members nominated by the public. He may, after consulting with the council for higher education⁴³, establish a university⁴⁴ or declare an existing educational institution providing higher education as a university.⁴⁵ Similarly, he may, after consulting the council for higher education, merge two public higher education institutions into one.

[46] However, a public university is governed by a ‘council’ defined in the Act as the governing body.⁴⁶ The council must consist of not more than thirty members of which five may be appointed by the Minister. The chairman and the vice-chairman must be elected from the members appointed by the Minister, however, the ministerial appointees constitute a small minority of the council.

[47] In terms of the Act, the council of NMU has developed an institutional statute that has been published, and which has been approved by Parliament,⁴⁷ which empowers the council:

- (1) To approve policies and strategic plans of the university at the institutional level.⁴⁸
- (2) To monitor the implementation of structures and policies approved by the council.⁴⁹
- (3) To identify and monitor the risks relevant to the business of the university.⁵⁰
- (4) To adopt its own rules, including the code of conduct of members of the council, in terms of which it conducts its activities.⁵¹
- (5) To approve the annual budget of the university.⁵²

⁴² Act 101 of 1997.

⁴³ Section 4 and s 8(3) of the Higher Education Act.

⁴⁴ Section 20(1) of the Higher Education Act.

⁴⁵ Section 21 of the Higher Education Act.

⁴⁶ Section 1 and 27(1) of the Act.

⁴⁷ Section 33 of the Act.

⁴⁸ Section 4(3)(b).

⁴⁹ Section 4(3)(c).

⁵⁰ Section 4(3)(d).

⁵¹ Section 4(3)(h).

⁵² Section 4(3)(p).

[48] Accordingly, the council of the applicant is the highest decision-making authority in matters relating to governance and is responsible for the overall governance, strategic mission and financial policy of the institution. It enjoys a significant measure of autonomy in its administration.

[49] In respect of its financial autonomy the Minister must, subject to the government policy on the funding of public higher education, allocate funds to public higher education on a fair and transparent basis. However, the university is not wholly funded or controlled by the State. Public universities, although created by statutes, are financially and operationally hybrid institutions. The applicant said that it is partially funded by the State, but its continued functioning and sustainability depends materially on student fees, third stream income, fundraising, donor contributions, research grants and external private partnerships, amongst other revenue sources. They contended that damage to the reputation of the university will impact on the number of students wishing to study at the university and the people willing to work and lecture there. It would have a major impact on donor grants and funding for research grants. Thus, without students, lecturers, research and donor funding, it said that it may cease to exist.

[50] It may be accepted that the provision of higher education is an essential service, but it is not one traditionally provided by government and the NMU is certainly not a monopoly. It operates in competition with other tertiary educational institutions, both private and public. That they have a material interest in the protection of their good name and reputation is indisputable.

[51] The question whether a public university can sue for defamation has not arisen in any reported judgments in South Africa and it is therefore an open question in our law. However, it has arisen in other jurisdictions. In *Hong Kong Polytechnic University*⁵³ an article had appeared in 'Next Magazine' titled 'Bluffing Lecturers: False Curriculum

⁵³ *Hong Kong Polytechnic University and Others v Next Magazine Publishing Limited and Another* [1997] 7 HKPLR 286.

Vitae' and it alleged that the head of department of business studies had put forward false qualifications, but the university deliberately turned a blind eye to the fraud. The issue for determination was whether the university's claim for damages for defamation was one which could be entertained in law. In the judgment on appeal the court held:

'In my judgment, the considerations which govern a body like a university are far removed from those in the *Derbyshire County Council* case. In no way does the university take part in the government of Hong Kong. It is not an organ of government, democratically elected or otherwise. If public interest be the test, I would hold that it strongly favours the protection of the reputation of institutions of learning like the university.'

I agree with these observations, and for these reasons I do not think that *Bitou Municipality* is authority for depriving a public university of its right to protect its good name and reputation. The matter arose again in England in *University of Salford*.⁵⁴ Eadie J referred with approval to *Hong Kong Polytechnic University* and expressed the view that the argument that the *Derbyshire County Council* case had the effect of preventing universities from suing for libel on the basis that they are to be regarded as public or governmental bodies, providing higher education on behalf of central government, was 'simply not correct'. He recognised that universities receive large sums of public money and had to comply with various statutory provisions, as they do in South Africa, but they were not to be equated with central or local government. A university has an identity and reputation separate from that of government. It provides services of a type that can be, and often are, provided by privately funded entities and it does not 'govern' members of the public in the sense of issuing or enforcing regulations which the public must conform to. Thus, I do not consider that the NMU can be considered to be an 'organ of state' for purposes of defamation. 'Organ of state', as McNally explained in *Modus Publications*, is not a term of art, and the fact that a public university is an organ of state as referred in the Constitution does not necessarily mean that it is an 'organ of government'⁵⁵ or a 'governmental body'.⁵⁶

⁵⁴ *Duke v University of Salford* [2013] EWHC 196 (QB).

⁵⁵ As in *Bitou Municipality* at para 13.

⁵⁶ As in *Derbyshire County Council*.

[52] For these reasons I do not think that the second argument can succeed either. In the result the NMU has established a clear right.

The interdict

[53] At the hearing of the urgent application, the court determined that the statements made were indeed defamatory. The publication of the statements were not in dispute and are prima facie wrongful.⁵⁷ The onus rested on the respondent to dispel this prima facie case.⁵⁸ Ms *Sidlai* did not advance any of the traditional defences to rebut the presumption of wrongfulness. However, she did submit that, in the event that I should find that the NMU did have locus standi, and therefore a clear right, that it had failed to establish harm. She submitted, with reference to *J v J*⁵⁹ that the NMU was required to present clear evidence that its reputation was indeed injured as a result of the respondent's conduct. The statement is not correct. In order to obtain an interdict an applicant is required to establish an injury actually committed or reasonably apprehended. I have set out earlier the evidence presented by the NMU in respect of the harm which it may suffer as a consequence of the publication of the statements. In my view, it does establish a reasonable apprehension of harm. I am accordingly of the view that the NMU did establish the requirements for a perpetual interdict.

The relief

[54] I have referred earlier to the rule nisi granted at the urgent hearing. As recorded, the 'interim interdicts' granted in terms of paragraphs 2 and 3 of the rule nisi, are irrespective of their form, final interdicts. Mr Mashalaba has fully complied with these orders and they are no longer susceptible to alteration by this court. They are definitive of the rights of the party and had the effect of disposing of a substantial portion of the relief claimed. The final interdict remains binding until set aside by rescission of judgment, on review or on appeal. There can be no purpose in my confirming the rule in respect of these orders.

⁵⁷ *Le Roux and Others v Dey* 2011 (6) BCLR 577; 2011 (3) SA 274 (CC).

⁵⁸ *National Media Limited and Others v Bogoshi* [1998] 4 All SA 347 (A); 1998 (4) SA 1196 (SCA).

⁵⁹ *J v J* 2016 ZAKZDHC 33 at para 89 – an unreported judgment of the Durban High Court.

[55] Accordingly, I am of the view that paragraph 1 of the rule nisi should be confirmed.

Costs

[56] As adumbrated earlier, the Constitutional Court in *Harrielall* have, for purposes of the *Biowatch*⁶⁰ principle, confirmed that a public university is an organ of state. Mr Mashalaba has asserted his right to freedom of expression, a fundamental right enshrined in Chapter 1 of the Constitution. Accordingly, in my view, the approach in *Biowatch* dictates that I should make no order as to costs.

[57] Accordingly, paragraph 1 of the rule nisi issued on 30 December 2025 is confirmed.

J W EKSTEEN
JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv MTK Moerane SC with Adv G J Gajjar and Adv K M Morris

Instructed by: Joubert Galpin & Searle

GQEBERHA

For Respondent: Adv A Sidlai

Instructed by: AJ Ntsuntswana & Sons Attorneys Inc

GQEBERHA

Date Heard: 19 March 2026

⁶⁰ *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC).

Date Delivered: 12 May 2026