

SOUTH AFRICA / JUDGMENT

Kusainda v University of Limpopo (11854/2023) [2024] ZALMPPHC 60 (7 June 2024) [2024] ZALMPPHC 60

COURT

Limpopo High Court, Polokwane

BEFORE

M Bresler

CASE / FILE NUMBER

11854/2023

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

CASE

NO: 11854/2023

(1)

REPORTABLE: NO

(2)

OF INTEREST TO THE JUDGES: NO

(3)

REVISED

DATE

07 06 2024

SIGNATURE

In

the matter between:

DICKIEL
KUSAINDA
APPLICANT
-and-
UNIVERSITY
OF LIMPOPO
RESPONDENT

JUDGMENT

BRESLER AJ:

Introduction:

[1] The Applicant applies in terms of the provisions of Uniform Rule 53 and 6 for the judicial review and setting aside under the provisions of the Promotion of Administrative Justice, Act 2 of 2001 (hereinafter 'PAJA') of the administrative decision of the Executive Committee of the Senate of the Respondent taken on the 5th of June 2023 to withdraw from the agenda of its meeting the Applicant's application for review of:

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

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

[2] In the alternative to the above, the Applicant prays for a review of the administrative action in as far as the Senate failed to take a decision on the review application.

[3] The Applicant furthermore prays for an order declaring that the Applicant has a right to:

3.1 Have his doctoral theses submitted to a panel of external assessors for the evaluation thereof; and

3.2 Continue his studies and to remain registered as a student at the University pending the finalisation of the evaluation and examination of his doctoral thesis.

[4] The Applicant also applies for an order:

4.1 Declaring that the Respondent's decision, alternatively failure to take a decision, infringes the constitutional rights of the Applicant.

4.2 Declaring that the termination of the Applicant's registration as a student of the Respondent constitutes an infringement of his rights.

4.3 Directing the Respondent, within 30 (thirty) days of the date of service of the order, alternatively such period of time as the Court may determine, to take a decision on the Applicant's review application.

4.4 Setting aside the decision to withdraw Applicant's registration as a student with the Respondent and directing the Respondent to re-instate the Applicant's registration.

[5] The common cause facts in this matter are fairly uncomplicated.

[6] The Applicant is an adult male Malawian citizen currently residing on the Respondent's Turfloop campus.

[7] On the 15th of January 2019, the Respondent accepted the Applicant to study a Doctor of Philosophy ('PhD') in International Relations in the School of Social Sciences. The acceptance was premised on the following documents presented in corroboration of his academic qualifications:

7.1 The Degree of Master of Science in Strategic Management awarded to the Applicant by the University of Derby in October 2007.

7.2 A Degree / Diploma Supplement issued by the Registrar of the University of Derby in respect of his Master of Science in Strategic Management.

7.3 A SAQA certificate of Evaluation which recognises inter alia:

7.3.1 the University of Derby as a 'recognised institution in the United Kingdom with own degree awarding powers'.

7.3.2 the Applicant's Master of Science (Strategic Management) degree as falling within the South African organising field classified as 'Business, Commerce and Management Studies'.

7.3.3 The Applicant's eligibility for access to further postgraduate doctoral studies.

7.3.4 Recognises the closest comparable South African qualification as a Master of Commerce: Strategic Management at NQF Level 9.

[8] The Respondent's admission requirements for a PhD are 'a relevant Masters' Degree or equivalent qualification.'

[9] The Postgraduate Departmental Selection Committee approved the application to study full time and Professor KB Shai, the Head of the Department, Cultural and Political Studies was allocated as the Applicant's supervisor.

[10] The Applicant commenced with his studies and research after 19 April 2019.

[11] The title of the Applicant's proposed PhD is:

'South African Defence Force Participation in the maintenance of the United Nations Security Council International peace and security resolutions: An exploratory Afrocentric perspective, 2007 – 2020'.

[12] The Faculty of Humanities Higher Degrees meeting held on the 11th of September 2019 approved the research proposal.

[13] On 5 February 2020, the Turfloop Research Ethics Committee issued an Ethics Clearance Certificate for the approved title in respect of a PhD degree in International Politics in the School of Social Science.

[14] The Applicant remained registered as a student at the Respondent for the successive years of 2020 to 2022 for the same PhD program.

[15] On or about the 13th of June 2022, the internal assessment of the Applicant's PhD thesis was completed. Prof. Shai initiated a request to the Director of the School of Social for the Approval of Assessors for the external examination of the Applicant's PhD thesis.

[16] On the 14th of June 2022, Prof. Shai was informed that the FEC discovered a 'serious issue with vertical articulation' and the matter was referred back to the School to investigate.

[17] After having received submissions from the School, Prof Shai was informed on or about the 13th of July 2022 inter alia that:

17.1 The motivation from the School on the articulation of the qualifications was deemed insufficient and less convincing.

17.2 The matter was discussed with the Director, Quality Assurance with reference to the SAQA documents.

17.3 The Applicant's Master's Degree is deemed compatible with a MSc in Commerce. His formative degrees are also in Business and Commerce.

[18] Prof Shai then presented an Internal memorandum to the Director, School of Social Sciences, which dealt with the non-appointment of external assessors and the issue of 'vertical articulation'.

[19] On or about the 18th of August 2022, the outcome of the Faculty Exco meeting was stated as follows:

'Assessors Not approved after another representation on articulation from the Department.'

[20] On the 13th of January 2023, the Applicant was informed that his studies have been terminated. The Applicant thereafter has taken all the required steps to exhaust the internal remedies.

[21] The Applicant lodged an appeal to the Post Graduate Appeal Committee against the decision to refuse to appoint external assessors and the decision to terminate his registration as a student.

[22] In response the Respondent stated:

'The Appeal is not Approved. The student has appealed, and based on the information provided, the decision that the Faculty took to terminate the student's registration for irregular admission is correct'.

[23] The Applicant lodged an internal appeal with the Registrar which was referred to the Senate Exco. On the 5th of June 2023, the Senate Exco (ECS) recorded:

'2. The meeting considered the item as part of the confirmation of the agenda for the day and unfortunately took the view that the matter was thoroughly dealt with in the previous meeting of which the outcome was communicated on the 26th of April 2023.

3. Consequently, the item was withdrawn from the agenda.
 4. The position of the ECS is that the decision as communicated earlier stands.
- [24] It is this decision that forms the subject of the review application currently before court.
- [25] During argument, counsel for the Respondent conceded inter alia that there were some irregularities and that it is indeed unfortunate. He furthermore submitted that the issue of the alleged erroneous admission should have been a self-review. It was recorded that he holds instructions to the effect that the Respondent is willing to re-assess the position of the Applicant subject to timelines being set by this court. This proposal was rejected by the Applicant.
- [26] Counsel reminded the Court that the Respondent is a creature of statute and that it is therefore bound to comply with its prescripts. If there is an irregularity in the admission, the Senate has a fiduciary obligation to ensure that the irregularity does not tarnish the standard upheld by the Respondent.
- [27] Counsel for the Applicant persisted in his case as set out in the Applicant's papers before court.

Application of law to the facts:

- [28] 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.
- [29] PAJA was promulgated to give effect to this constitutional right.
- [30] The failure and / or refusal by the Executive Committee of the Senate to entertain the review of the Applicant, has resulted in effect in a failure and / or refusal by the Executive Committee of the Senate to make a final decision on:
- 30.1 The approval of the appointment of external assessors to evaluate the Applicant's doctoral thesis; and
- 30.2 the termination of the Applicant's studies and registration with the Respondent.
- [31] A court has the power to review an administrative action if the action concerned consist of the failure to take a decision.[1] It is evident that the Respondent failed to take a final decision, granting this court the power to review the administrative action.
- [32] At the heart of this decision (or rather failure to take a final decision), lies the previous administrative actions relating to the refusal to appoint external assessors and the Applicant's termination of his studies.

[33] The Applicant submitted that the decision not to appoint external assessors is reviewable premised essentially on the following

grounds:

29.1 Relevant consideration were not taken into consideration.

29.2 Procedural unfairness of the administrative decision.

29.3 Rationality of the decision.

29.4 Unreasonableness.

29.5 The decision was otherwise unconstitutional and unlawful.

29.6 The decision constituted a failure to take a decision.

29.7 The decisions were procedurally unfair in relation to Applicant's legitimate expectations.

[34] This Court agrees with the submission by the Applicant that the Respondent failed to consider that the Respondent accepted as appropriate the articulation of the Applicant's Master's degree with his proposed field of doctoral study. This decision continued to stand and was not reversed or reviewed.

[35] During the proceedings, this Court raised the question of whether the *functus officio* doctrine does not apply in the circumstances. Hoexter[2] states that ordinarily an administrator will be *functus officio* once a final decision has been made and will not be able to revoke the decision in the absence of statutory authority. She furthermore states that where a mistaken decision was made, the administrator will be *functus officio* irrespective of whether the mistake was one of fact or law, and whether it was within or beyond the administrator's jurisdiction. An exception may exist if the error comes to the administrator's attention as soon as the decision has been announced.

[36] In casu it is common cause that the original decision to approve the Applicant's enrolment for PhD studies has not been revoked or reviewed. In this court's view, the Respondent is therefore *functus officio* in this regard and cannot revisit the decision until same is set aside by a court of law.

[37] 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[3] referred to by the Applicant in his Heads of Argument.

[38] The Senate Exco's refusal to appoint external assessors failed to consider that the Respondent cannot revisit the admission at this late stage and in the absence of a formal self-review. This constitutes a ground for review as contemplated in Section

6(2)(e)(iii) of PAJA.

- [39] It stands to be noted that the Senate Exco was mistaken as to the nature of the Applicant's Master's Degree. It is common cause that he holds an MSc in Strategic Management and not Developmental Studies. This material mistake of fact, in itself, also constitutes a ground of review.
- [40] Having stated the aforesaid, the defence as stated by the Respondent holds no water. In the absence of a review and setting aside the original decision to admit the Applicant to the PhD studies, the subsequent refusal to submit his doctoral thesis to external examiners is fundamentally flawed, administratively unfair and must be reviewed and set aside.
- [41] As to the decision to terminate the studies of the Applicant, the following grounds for review was raised:
- 41.1 Procedural unfairness of the termination.
- 41.2 Relevant consideration were not taken into consideration.
- [42] The Applicant stated in its Founding affidavit that he was merely informed that his studies was terminated. Prior to taking the decision, the Applicant was not afforded any opportunity to address the Respondent.
- [43] This renders the decision procedurally unfair as contemplated in Section 3(2)(b) and 6(2)(c) of PAJA.
- [44] Both decisions, being the crux of the item on the agenda of the meeting of the 5th of June 2023 are, in themselves, administratively unfair and inherently reviewable. As stated herein before, numerous further grounds for review of the said decisions were raised by the Applicant. It is not necessary for this court to consider the remaining grounds. Suffice to state that the failure to consider these decisions at the meeting held on the 5th of June 2024 was tantamount to infringing the Applicant's right to fair administrative action that is lawful, reasonable and procedurally fair.
- [45] In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others*[4] 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 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.'
- [46] In as far as grounds for review has been established, the impugned decision taken on the 5th of June 2023 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.

[47] 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.[5] As stated before, 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.

[48] The declaratory relief is thus warranted under the prevailing circumstances.

[49] This Court feels compelled to emphasize the following words of the Honourable Khampepe J[6]:

‘There are few things as important for the flourishing of a society and its people as education. Through education, doors are opened to opportunities that were never dreamt of before. I am not exaggerating when I say that education changes lives. It enriches and develops our children so that they may reach the height of their potential. And, as our citizens are empowered through education to improve their future and achieve their dreams, our nation will undoubtedly prosper too.

[50] Although the Applicant is not per se a citizen of South Africa, the sentiment remains the same. The Respondent, as an educational institution, has a moral and ethical duty empower people through education rather than taking a pedantic approach. The Respondent will be well-advised to revisit its policies and procedures to provide for meritorious individual circumstances.

Costs:

[51] Although the Court has not considered all the grounds of review, the Applicant is substantially successful in claiming the relief as set out in its Notice of Motion. In *Biowatch Trust v Registrar, Genetic Resources and Others*[7] it was stated that the State should bear the costs if the challenge to the constitutionality of a law or of State conduct was ‘genuine’ and ‘non-frivolous’.

[52] This Court does not perceive any reason to deprive the Applicant of his costs.

[53] The Applicant’s counsel recorded that they are acting pro bono in this matter. The Respondent submitted that, in as far as they act pro bono, no cost order should be awarded against the Respondent in the event of being successful.

[54] Section 92 of the Legal Practice Act, Act 28 of 2014 provides for the recovery of legal cost by practitioners who render free legal services. It is thus beyond doubt that this court is empowered to make a cost order in favour of the Respondent.

[55] As to the scale of fees to counsel as contemplated in Uniform Rule 67A(3)(a), this court is satisfied that, having regard to the complexity of the matter, the extent of the record, the importance that the matter has to the Applicant and the lack of unethical or reprimandable conduct by the legal representatives of the Applicant, that costs to counsel of Scale C is warranted, such costs to include the costs of two counsel where so employed.

Order:

[56] In the result the following order is made:

56.1 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:

56.1.1 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

56.1.2 The decision to terminate the Applicant's studies and registration with the Respondent is hereby reviewed and set aside.

56.2 It is declared that:

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

56.2.2 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.

56.2.3 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.

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

56.3 The Respondent is directed to, within 30 (thirty) days from the date of judgment, take a decision on the Applicant's review application.

56.4 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.

56.5 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.

M BRESLER

ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

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DATE OF JUDGMENT : 6 June 2024

- [1] Section 6(2)(g) of PAJA
- [2] Hoexter, Administrative Law in South Africa, Second Edition, Juta at 278
- [3] 2014 (3) SA 481 (CC) at [90] to [92]
- [4] 2014 (1) SA 604 (CC)
- [5] Section 8(2) of PAJA
- [6] In Moko v Acting Principal, Malusi Secondary School and Others 2021
(3) SA 323 (CC) at [1]
- [7] 2009 (6) SA 232 (CC) at [22]

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