

SOUTH AFRICA / JUDGMENT

Manaka v University of the Witwatersrand (021837/2023) [2023]

ZAGPJHC 1186 (18 October 2023)

[2023] ZAGPJHC 1186

COURT

South Gauteng High Court, Johannesburg

BEFORE

JW Scholtz

CASE / FILE NUMBER

021837/2023

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Source record**REPUBLIC OF SOUTH
AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG DIVISION,****JOHANNESBURG****CASE NO: 021837/2023****18/10/23**

In the matter between:

MANAKA, KOKETSO

MONOBE

APPLICANT

And

THE UNIVERSITY OF

THE WITWATERSRAND

RESPONDENT

JUDGMENT

JW SCHOLTZ AJ:

- [1] This is an interlocutory application by Mr Koketso Monobe Manaka (Mr Manaka/ the applicant) against the University of the Witwatersrand (Wits/the respondent) to compel the furnishing of certain information pursuant to a review application in terms of Rule 53 of the Uniform Rules of Court.

- [2] The background to the application is that on 9 March 2023, Mr Manaka launched an urgent application against Wits to review and set aside its decision to refuse him permission to renew his registration for the third year of the degree of Bachelor of Medicine and Surgery (MBBCh III) for the 2023 academic year.
- [3] The urgent application was enrolled for 14 March 2023, stood down until 15 March 2023 and was heard on 16 March 2023. After argument, the urgent application was struck from the roll by Adams J on 22 March 2023 and Mr Manaka was ordered to pay the respondent's costs including the costs of two counsel. In his judgment dismissing the urgent application, Adams J held as follows at paragraph [33] —

"Whilst he [Mr Manaka] has a right to apply for re-admission to the MBBCh III in 2023 that right was subject to University and Faculty Rules. To establish a prima facie right for purposes of requiring Wits in the interim, to readmit him, he must show this Court that he could succeed in Part B in reviewing and setting aside the impugned decision on the basis that it is was unreasonable and irrational... I am not persuaded that he has prospects of success in that regard."

- [4] On 23 March 2023, Mr Manaka sent an email directly to the Deputy Judge President Sutherland (DJP), requesting the allocation of an expedited date for the hearing of Part A of the application. The DJP responded that the request was inappropriate and it was not within its powers to second guess an order of the Court. He recommended that Mr Manaka prosecute Part B of the application to ripeness in the opposed motion court.
- [5] On 24 March 2023, Mr Manaka confirmed that he would accept an offer for registration for an alternative degree namely, that of a Bachelor of Health Sciences (BHSc) majoring in Pharmacology and Molecular Medicine.

- [6] The notice of motion in the application for review also required Wits to produce —

"[T]he record of the proceedings sought to be reviewed and set aside above (including all correspondence; reports; memoranda, minutes of meetings, transcripts of recording of proceedings; documents; evidence; Faculty of Health Science 2021 and 2022 statistics relating to second and third years' intake; pass rate, re-admissions and academic exclusions as well as all related information including the breakdown of race and gender; any other [sic] before the Respondent when the decisions were made; and to notify the applicant that he has done so."

- [7] On 4 April 2023, Mr Manaka's attorneys sent a letter to the respondent's attorneys requesting them to furnish the record as required in terms of Rule 53, listing various documents and items of information which they contended formed part of the record.
- [8] On 7 April 2023, the respondent's attorneys replied to Mr Manaka's attorney. Their letter is annexure TMM2 to the founding affidavit. The relevant paragraphs thereof are paragraphs 4 to 7 and they read as follows —

"4. Please note that our client objects to furnishing your client with the documents and information requested to be included in the record of decision listed in paragraph 4.1.1, 4.1.6 - 4.1.6.9, 4.2 of your letter under reference for the following reasons:

4.1. The documents and/or information had no effect on or relevance in the decision sought to be reviewed; and/or

4.2. The documents are confidential and/or privileged, and the disclosure of the documents and/or information will infringe on the privacy rights of persons mentioned in the documents.

5. The information, documents and/or reasons requested in paragraphs 4.1.2, 4.1.3, 4.1.4 and 4.1.5 of your letter under reply have previously been provided and are attached to our client's answering affidavit filed on 14 March 2023.

6. We submit that all the necessary documentation and information forming part of the record of the decision sought to be reviewed have been included and attached to the affidavits exchanged between the parties and filed before the Honourable Court.

7. Notwithstanding the aforesaid, the documents enclosed herewith and listed below form the record of the decision sought to be reviewed by your client:

7.1. Wits Student Matric and Academic History for Mr. KM Manaka.

7.2. Wits Student MBChB III GEMP I result for Mr. Manaka.

7.3. Wits letter to Mr. KM Manaka on 19 December 2022 Informing him that he has failed to meet the minimum requirements for MBChB III.

7.4. Wits Student Application Form for WRC for Mr. Manaka.

7.5. Mr. Manaka appeal letter to WRC1.

7.6. MBChB III WRC2 record for Mr. Manaka with reasons for dismissing the appeal.

7.7. Wits 2022-2023 procedure relating to the renewal or refusal of registration of students.

7.8. Wits 2022 Health Sciences rules and syllabus.

7.9. Wits supplementary examinations renewal of registration and re-examination policy.

7.10. WRC1 decision.

7.11. WRC2 decision."

[9] Mr Manaka's attorneys replied on 23 April 2023. Their letter is annexure TMM3 to the founding affidavit in the application to compel. The relevant paragraphs are paragraphs 3 to 5 thereof, which read as follows —

"3. Please request your client to provide us with those Statistics to which our client is obviously entitled, and which should include:

- 3.1. The number of GEMP1 students who passed in 2022 but did not meet the minimum requirements for the 1st time (and their race and gender);
 - 3.2. Those who were allowed to re-register by the BoE (and their race and gender);
 - 3.3. Those who were allowed to re-register after the WRC 1 process (and race and gender);
 - 3.4. Those who were excluded for the 2023 academic year (and their race and gender);
 - 3.5. The number of GEMP 1 students who failed (not deemed to have failed) in 2022 but were allowed to re-register in 2023 (and their race and gender);
 - 3.6. The names of the WRC and WRC2 panel members.
4. We further request the information requested in an email sent to Aidan Mylchreest on 3 March 2023, as contained in annexure "KM12" which includes inter alia:
 - 4.1. The number of students registered for 2nd year in 2021 (and their race and gender);
 - 4.2. The number of students with a straight fail, and were excluded as a result thereto (and their race and gender);
 - 4.3. The number of students with a straight fail but were allowed to register (and their race and gender);
 - 4.4. The number of re-admissions (and their race and gender);
 - 4.5. The number of exclusions at the end of the WRCs' processes (and their race and gender).
 5. We reiterate our client's position that, should it be necessary, the personal information of students as may be contained in any of the requested documents may be redacted."
- [10] The respondent's attorneys replied on 26 April 2023. The letter is annexure TMM4 to the founding affidavit. The relevant paragraphs are paragraphs 2 to 4 thereof, which read as follows —
- "1. We refer to your correspondence dated 23 April 2023.
2. We record that our client has provided yourselves with the full record of the proceedings, in respect of our client's WRC process, that your client seeks to review. The further information being requested does not form part of that record and, therefore, falls outside the ambit of Rule 53 of the Uniform Rules of Court.
 3. We wish to place on record that the Information requested is irrelevant to the review proceedings at hand and constitutes a "fishing expedition" on the part of your client. It is clear that the request has no merit and is not supported by both the Rules of the University and the Rules of Court.

4. On the basis set out above, our client will not furnish the requested information to your client. We wish to state that our client will oppose any legal proceedings launched by your client, in pursuance of the requested Information and reserves the right to seek an adverse costs order against him."

[11] On 12 May 2023, Mr Manaka launched the present application, styled an "Application to Compel". In terms of paragraph 1 of the notice of motion an order is sought —

"Directing the Respondent to furnish the applicant with the Faculty of Health Sciences' 2021 and 2022 statistics relating to MBBCh II and III intake; pass rate, re-admissions and academic exclusions as well as all related information including the breakdown of race and gender; (as well as the information sought on 01 and 03 March 2023 as contained in annexure KM12 to the main application)".

[12] The matter was enrolled on the opposed motion roll of 24 July 2023 before Twala J. The application was struck from the roll with costs in the cause.

[13] The application was subsequently re-enrolled. In the parties' joint practice note, Wits entered a special note, pointing out that the matter had been enrolled without the applicant having explained why the matter ought to be re-enrolled and pointing out that there had not been a compliance affidavit. Such affidavit was filed on 23 August 2023 and at the commencement of the matter it was agreed between the parties that the matter was properly before the Court.

[14] The impugned decisions in respect of which the information is sought by Mr Manaka are those of the Wits Readmissions Committee – 1 ("WRC1"), and the Wits Readmissions Committee – 2 ("WRC2"). WRC1 decided to refuse Mr Manaka permission to renew his registration for the third year of MBBCh in 2023 and on appeal WRC2 upheld the decision of WRC1. In essence, Mr Manaka failed MBBCh III because he failed the theory component in that he attained a weighted average of 56.01% and not the minimum requirement of 60.00%, in addition to failing the so-called "Tracks", in that he scored a mark below the sub-minimum of 50.00% in one of the Tracks. The material reasons why Mr Manaka was not granted permission to renew his registration for his MBBCh III were that he failed to meet the minimum requirements of study and subsequently failed to provide any supporting documentation to substantiate any of the reasons he gave for his failure to do so.

[15] In his judgement dismissing the urgent application, Adams J summarised the position as follows —

"[28]. Mr Motau SC, who appeared on behalf of Wits together with Mr Edwards, contended that the factual error complained of by the applicant is not of a material nature and therefore cannot and should not, by and of itself, predicate a review and setting aside of the decision. The main reason for the WRC-1's refusal to permit the applicant to re-register for the MBBCh III, so the contention goes, was the fact that the applicant failed the year in that his weighted average final mark for the Theory Component was just under 4% short of the required minimum pass rate,

coupled with the fact that he had not attained the subminimum of 50% in one of the Study Groupings I Tracks for the year. Other considerations included the fact that, of the six Block Assessments for the study year, the applicant had failed five of those in that he did not attain 60% in those five block examinations.

- [29] I find myself in agreement with these submissions. I do not believe that it can be said with any conviction that the WRC-1 made an irrational or an unreasonable decision and that is so even if one is to accept that they made an error by asserting that five of the six Tracks were not passed by the applicant. In their final letter dated 28 February 2023
- from the Chief of Staff & Director: Legal Services - Wits explains in detail the thinking behind the decision by WRC-1, as confirmed by WRC-2."
- [16] Wits argues that the matter is moot and that the Court should accordingly not grant the relief sought in the application to compel. It is argued that the relief sought by Mr Manaka in Part B is "entirely unsustainable" and does not have prospects of success. Furthermore, Mr Manaka has accepted a tender, being the alternative relief in Part B of the notice of motion which Wits revived after the hearing and determination of Part A of the notice of motion in the main application.
- [17] In her answering affidavit on behalf of the respondent, Ms Carol Gail Crosley, the Registrar of Wits, states that Mr Manaka persists with his review application while registered with Wits midway into the academic year and in circumstances where he is currently registered for an alternative degree within the Health Sciences Faculty and in a context where he is entitled to apply to the university for readmission to the MBChB programme for the 2024 academic year. As such, so it is argued, the review application is in moot in circumstances in which Mr Manaka failed to obtain interim relief which on his own version renders Part B nugatory; and Mr Manaka accepted a tender for the alternative Part B relief which he sought. Accordingly, so it is argued, the Court should not make an order regarding the production of the record in these circumstances, especially since Adams J expressed the view that Mr Manaka's prospects of success in Part B of the review application are poor.
- [18] Mr Manaka, in turn, argues that the contention of mootness is premature and misconceived. It is pointed out by Mr Mahapa, his attorney, who deposed to the founding and replying affidavits in the application to compel, that Mr Manaka's receipt of the complete record and his subsequent right to amend and revise the relief sought is the essence of what is protected by Rule 53(3). It is also contended that any student who has been academically excluded from an institution of higher learning has to live with that record for the rest of his life. This record does not only affect his potential to apply to other institutions to further his studies but also has a potentially adverse impact on future employability (paragraph 25 of the replying affidavit). It is argued that Mr Manaka has the right to supplement the founding papers once the full record has been received. It is also argued that Mr Manaka's right to reapply for admission into the MBChB programme does not —

"legitimize or take away the irrationality and/or unlawful and/or procedurally and substantially unfair administrative decision that caused him them a year out of medical school, and any other further consequences related thereto" (paragraphs 48 and 50 of the replying affidavit).

[19] It is also argued in paragraph 63 of the replying affidavit that the offer to pursue an alternative degree was only intended to resolve Part A of the application and not to render the relief sought in Part B moot.

[20] It seems to me that the issue of mootness is not something that should be considered finally by this Court in the context of an interlocutory application, where the applicant may well wish to supplement his founding papers in the light of whatever further documentation he has received or may receive. I will therefore hold for purposes of this application that the matter is not moot and leave the final determination thereof to the Court that hears Part B of the main application for review, should the applicant persist therewith.

[21] In paragraph 10 of the joint practice note filed by the parties, it is recorded that —

"The applicant seeks an order compelling the respondent to furnish him with

10.1 The names of the panel members of the WRC1 and WRC2;

10.2 Minutes of the meeting of the WRC1 and WRC2;

10.3 The transcribed record of the proceedings of the WRC1 and WRC2;

10.4 The Faculty of Health Sciences 2021 and 2022 statistics relating to MBBCh II and III intake, pass rate, readmissions and academic exclusions as well as all related information including the breakdown of race and gender. In light of the lengthy nature of the list of statistics sought, the Court's indulgence is sought to include the listed information sought by reference herein which information is set out in the draft order."

[22] A draft order was uploaded on CaseLines. In the draft order provision is made for the following documentation and information —

"1.1 The Faculty of Health Science's 2021 and 2022 statistics relating to MBBCh II and III intake, pass rate, readmissions, academic exclusions which include the breakdown of race and gender of such academic exclusions and readmissions in the aforementioned years of study.

1.2 Transcripts of recordings of proceedings in the WRC1 and WRC2 relating to the decision to refuse the Applicant permission to renew his registration for the MBBCh III for the 2023 academic year.

1.3 The names of members of the panel in the WRC1 and WRC2.

1.4 The WRC1 report that served before the WRC2 panel.

1.5 The number of GEMP1 students who passed in 2022 but did not meet the minimum requirements for the first time with the breakdown of such information on race and gender, including:

1.5.1 Those who were allowed to re-register by the BoE;

1.5.2 Those who were allowed to re-register after the WRC1 process;

1.5.3 Those who were allowed to re-register after the WRC2 process; and

1.5.4 Those who were excluded for the 2023 academic year.

1.6 The number of GEMP1 students who failed in 2022 but were allowed to re-register in 2023 including the breakdown of such information on race and gender."

[23] It was argued on behalf of the respondent that the applicant did not seek or make out a case in respect of either the minutes of the meeting of the WRC1 and WRC2 or the transcribed record of the proceedings of the WRC1 and the WRC2.

[24] It was argued by Mr Edwards on behalf of the respondent that nowhere in the application to compel was provision made for the minutes or transcript, and that they were opportunistically included in the practice note. It was argued that the Court was confined to what was asked for in the interlocutory notice of motion and founding affidavit. It was further argued that the applicant was not entitled to the minutes or transcribed record, it being trite law that an applicant is obliged to make out a case in his founding affidavit and stand or fall by it.

[25] Mr Manentsa on behalf of the applicant argued that the notice of motion in the main application clearly mentions "minutes of meetings; transcripts of recordings of proceedings". He also drew attention to paragraph 16 of the founding affidavit in the application to compel which is headed "REQUEST FOR THE RECORD" and where the notice of motion in the main application containing the reference to "minutes of meetings"; transcripts of recordings of proceedings" are mentioned.

[26] Both parties referred extensively to the decision of the Constitutional Court in *Helen Suzman Foundation v Judicial Service Commission*[1] (*Helen Suzman Foundation*).

[27] In paragraph [19] of the judgment, Madlanga J refers with approval to the decision in *City of Cape Town v South African National Roads Agency Limited*

[2013] ZAWCHC 74 at paragraph [48] —

"[A]ny record of the deliberations, by the decision-maker would be relevant and susceptible to inclusion in the record.... The contents of such deliberations can often be the clearest indication of what the decision-maker took into account and what it left out of account. I cannot conceive of anything more relevant than the content of the written record of such deliberations, if it exists,..."

[28] In paragraph [22] of the judgment, Madlanga J continues —

"It cannot be that deliberations, as a class of information, are generally: (a) irrelevant for purposes of assisting an applicant in pleading and presenting her or his case; or (b) subject to some form of privilege. Further I cannot conceive of any policy or public interest reasons for excluding deliberations from the record in general."

[29] Madlanga J continues as follows at paragraph [27] —

"In sum, I can think of no reason why deliberations as a class of information ought generally to be excluded from a Rule 53 record. For me the question is whether deliberations are relevant, which they are and whether – despite their relevance – there is some legally cognisable basis for excluding them from the record. This approach to what a record for purposes of Rule 53 should be better advances a review applicant's rights of access to Court under Section 34 of the Constitution."

[30] In light of the above clear authority by our highest court, no convincing reasons were advanced in the present case for excluding the transcript of proceedings in the WRC1 and WRC2 relating to the applicant, from the record.

[31] Mr Edwards on behalf of the respondent conceded that if there were transcripts of such proceedings, they would indeed be relevant. However, he advised the Court from the Bar that his instructions are that such proceedings were not recorded. He advised that this was not canvassed in the respondent's answering affidavit, as the issue was not specifically canvassed in the applicant's founding affidavit.

[32] Mr Manentsa expressed surprise at this communication and stated that he would expect such state of affairs to be confirmed in an affidavit. I tend to agree with him.

[33] If the transcript of recordings of the proceedings of the WRC1 and WRC2 is to be produced (if such recordings were made), it stands to reason that there could be no objections to producing the names of the members of those two panels, who participated in the deliberations. I can conceive of no reason why the identities of the decision-makers should not be disclosed.

[34] If the WRC1 produced a report that served before the WRC2, such report would clearly form part of the record that was before the respondent when the decisions were made and such report ought to be made available.

[35] However, I take a different view of the statistics sought by the applicant, as set out in paragraphs 1.1, 1.5, and 1.6 of the draft order uploaded on 1 September 2023. The reason why these statistics are sought are stated to be as follows by the applicant —

"[P]art of the respondent's case is that it has consistently and objectively applied its own clear and lawful policies. The stats will most likely prove the opposite." (Founding affidavit, paragraph 23)

"The stats sought, are therefore not only relevant to the issues, but also pertinent to demonstrate the [in]consistent application of the Rules and policies by a public institution such as the Respondent". (Founding affidavit, paragraph 29)

"Although the respondent wishes to assert its powers to refuse readmission to a student who fails to satisfy the minimum requirements leading to a qualification in a faculty, in this case, MBBCCh programme, it cannot be disputed that reading from the same policy, at the end of the day, it is a numbers game." (Replying affidavit, paragraph 9.2)

"[T]he respondent either took or ought to have taken into account, the number of places available for the 3rd year of study in the MBBCCh programme, both insofar it relates to new student progressing from 2nd year, and those who had to repeat. Accordingly, the avowal that the statistics were not taken into account and do not form part of the record of the decision, is simply indefensible." (Replying affidavit, paragraph 9.3)

The applicant is accordingly entitled by law, to the statistics in order to advance sensible and coherent grounds of review, and to demonstrate that the impugned decisions stands to be reviewed and set aside." (Replying affidavit, paragraph 16)

[36] The applicant further contends that —

"All the information and documents sought by the applicant are available, public and relevant. There is no conceivable reason for the respondent not to provide them, whether this is done in terms of Rules 35 or 53, or by virtue of this Honourable Court exercising its inherent powers to regulate its process" (Replying affidavit, paragraph 19)

[37] The respondent's answering affidavit was deposed to by Ms Carol Gail Crosley, the Registrar of Wits. She states in paragraph 2 of her answering affidavit that the contents of the affidavit fall within her own personal knowledge and belief and she states in paragraph 3 that she has the aforesaid personal knowledge by virtue of her position within Wits as well as the documents which form part of the respondent's records or are within its control. She is the custodian of the academic records and processes of the university.

[38] In paragraph 5.1 of her affidavit, she states that —

"At the outset, it should be made clear that none of the information sought in this application forms part of the record of decision(s). It was not before the decision makers and none of it constitutes a document which throws light on the proceedings – either on a procedural or evidentiary level."

[39] In paragraph 18.1 of her answering affidavit, Ms Crosley points out that it is the applicant's attorney (Mr Mahapa) who deposed to the founding and replying affidavits and that he provided no basis for his knowledge pertaining to the record of the decisions. No explanation is provided for the applicant's (Mr Manaka's) failure to provide a confirmatory affidavit. She accordingly contends that any allegations pertaining to the content of the record should be struck out and/or disregarded as unsubstantiated and inadmissible hearsay

evidence. (Paragraph 18.2 of the answering affidavit).

[40] Dealing with this complaint, Mr Mahapa on behalf of the applicant states as follows in paragraphs 78 and 79 of the replying affidavit —

"Given the fact that Ms Crosley is aware, or is reasonably expected to know that the applicant had to, and is still catching up with the other students, it is puzzling that she takes a technical issue that I have not provided the applicant's confirmatory affidavit.

In this interlocutory application, I have not raised any new matter which is before this Honourable Court save for the preceding paragraph. Therefore the applicant's confirmatory will serve little or no value."

[41] I find this to be an unsatisfactory explanation. Mr Mahapa is not the applicant and, particularly insofar as matters relating to the record and the procedures which affected him, one would have expected Mr Manaka at least to depose to a confirmatory affidavit.

[42] In paragraph 25 of her answering affidavit, Ms Crosley states —

"25.1 It is denied that the statistics will most likely show that Wits has failed to consistently and objectively apply its own clear and lawful policy.

25.2 In any event, the allegation is needlessly vague and premised entirely upon speculation.

25.3 Wits' policies form part of the issues determined in Part A of the application and findings were made by Justice Adams, in that regard."

[43] In paragraph 27.1 of her answering affidavit, Ms Crosley states that —

"The impugned decision(s) may be properly assessed, both procedurally and evidentially, without the statistics."

[44] In paragraph 30.1 of the answering affidavit, Ms Crosley states that —

"It is denied that these statistics are relevant to the issues. In any event, these statistics do not form part of the record of proceedings and do not throw light on the proceedings, procedurally or evidentially."

[45] In the notice of motion in the main application in this matter (at page 01-8 of the CaseLines record and quoted in paragraph 7 above), the record of proceedings is sought by the applicants, which is stated to include all correspondence, reports, memoranda, minutes of meetings, transcripts of recordings of proceedings, documents, evidence and various statistics "before the respondent when the decisions were made" (my emphasis).

[46] In the locus classicus of *Johannesburg City Council v Administrator Transvaal and Another*[2] the Court said the following —

"The words 'record of proceedings' cannot be otherwise construed in my view, than as a loose description of the documents, evidence, arguments and other information before the tribunal relating to the matter under review at the time of making of the decision in question. It may be a formal record and dossier of what has happened before the tribunal, but it may also be a disjointed indication of the material that was at the tribunal's disposal. In the latter case, it would, I venture to think, include every scrap of paper throwing light, however, indirectly on what the proceedings were both procedurally and evidentially. (my emphasis)

[47] It was argued by Mr Edwards on behalf of the respondent that the documents sought by the applicant, and in particular the statistics, do not throw light on the proceedings sought to be impugned, either procedurally or evidentially.

[48] As was argued by Mr Edwards, the statistics are sought by the applicant despite the deponent to the university's answering affidavit (Ms Crosley) confirming that the information sought did not form part of the record of proceedings. I am not aware of any evidence or other indications that the statistics so sought were before the committees when the decision relating to the applicant were taken.

[49] As was argued by Mr Edwards, it should be borne in mind that the impugned decision arrived at by WRC1 and which was confirmed by WRC2 on appeal was premised inter alia on the following —

"The Wits Readmissions Committee – 1 (WRC-1) has noted that you failed to meet the minimum requirements of study: It has considered carefully the circumstances surrounding your failure and regrets to inform you that it has decided to refuse permission for you to renew your registration....

You have not provided any supporting documentation to substantiate any of the reasons that you have given for your failure. You have mentioned the loss of your grandmother, but you have not provided any timelines of events in relation to your actual studies." (Letter from the respondent to the applicant dated 13 January 2023, quoted in the judgment of Adams J at 09-125)

[50] I agree with the respondent's counsel that the statistics were not relevant to the impugned decisions. The relevance of the statistics as alleged by the applicant in his founding and replying affidavits and in particular what they might or are likely to show seems to be entirely speculative, especially in circumstances where there is no evidence that those statistics were before WRC1 or WRC2 or were in fact considered by those committees. As was said by the Constitutional Court in the Helen Suzman Foundation (above) in respect of documents sought on Rule 53 proceedings —

"[R]elevance is assessed as it relates to the decision sought to be reviewed, not the case pleaded in the founding affidavit." [3]

[51] To the extent that it is contended in the replying affidavit that the applicant is entitled to production of any documentation or information, (and in particular, the statistics, outside of the provisions of Uniform Rule

53) it was argued by Mr Edwards that this is not permissible in the present case. In the first place, it was pointed out that none of these grounds were raised in the founding affidavit and that it is trite law an applicant may not make out a case in reply. Furthermore, it was argued on behalf of the respondent that the applicant may not in the present case rely on section 173 of the Constitution, or Uniform Rule 35 or section 32 of the Constitution.

[52] Mr Edwards argued that section 173 of the Constitution, which clothes a court with the inherent power to regulate its own process, does not avail the applicant in the present case because, given the mechanism already provided by Rule 53, there is no lacuna which would result in an injustice, the information sought is additional to the record and it is irrelevant to the impugned decisions.

[53] Reference was made by Mr Edwards to the case of *Mamadi v Premier of Limpopo Province and Others*[4] where it was held that the contention that section 173 could be used to obtain all access to information is unpersuasive and that the section has never been employed in trial proceedings to obtain the Rule 53 record. The Court, per Theron J, went on to state that —

"It suffices to say that Rule 53 provides the prevailing mechanism with which litigants can access all documents and reasons relevant to the impugned administrative decision." [5]

[54] Reference was also made to *Phillips and Others v National Director of Public Prosecutions*[6] where the Constitutional Court held that —

"[O]rdinarily the power in section 173 to protect and regulate relates to the process of Court and arises when there is a legislative lacuna in the process. The power must be exercised sparingly having taken into account interests of justice in a manner consistent with the Constitution."

[55] Mr Edwards also argued that the applicant was not entitled to gain access to information by way of Uniform Rule 35. In the first place, the applicant does not rely on Uniform Rule 35 and its founding papers and accordingly fails to make out a case for its application. Furthermore, in the *Helen Suzman Foundation* case (above) the Constitutional Court distinguished the procedures in Rule 35 and 53 as follows —

"The Rule 53 process differs from normal discovery under Rule 35 of the Uniform Rules of Court. Under Rule 35 documents are discoverable if relevant, and relevance is determined with reference to the pleadings. So, under the Rule 35 discovery process asking for information not relevant to the pleaded case would be a fishing expedition." [7]

[56] Accordingly, so Mr Edwards argued, the applicant was not entitled to the record of proceedings in terms of Uniform Rule 35.

- [57] Finally, it was argued that the applicant was not entitled to rely on section 32 of the Constitution, which provides for the right of access to information which right has been, given effect through national legislation being the Promotion of Access to Information Act 2 of 2000 (PAIA).
- [58] Section 7(1)(a) of PAIA provides that it does not apply to the record of a public or private body if that record is requested for the purpose of criminal or civil proceedings, is requested after the commencement of such criminal or civil proceedings and the production of or access to that record is provided for in any other law.
- [59] Apart from the fact that the applicant did not take any steps in terms of section 11 of PAIA to request the information, the review application instituted by the applicant constitutes a civil proceeding and accordingly PAIA finds no application in the current review application. In *Industrial Development Corporation of South Africa Limited vs PFE International Inc (BVI) and Others*[8] the Supreme Court of Appeal held that the contention that PAIA was intended to supplement the Rules of Court cannot be sustained. This was confirmed by the Constitutional Court in *PFE International and others vs Industrial Development Corporation of South Africa Limited*[9].
- [60] I am in agreement with the arguments advanced on behalf of the respondent.
- [61] In paragraph 20 of the founding affidavit, it is stated that the applicant is amenable to receive documents where the personal information of students have been redacted. The respondent also requested that the names of specific students be redacted in any records ordered to be provided. This is obviously the correct approach.

Order

- [62] Accordingly, I make the following order —
- a. The respondent is directed to furnish the applicant with transcripts of the recordings of proceedings of the Wits Readmission Committee – 1 (WRC1) and the Wits Readmission Committee – 2 (WRC2) relating to the decision to refuse the applicant permission to renew his registration for the MBBCh III course for the 2023 academic year, within ten (10) days of the granting of this order.
 - b. Should the above-mentioned transcripts not exist or be available, the respondent shall file an affidavit confirming such fact and explaining why such transcripts are not available.
 - c. To the extent that the contents of any transcripts provided by the respondent to the applicant do not relate to decisions relating to the applicant or contain the names of any other students at the University of the Witwatersrand, such information and names shall be redacted.

d. The respondent is directed to furnish the applicant with the names of the members of the WRC1 and WRC2 panels which deliberated on and made decisions relating to the applicant in respect of his registration for the 2023 academic year.

e. Costs shall be costs in the cause.

JW SCHOLTZ

ACTING JUDGE OF THE HIGH COURT

For the Applicant:

Advocate B Manentsa

instructed by

TM Mahapa Inc

For the Respondent:

Advocate B Edwards

MVMT Attorneys

Date of hearing: 28 August 2023

Date of Judgment: 18 October 2023

This judgment was handed down electronically by circulation to the Parties' legal representatives by email and by being uploaded

to CaseLines. The date of this judgment is deemed to be 18 OCTOBER 2023.

[1] 2018

(4) SA 1 (CC); 2018 (7) BCLR 763 (CC).

[2] (1970)

(2) SA (89) (T) at 91G - 92B.

[3] Helen Suzman Foundation at para 26.

[4] 2023

(6) BCLR 733 (CC) at para 38

[5] Id.

[6]

[2005] ZACC 15; 2006

(1) SA 505 (CC) at para 48.

[7] Helen Suzman Foundation at para 26.

[8] 2012(1) SA 269 (SCA).

[9] 2013

(1) SA 1 (CC).

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