

SOUTH AFRICA / JUDGMENT

Mnqandi v Walter Sisulu University and Others (440/2024) [2024] ZAECMHC 40 (28 May 2024)

[2024] ZAECMHC 40

COURT

Eastern Cape High Court, Mthatha

BEFORE

L. Rusi

CASE / FILE NUMBER

440/2024

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE
DIVISION, MTHATHA)
CASE
NO: 440/2024
In the matter

between:

SIYASANGA
MNQANDI
Applicant
and
WALTER
SISULU UNIVERSITY
1st
Respondent
WALTER SISULU
UNIVERSITY REGISTRAR,
DR
L.
NTONZIMA
2nd
Respondent
MINISTER
OF HIGHER EDUCATION, SCIENCE
AND
TECHNOLOGY
3rd

Respondent

JUDGMENT

RUSI J

- [1] Admission policies adopted by institutions of higher education are a student's gateway to receiving instruction in the higher branches of learning. When misapplied or misunderstood by those on whom they are binding, they are capable of thwarting rather than enabling the student's right to education.
- [2] Recent years have seen the evolution of admission and registration policies of many institutions of learning, in particular tertiary institutions including the first respondent ("the University") as these institutions make the most of the exponential advances in information and communication technology. Like most if not all of its counterparts, the University has also done away with the traditional face-to-face application, admission and registration system, and the online system is its new way of making tertiary education accessible.
- [3] The University's annual prospectus contains its general rules and regulations which deal, inter alia, with requirements for admission to various courses of study. These rules and regulations have legal force and effect and are binding to it and its students. The University's admission policies are established in terms of the Institutional Statute[1] and the Higher Education Act.[2]
- [4] The management and administration of the University as well as the implementation of its regulatory instruments, namely, – the Higher Education Act, the University's Institutional Statute, its rules and policies, as well as relevant higher education policies vest with the second respondent.
- [5] Following her admission by the University into the Bachelor of Education in Foundation Phase Teaching (the B.Ed Degree), the applicant in the instant case attempted to register for the same qualification. Her attempt was unsuccessful as the University's online registration portal issued her with notification that the qualification was already fully subscribed.
- [6] Aggrieved by this state of affairs, she approached this Court on urgent basis on 01 February 2024 for an order declaring the University to be in breach of contract and her right to further education which section 29(1)(b) of the Constitution[3] guarantees. As relief for the alleged breach of contract she sought specific performance, and on 07 February 2024 she obtained an interim order with an adjunct of a rule nisi returnable on 20 February 2024, in terms of which the first and second respondents were ordered, inter alia, to register and enroll her for the B.Ed Degree at the Mthatha Walter Sisulu University, pending the final determination of the application.

- [7] The application became opposed by the first and second respondents, hence it served before me for final determination on 05 March 2024. The third respondent abides this Court's decision. At the time of this application lectures at the University had commenced and the applicant was unable to attend them.
- [8] In justifying the urgency with which she brought this application, the applicant contends that when the University unlawfully barred her from registering for the B.Ed qualification, she acted with the necessary swiftness in approaching this Court and she will not be afforded substantial redress at a hearing of the matter in due course. It is this issue of urgency that I must immediately dispose of.

Urgency

- [9] A determination of urgency in application proceedings entails the question whether the applicant will be afforded substantial redress at the hearing of the matter in due course.[4] Uniform Rule 6(12) provides:

“(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to it seems meet.

- (b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons

why he claims that he could not be afforded substantial redress at a hearing in due course.”

- [10] The facts of each case determine whether the applicant will be afforded substantial redress at the hearing in due course. It has not been disputed that at the time of this application the University had commenced with the lecturing of its registered students. Since the circumstances giving rise to the present application implicate the applicant's constitutional right, it behoves this Court to hear the application on urgent basis as the applicant cannot be expected to endure a continued violation of the right that she seeks to vindicate.
- [11] In any event, this Court is clothed with the discretion to resolve a matter speedily where the circumstances of the case such as the present so demand since form cannot be allowed to trump substance. I am therefore satisfied that the matter is sufficiently urgent. I deal, in turn, with the merits of the application.
- [12] For convenience I shall refer to the first and second respondents collectively as the University without derogating from the separate legal existence of the University as an institution. The second respondent shall conveniently be referred to as the Registrar whenever the context so necessitates.

Factual background

- [13] While still in Grade 12 in the year 2023, the applicant applied to the University through its online application system for admission to study towards the B.Ed Degree. Having met the requirements for her admission, she was admitted into the University to study for this qualification. She made payment of the required initial minimum registration fee of R4 800.00 on 24 January 2024, at 09h55.
- [14] When she began registration, the online registration portal advised her that the qualification was fully subscribed, as a result, she could not register. Her written demand to the University that it allows her to register for the B.Ed qualification to which she was admitted did not yield favourable results and this impelled the instant application. These facts are common cause between the parties.

The issues for

determination

- [15] The issue for this Court's determination is whether a contract was concluded between the University and the applicant when she accepted the University's offer register for the B.Ed qualification or upon her payment of the minimum registration fee; and whether the University breached the said contract when its online registration portal refused her registration for the B.Ed qualification. I am also called upon to determine whether the University violated the applicant's right to further education when it refused to register her for the B.Ed Degree.

The case of the applicant

- [16] The applicant alleges that she was officially admitted by the University and accepted its firm offer on 24 January
2024. She accepted the offer by calling the University on its given telephone number and asked to speak with the Registrar. When her call was transferred to the office of the Registrar, she indicated to the person she spoke with from that office that she accepts the offer to register for the B.Ed qualification.
- [17] The material term of the offer she received from the University was payment of the minimum registration fee of R4 800.00. Subsequent to this call she proceeded to pay the minimum registration fee after which 'she was cleared to register'. When she attempted to register, she was unsuccessful, and the student portal gave her notification that her course of study was fully subscribed.
- [18] The applicant annexes to her founding papers as "Annexure B" an undated copy of a screenshot of the University's online admission status check. For ease of comprehension, I reproduce the relevant parts of Annexure B below:

'Applicant,

Please use your WSU Reference number or ID Number to check your admission status.’

Welcome: 240091639 Siyanga Mnqandi

Choice 3

Qualification: B.Ed in Foundation Phase Teaching

Status: ADMITTED

Offering Type: MTA – Nelson Mandela Drive-F/T

- [19] She also annexes a copy of proof of immediate payment of the minimum registration fee issued by Capitec Bank at 09h55 on 24 January 2024 which the University recorded as a credit against her account. “Annexure E”, being an undated computer screen copy which depicts that the applicant went online and saw the University’s notification that the course had become fully subscribed, is also annexed to her founding papers.
- [20] According to the applicant, a contract came into existence between her and the University when she accepted its firm offer to register for the B.Ed qualification and she perfected it when she paid the required minimum registration fee. Resulting from this contract, she says, the University had an obligation to allow her to register for the qualification it admitted her to study towards.
- [21] The applicant further alleges that the University breached the contract that came into existence between it and her when it barred her from registering for the B.Ed qualification notwithstanding her admission into this qualification and payment of the required registration fee. It is the applicant’s contention in this regard that the University’s conduct in giving her space to another student despite her admission, is constitutionally reprehensible.
- [22] It is her assertion further that the University violated her right to education which section 29(1)(b) of the Constitution guarantees and also failed to fulfil its obligation to make available and accessible to her further education through reasonable measures.
- [23] The applicant goes on to state, therefore, that she has a clear right to the relief she seeks and that she will suffer irreparable harm if she is not granted the relief sought. In this regard she states that she will lose a year of tuition as a result of her unlawful exclusion from registration by the University, and that the prejudice she continues suffer results from the fact that lectures had begun and she unable to attend them. She further states that since she unsuccessfully demanded registration by the University by way of a letter written to the University by her legal representatives, no other alternative remedy is available to her for vindicating her rights.

The respondents’ case

- [24] That a contractual relationship was established between it and the applicant, and the alleged breach of contract, are denied by the University. According to the University, the applicant's asserted right to education does not extend to a right to enrolment or registration at the institution.
- [25] The University states that the B.Ed Degree received 16 956 applications for the 2024 academic year, but only 501 met the admission requirements. The quota for this qualification for the 2024 academic year is limited to 110 vacancies as determined by its Council with the approval of Senate. All the applicants for admission, including the applicant in the instant case, so the University says, were advised via SMS, email and correspondence that registration was subject to the availability of space. This fact was neither denied nor admitted by the applicant in reply, she noted it.
- [26] The fact of the applicant's admission into the B.Ed qualification and her payment of the registration fee is admitted by the University. That being the case, according to the University, the applicant's admission into the qualification did not guarantee her a right to register for the qualification nor does it vest a legal right to be so registered as it is subject to availability of space. On this score, the University alleges that the applicant was refused registration for the qualification because it had become fully subscribed.
- [27] In the University's answering affidavit, its Registrar further states that due to the excessive number of the applications that the University receives for its qualifications and programmes, it applies its selection process subject to its capacity to offer the qualification and programmes concerned; and the students' registration is subject to availability of space.
- [28] The University contends that its admission and registration policies are fair and transparent and are codified in its prospectus. It further states that its qualifications and programmes historically became fully subscribed within thirty minutes after registration becomes open. According to the University, this also comes with a challenge in that the number of applicants who meet its minimum requirements invariably exceeds its quota and this is the case in each academic year. Resulting from this, it became necessary for it to implement a first come first served basis of online registration in order to promptly complete the registration process and prevent over subscription on pain of lack of funding from the third respondent for a given academic year.
- [29] The applicant's assertion that she accepted the University's offer telephonically on 24 January 2024 is disputed by the University which states that acceptance of the offer is not done telephonically but 'by way of, inter alia, registration via its online registration portal'.
- [30] The University takes cognizance of the fact that it is the only university that serves a vast area around the Eastern Cape with approximately 4million people who reside in the former Transkei homeland and who do not understand distant learning and often shy away from it. It further states that it receives approximately 357 622 applications each year and it can only admit 31 000 of which 7 322 is the maximum intake for first year students. It is its contention, however, that allowing a course of study to be oversubscribed would be

prejudicial to its fiscus and by extension, its students as resultant additional teaching capacity would deplete its limited financial resources.

- [31] It is its assertion further, that even though it refused the applicant registration, and while also confirming receipt of her letter of demand, the applicant has an alternative remedy of applying for admission at another institution of higher learning.

The applicant's reply

- [32] Dealing with the University's defence that registration for the qualifications it offers is on a first come first served basis, the applicant states, in her replying affidavit, that provision is made for a period of three days within which to complete registration for a given qualification, failing which the space reserved for a student would be given to another qualifying student. She further states on this score that the University cannot allow a student three days to complete registration and simultaneously provide that registration will be on a first come first served basis.
- [33] It is the applicant's assertion further in reply, that the reason for the call she made to the office of the Registrar was to get assistance with registration as she experienced problems when she attempted to register online. She makes no reference to a particular dispensation or the University's regulatory instrument in terms of which a 3 day period of registration is afforded to a student who is admitted into the University for the academic year 2024.
- [34] She further alleges in her replying affidavit that the University is the author of its over subscription challenge by admitting more students than it is able to register. She persists with the contention that when a student receives communication that he or she has been admitted by the University, the said admission implies that the University has reserved space for the student concerned.

The parties'

submissions

- [35] Mr Vobi, counsel for the applicant, took the view that the admission status in Annexure B contains no condition on which the applicant was admitted. It was his submission further, that the first come first served basis of registration provided for in University's 2024 prospectus contains no condition that a student's space would be given to the next student in the even the affected student is unable to register on first come first served basis.
- [36] It was Mr Vobi's submission further that the University had an obligation to provide space to the applicant as an admitted student who had also paid the required minimum registration fee. This, said Mr Vobi, was all the more so that there was no condition attached to both the applicant's admission status and the 2024 prospectus which would justify the giving away of the applicant's space to another student.

- [37] He further submitted that when the University admitted the applicant, it made an offer to her to register for the B.Ed Degree and implied that it would make available to her space to register to study towards the said qualification. According to Mr Vobi, this was an irrevocable offer which the University had to keep open for the applicant. By giving away her space, so the submission continued, the University acted in breach of contract when regard is also had to the fact that the applicant acted promptly in registering for the qualification subsequent to her admission.
- [38] In buttressing his argument regarding the alleged breach of the applicant's right to further education as provided for in section 29(1)(b) of the Constitution, Mr Vobi referred me to various cases[5], including Moko[6], in which the Courts had occasion to consider the right to education in section 29(1) of the Constitution.
- [39] The Court, in Moko, considered the lawfulness of the conduct of the Acting Principal of Malusi Senior Secondary School in refusing the applicant therein entry in the examination on the basis that he did not attend extra lessons. The Court in that case held that refusing the applicant entry into the school without adequate justification and preventing him from entering his examination was undeniably a breach of his right to basic education provided for in section 29(1)(a) of the Constitution.
- [40] There ought to be little to no controversy regarding the fact that Moko dealt with the right to basic education, which is immediately realizable, as opposed to further education which, in terms of section 29(1)(b) is progressively realizable. Apart from this fact, Moko is distinguishable on the facts in that in the present case, the applicant has not assailed the University's examination policies to the extent that they would affect her as the beneficiary of the right to further education.
- [41] A further submission is made in the applicant's heads of argument that the University was not entitled to reject the applicant for reasons of availability of space. I was referred in this regard to Mbana v Walter Sisulu University[7], a decision from this Division by my brother JOLWANA J.
- [42] The matter of Mbana concerned a contractual claim founded on breach of contract by the University after it prematurely excluded the applicant from registering for the Bachelor of Laws Degree despite the fact that he had been given three days from admission to complete his registration. The applicant in that case had received an admission letter from the University dated 07 February 2023 in which it set out certain terms of the offer, one of which was that the applicant had to accept the offer within 3 days and that registration was on first come first served basis. In that application, the applicant also sought to vindicate his right to further education by alleging that when the University prematurely excluded him from registration, it violated his right to further education as enshrined in section 29(1)(b) of the Constitution.

[43] In dealing with the applicant's alleged late acceptance of the University's offer, the court in Mbana, said:

'[33] It seems to me that the University was required to prove that the applicant's acceptance of the offer was out of the time prescribed in the admission letter. Vague epithets like availability of space and first come first served would indeed bind the applicant but only after the expiry of the 3 (three) day period. This is so because the University would not be bound to accept a late acceptance if the applicant had only attempted to register after 3 (three) days. Put differently, the University would be entitled to reject a late acceptance and the constitutional right to further education contained in section 29 (1) (b) would, in those circumstances, not avail the applicant. This means that the respondents are required to prove that the acceptance was late. They have failed to do so. That failure to prove that the acceptance was late cannot co-exist with prematurely giving applicant's space to another deserving student.

[44] It further found that it was improper of the University to adopt a first come first served basis of registration and simultaneously allow the applicant therein 3 days to complete his registration. It further remarked that the University's failure to disclose in the admission letter that there were 75 spaces that the student would be competing for was indicative of lack of transparency in the University's admission and registration policy.

[45] In granting the relief sought by the applicant in Mbana, the court further found, inter alia, that the University failed to adduce evidence to show the alleged late acceptance of the offer by the applicant in relation to the date of the admission letter that it issued him with; and that it failed to set out the terms of the offer with clarity and certainty. I will revert to the applicant's reliance on Mbana at an opportune moment in this judgment.

[46] In the first instance Mr Hobbs, counsel for the University, voiced discontent at the poor quality of presentation of the application papers by those representing the applicant. This relates to what appears to be a repetition of the facts belonging to the already quoted case of Mbana, which, as will be demonstrated herein below, are distinguishable from those of the instant application.

[47] I interpose to state that this is, without a doubt, attributable to an apparent "cut and paste" process of developing and drafting the papers filed of record in this application. Mr Hobbs submitted that this tends to bring about a contradiction relating to the facts that the applicant places before this Court in the instant matter.

[48] Concerning the merits of the application, Mr Hobbs submitted that the document that the applicant relies on marked Annexure B to her founding papers has deficiencies to the extent that it does not depict the time at which the applicant received the ostensible offer from the university.

[49] It was Mr Hobbs's submission further, that the applicant has not made out a case for the relief she seeks both in enforcing the ostensible contract and seeking to vindicate her right to further education. In this regard, Mr Hobbs submitted that from the facts of the

application, no unlimited or open-ended offer existed for the applicant to accept at her convenience. He further submitted that the offer to register for the B.Ed Degree as may have been made to her by the University was on a first come first served basis, subject to availability of space.

[50] According to Mr Hobbs, the applicant fell short in pleading the agreement on which she relies, and which, on her version, was partly oral and partly written. This relates to the telephone the telephone call she made to the University during which she allegedly spoke to a staff member whom she informed she was accepting the offer made. On this score, he further argued that the applicant's failure to state the name of the staff member means that she failed to prove who represented the University in that instance and whether

that person had the capacity to represent the University.

[51] Regarding the alleged violation of the applicant's right to further education by the University, Mr Hobbs submitted that the applicant's right to education does not extend to being registered by the University. The applicant on the other hand, so the submission went, undeniably had every right to have her application considered by the University in terms of its admission and registration policy, and this was done, hence she was admitted.

[52] Mr Hobbs further submitted that since the applicant has not challenged the University's admission and registration policy, or in the

absence of an allegation by her that the University failed to consider her application in terms of its admission and registration

policy, its decision refusing to register her is unassailable. It was his view instead that the applicant has herself to blame for being tardy in reporting for registration in circumstances where there was a forewarning by the University that registration of all students for its courses of study, including the B.Ed Degree was on a first come first served basis subject to availability of space.

The law

[53] A contract comes into being when an offer which the offeror made is accepted by the offeree. Both the offer and acceptance must fulfil all the essentials of a contract.[8] For the acceptance to be valid, it must be unequivocal and in terms of the offer and must be accepted while the offer exists.[9] The offer must be firm and communicated to the intended offeree. When time is prescribed for the acceptance of the offer, it must be accepted within that period, failing which it lapses.[10] The result of a lapsed offer is that any attempt made by the offeree to accept it will not bind the offeror and does not bring about a valid contract.

[54] Where no time is prescribed for acceptance, an offer will validly be accepted and bring about a contract if accepted within reasonable time. What constitutes reasonable time will depend on the nature of the contract and the circumstances of each case.

[55] Once contractual obligations have been created by a valid acceptance of the offer, a breach of such obligations will entitle the aggrieved party to seek redress by inter alia, claiming specific performance. The principles relating to a claim for specific performance were enunciated by Innes J in *Farmer's Co-op Society (Reg) v Berry*[11] when he said:

‘Prima facie every party to a binding agreement who is ready to carry out his obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by Kotze CJ in *Thompson v Pullinger* (1894)1 OR at p301, ‘the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt’. It is true that Courts will exercise a discretion in determining whether or not decrees of specific performance will be made. They will not, of course be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. . . In order to succeed in its claim for specific performance, the applicant must allege and prove: the terms of the contract; compliance with any antecedent or reciprocal obligations, or tender to perform them; and non-performance by the defendant. . .’[12]

[56] The onus is on the party seeking specific performance to allege and prove the terms of the contract and compliance with any antecedent or reciprocal obligation and that the non-performance by the defaulting party amounted to a repudiation, alternatively breach of the contract. If the contract on which reliance is placed as well as compliance with its terms are not proven, specific performance ought to fail.[13]

[57] An applicant for declaratory relief as in the present case, must satisfy the court of no more than the fact that he or she is a person interested in an “existing, future or contingent right or obligation.[14] In determining whether or not a declaratory order should be made the court must first be satisfied that the applicant is a person

interested in an ‘existing, future or contingent right or obligation’, and if so satisfied, it must decide whether the case is a proper one for the exercise of the discretion conferred on it.[15]

[58] As regards an alleged breach of a constitutional right, and as held in *Ferreira v Levin* NO; *Vryenhoek v Powell* NO,[16] a party alleging the violation of a constitutional right bears a burden of proving the facts upon which they rely for their claim of infringement of the particular right in question. Once there is prima facie proof of the violation, the party wishing to establish that the violation is justifiable in terms of the limitations clause bears the burden of proving such justification. This does not suggest that the respondent has the ordinary onus of proof, but that it has an evidentiary burden which places a duty on it to adduce evidence of facts or policies which will enable the court to determine whether the violation of the right amounted to a justifiable limitation.[17]

[59] The rule in *Plascon Evans*[18] ought to apply in the instant matter since these are motion proceedings – final relief will be granted if the facts alleged

by the applicant, which the respondent admits, together with the facts alleged by the respondent justify the granting of such a final order. This Court will be entitled to accept the facts alleged by the applicant in so far as they are admitted by the respondent, and those alleged by the respondent in so far as his version is plausible and credible.[19] In the discussion that follows herein below I attempt to apply the above legal principles.

Discussion

- [60] What can be accepted as incontrovertible is that admission to the University and registration to study towards a specific qualification are two distinct processes with different rules and requirements. In the instant matter no issue arises regarding the applicant's admission to the University. Suffice to state that as provided for in the University's 2024 prospectus, for any student to report for registration, they must have received notification in writing from the Registrar that they have been admitted.
- [61] I venture to state that the applicant's admission into the University would in the instant case indeed constitute a firm offer by the University for her to register to study towards the B.Ed qualification. Herein below I deal first with whether the applicant has proven that she validly accepted an offer from the University. I later deal with whether the applicant has made out a case regarding the alleged violation of her constitutional right to further education.

Has valid acceptance of the offer been proven?

- [62] It is worth noting that no provision appears from the University's 2024 prospectus that I was referred to, for a specific manner of acceptance of the firm offer by the University before a student may report for registration. Apart from this, on her own showing, the applicant received and telephonically accepted the University's firm offer to enroll or register for the B.Ed qualification on 24 January 2024. She would, on the University's unchallenged version, have been competing with 501 students for space among the 110 spaces that were the maximum allowed for the B.Ed qualification.
- [63] It is indeed a common cause fact between the applicant and the University that it is only after a student receives communication from the Registrar that he or she has been admitted that he or she will report for registration on the University's registration portal.
- [64] Herein lies the problem I have with the applicant's version – as its name suggests, the admission status check per Annexure B on which she relies to prove her admission, connotes that the applicant obtained this document when she went online to ascertain her admission status. Furthermore, as gleaned from the extract of the said Annexure B which I provided earlier on in this judgment, the portal would have prompted the applicant to use her Identity number or reference number in order for her to obtain her admission status.

- [65] To my mind, Annexure B cannot be equated with a notification in writing from the Registrar that the applicant was admitted. It contains no date on which the offer was made, nor does it contain the terms on which the applicant was admitted into the B.Ed qualification. I must not be understood to be saying that the applicant's admission per se is cast into doubt by her production of Annexure B. It is a fact that the University admits that she was indeed admitted to register for the B.Ed qualification.
- [66] While the University admits the fact of the applicant's admission to register for the B.Ed Degree, it was important for the applicant to adduce clear and cogent evidence of the date on which the University made the offer, and the terms of the offer. The date and terms of the offer by the University become important when regard is had to the University's uncontroverted version that registration was on first come first served basis.
- [67] I may add that in as much as the applicant states in her founding affidavit that the firm offer that she received on 24 January 2024 had as one of its terms the payment of the minimum registration fee, Annexure B does not state this term of the said offer.
- [68] What this means is that, if, as the applicant suggests, it was also a term of the offer that the University made to her, that it would keep the said offer open for acceptance within a period of 3 days, the onus was on her to prove such a term by adducing cogent evidence. It must be understood that an undertaking to keep an offer open for acceptance by the offeree for a specified or unspecified period (an option contract), is a contract on its own albeit infused in the main agreement. This kind of offer is irrevocable and must be distinguished from an ordinary offer which is made subject to a time limit, which the offeror may revoke at any time before its acceptance. If not withdrawn, this latter offer lapses if it is not accepted within the specified period, or reasonable time if no period has been stipulated for its acceptance.[20]
- [69] The effect of the applicant's failure to produce the Registrar's notification in writing that she was admitted into the B.Ed qualification on 24 January 2024 creates a lacuna in her version. Furthermore, in the light of the undisputed provisions of the University's 2024 prospectus that registration is on first come first served basis; and in the absence of notification in writing from the Registrar setting out the terms of her admission, the applicant's version that provision was made for acceptance of the offer within 3 days cannot stand either. For the foregoing reasons, the admission status check (Annexure B) is of no assistance to her in this regard.
- [70] The question that remains is whether as contended by the applicant, the offer that the University made to her was an open one which she could accept at her convenience.

- [71] Significantly, nothing suggests that the University's offer was exclusive to the applicant. Clause 1.11 of the University's 2024 prospectus provides that students register online on first come first served basis subject to the availability of space. What this postulates is that admission on its own does not provide a student with automatic registration for a particular course of study.
- [72] There is nothing unusual about the kind of offer that the University made in the nature of its admission and registration systems. I hold the view that it was, instead, a general offer directed at those students whom the University selected as meeting the minimum requirements for admission with the applicant being one of them.
- [73] On the facts of the application, and in the light of the fact that the University's 2024 prospectus does not state the manner in which that offer may be accepted. An interpretation of the rules of admission and registration contained in the prospectus must therefore be considered. In casu, such an interpretation ought to lead to a conclusion that it is those students who complete their registration while the offer remains open for acceptance who would then have concluded a binding contract with the University. In the context of the present case, those would be the first students to take up the maximum 110 spaces determined as the University's quota for the B.Ed Degree.
- [74] Therefore, even if it were to be accepted that the applicant first had to verbalize her acceptance of the offer by phoning the office of the Registrar, this would not detract from the fact there is no evidence before me which suggests that it was an irrevocable offer which the University kept open for her acceptance at her convenience.
- [75] At the risk of stating the obvious, the fact that the registration is on a first come first served basis connotes that registration must be done with the necessary promptitude. The University's unchallenged version is that this applied to the quota of 110 vacancies for the B.Ed qualification. It therefore stands to reason that the type of contract and the peculiar circumstances of each case must determine what constitutes reasonable time where no specific time is stipulated for acceptance of the offer.
- [76] This brings me to Mr Vobi's submission that the applicant had to register within reasonable time. According to him, reasonable time would in this case mean until the commencement of lectures. It has not been disputed that the B.Ed Degree only had 110 spaces for 2024. I hold the view that it would defy logic in such circumstances if, as against its first come first served basis of registration, the University would simultaneously open registration until the commencement of lectures. This view is fortified by the University's uncontroverted version that its qualifications historically become fully subscribed within 30 minutes of the opening of registration. Mr Vobi's submission that reasonable time in this case meant 'until the commencement of lectures' cannot be sustained.
- [77] Furthermore, the contention made on behalf of the applicant that her admission by the University amounted to an irrevocable offer (an option from which a contractual right resulted) can equally not be sustained. I have already mentioned that an offer would be

irrevocable where the offeror contracts with the offeree to keep the offer for a specific time. [21] I have already stated that there is no indication upon a consideration of the facts of this application that the University offered to keep the offer open for a specific time for the applicant's acceptance. The applicant's contention that the offer by the University was an irrevocable one has no correlation with any of the evidentiary material placed before court in this application.

The applicant's reliance on Mbana

[78] Mr Vobi's reliance on Mbana in support of the applicant's contention regarding breach of contract and a violation of the applicant's right to further

education is misplaced for the following reasons – it is not a case advanced by the applicant that the University's admission and registration policy is unlawful and unconstitutional to the extent that it excluded her from registration by limiting the B.Ed Degree quota to 110 vacancies. Nor is it her case that the University's non-disclosure of the number of spaces that were available for registration made it impossible for her to register before the B.Ed qualification became fully subscribed.

[79] In addition, and in any event, the applicant in Mbana produced proof of written notification by the University dated 07 February 2023 that he was admitted to the B.Ed Degree. This written

notification contained the University's terms of the offer which the court found were not set out clearly and with certainty.

That has not been the case in *hoc casu* – the applicant relied on a copy an undated screenshot (Annexure B) being the results of her own admission status check. For these reasons Mbana is distinguishable from the instant case on the facts.

[80] The respondent's version is that acceptance of its offer is done by *inter alia* registration on the online portal. I note that the University does not state that the applicant could not have made a telephone call to the office of the Registrar and that her acceptance of the offer by means of a telephone call rendered the acceptance invalid. Since the University produced no countervailing evidence of a prescribed method of acceptance of the offer, I hold the view that

what should be of importance in such a case is the student's manifestation of his or her acceptance of the offer in some way. That could be telephonically or by some other clear and acceptable communication to the University. It must be accepted that in the instant case, nothing barred the applicant from verbalizing her acceptance of the offer telephonically.

[81] Whether by her acceptance the applicant could still bind the University to a contract is a different issue which is at the centre of this application. I note that the applicant states that after she accepted the University's offer, she was 'cleared for registration'. She states this without explaining how she was 'cleared'.

- [82] While I sympathize with the applicant, to my mind, even if it were to be accepted that she manifested her acceptance of the offer on 24 January 2024, once the 110 spaces had been taken up, no student would then be registered. The corollary of this is that any attempt by the applicant to register for the B.Ed Degree after the University had reached its quota became inoperative. Put differently, after the University had reached the quota of 110 students for the B.Ed Degree, the applicant's telephonic acceptance of the offer and payment of the registration fee could not bring about a contract that would be binding on the University.
- [83] That being the case, the applicant makes a contradictory averment in her replying affidavit that the reason for her telephone call to the office of the Registrar was to get assistance as she experienced unspecified problems with the online registration portal. This tends to deal her case regarding the real purpose of the said telephone call, a fatal blow.
- [84] The upshot of the foregoing is that the applicant has failed to prove that a contract came into existence between her and the University. Therefore, no basis has been established for this Court to enforce any contract as none has been proven.

The violation of the right to further education

- [85] The applicant states that by refusing to register her and giving away her space to another student despite her admission, the University breached her constitutional right to further education.
- [86] An applicant must stand and fall by his or her founding affidavit. This is trite law.[22] The applicant's attempt in her heads of argument to challenge the University's policy that registration of students is subject to availability of spaces cannot come to her aid. The function of affidavits in application proceedings is not only to identify the issues between the parties as would do pleadings in action proceedings, but also to place evidence before court, and the deponent to an affidavit must clearly and concisely set out the facts relied upon in the affidavit.[23] This is so because whatever case the applicant sets out in her founding papers, is a case that the respondent must confirm or refute.
- [87] Her allegation that the University violated her constitutional right to further education when it refused to register her must be viewed against the fact that she has not mounted a challenge to the University's admission and registration policy, whether as to the manner of admission and registration, or the extent of its quota for its B.Ed qualification. Even though the applicant alleges, at most, that she made a call to the office of the Registrar because she experienced problems with the registration portal, she doesn't spell out what those challenges were.

[88] Important to note is that section 29(1)(b) of the Constitution provides a right to further education, which the state, through reasonable measures, must make progressively available and accessible. Paramount to the right provided in section 29(1) is an obligation of the state to make further education progressively available and accessible through reasonable measures.[24]

[89] For the sake of completeness, the Court in *Government of the Republic of South Africa and Others v Grootboom and Others*[25], set out the interpretation of these elements, and I conveniently summarize it as follows:

- (1) The measures taken by the state must be reasonable both in their conception and implementation. They must be supported by appropriate, well-directed policies and programmes with due regard being had to social, economic and historical context and must be balanced and eschew exclusion of a significant segment of society; must be capable of responding to the needs of those most desperate in society.
- (2) Progressive realization entails progressive facilitation of accessibility which involves an examination of legal, administrative, operational and financial hurdles which should be lowered over time where possible. The third defining aspect of the obligation to take the requisite measures is that the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the

measures employed to achieve the result are governed by the availability of resources.

- (3) Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.

[90] The applicant has not in any way challenged the University's admission and registration policy as not meeting the threshold of section 29(1)(b). In contrast, her version establishes that she was on equal footing with the rest of the applicants in relation to the University's first time first served basis of registration. Her averment that the failure or refusal of the University to register her violated her right to further education cannot be sufficient to impugn the University's conduct in refusing her registration.

[91] It cannot be sufficient that it is in her heads of argument that the applicant states that the University was not justified in excluding her from registration on the basis of its first come first served registration policy, whereas she did not set out sufficient facts in her affidavit to substantiate this conclusion. The argument posited on her behalf in her heads of argument cannot substitute the evidential material that this Court would require in assessing whether the University was justified to begin with, in excluding students from registration based on its quota requirements. The applicant's assertion that her constitutional right to further

education has been violated by the University can therefore not be sustained.

A remark in passing

[92] By its nature, a rule nisi with an adjunct of an interim order serves to provide interim relief while the court adjudicates the matter. I am not unmindful of the fact that in the instant case, the interim order directing the University to allow the applicant to register for the B.Ed Degree had an effect of a final order in the sense that registering for this qualification was the very same right that the applicant sought to vindicate.

[93] This fact notwithstanding, I see no reason why the applicant should, in the specific circumstances of the present case, and at least for the present, be allowed to benefit from continuing to exercise a right which she secured by circumventing the University's registration policy. Floodgates would be opened, I think, if the University's prospective students would be allowed to utilize proceedings in this Court as a means to secure registration when they have failed to act in accordance with the policy prescribed by the University for registration and be vigilant in so doing.

Costs

[94] The instant application was, in my view, the applicant's genuine attempt to vindicate her constitutional right to further education. I am acutely alive of my duty to guard against the unmerited labelling of litigation as constitutional litigation, lest there be an abuse of the protection that a litigant has against payment of costs even where he/she is unsuccessful. I do not believe that the present application was frivolous and vexatious. Therefore, the applicant must benefit from the Biowatch principle, and be exonerated from paying the University's costs.[26]

Order

[93] In the result, the following order shall issue:

1. Any non-compliance by the applicant with the Uniform Rules of Court regarding the enrolment of this matter is hereby condoned. This application is hereby heard and determined as one of urgency as envisaged in Rule 6(12) of the Uniform Rules of this Court; and the forms and time frames regarding service as prescribed by the Uniform Rules are hereby dispensed with.
2. The application is dismissed, with the rule nisi dated 07 February 2024 being hereby discharged.
3. Each party shall pay its own costs.

L. RUSI

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant : Adv S I Vobi

Adv A Nase

Instructed by : ABONGILE DUMILE ATTORNEYS INC.

18 Park Road

MTHATHA

Counsel for the first and second

respondents : Adv J L Hobbs

Instructed by : DRAKE FLEMMER & OSMOND (EL)

INC.

TM Madala Chambers

14 Durham Street

Date heard: 05 and 06 March 2024

Date delivered: 28 May 2024

[1] Section 78 of the Statute of Walter Sisulu as published in Government Notice No. 13 (Government Gazette no. 37235) dated 14 January 2014, provides for the council's powers to admit any person who satisfies legal requirements for admission and any further

requirements for admission as may be laid down by the council and laid down in the Rules, as well as other matters related to

admission and registration of students.

[2] Section 37 of the Higher Education Act 101 of 1997 provides:

(1) Subject to this Act, the Council of a public higher education institution, after consulting the Senate of the public higher education institution, determines the admission policy of the public higher education institution.

(2) The council must publish the admission policy and make it available on request.

(3) The admission policy of a public higher education institution must provide appropriate measures for the redress of past inequalities and may not unfairly discriminate in any way.

(4) Subject to this Act, the Council may, with the approval of the Senate –

(a) determine entrance requirements in respect of particular higher education programmes;

- (b) determine the number of students who may be admitted for a particular higher education programme and the manner of their selection;
- (c) determine the minimum requirements for readmission to study at the public higher education institution concerned; and
- (d) refuse readmission to a student who fails to satisfy such minimum requirements for readmission.

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[3] The Constitution of the Republic of South Africa, Act 108 of 1996.

[4] Luna Meubels Vevaarrdigers (Edms) BPK v Makin (t/a Makin's Furniture Manufacturers) 1977

- (4) SA 135 (W); East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767)

[2011] ZAGPJHC 196 (23 September 2011).

- [5] Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another (CCT 103/12) [2013] ZACC 25; 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) (10 July 2013); Head of Department Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another (CCT

40/09)[2009] ZACC 32; 2010 (2) SA 415 (CC) ; 2010 (3) BCLR 177 (CC) (14 October 2009).

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- [6] Moko v Acting Principal of Malusi Secondary School and Others (CCT 297/20) [2020] ZACC 30; 2021 (3) SA 323 (CC); 2021 (4) BCLR 420 (CC); (2022) 43 ILJ 2269 (CC) (28 December 2020).
- [7] Mbana v Walter Sisulu University and Others (846/2023) [2023] ZAECMHC 9 (7 March 2023) (“Mbana”).
- [8] Visser, Pretorious, Sharrock and Van Jaarsveld – Gibson’s South African Mercantile & Company Law (Juta) 8th Edition, at 29 -39.
- [9] Op cit, at 34.
- [10] AJ Kerr - The Principles of the Law of Contract, Sixth Edition (Lexis Nexis) (2002), at 61-74.
- [11] 1912 AD 343.
- [12] Op cit, at 350.
- [13] Haynes v King Williamstown Municipality 1951
- (2) SA 371 (A) at 378F-379B; S.A. Cooling Services (Pty) Ltd v Church Council of the Full Gospel Tabernacle 1955
- (3) SA 541 (D), at 543H; SWJ Van der Merwe Contract-General Principles 4 ed (2011) at 331.
- [14] Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005(6) SA 205(SCA) at para17 and 18.
- [15] Durban City Council v Association of Building Societies 1942 AD 27; Reinecke v Incorporated General Insurances Ltd 1974(2) SA 84 (A) at 95C.
- [16] 1996
- (1) BCLR 1 (CC), 1996 (1) SA 984 (CC), [1995] ZACC 13 ('Ferreira') at para 44).
- [17] Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae) 2001
- (4) 491 (CC), 2001 (8) BCLR 765 (CC), [2001] ZACC 21 para 19; Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders 2005
- (3) SA 280 (CC), 2004 (5) BCLR 445 (CC), [2004] ZACC 10 para 36.
- [18] Plascon- Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd 1984(3) SA 620 (SCA).
- [19] Airports Company South Africa Soc Ltd v Airports Bookshop (Pty) Ltd t/a Exclusive Books, 2017 (3) SA 128 (SCA) para 26.
- [20] Kerr footnote 8 supra, at 74; and 82 – 84.
- [21] Anglo Carpets (Pty) Ltd v Snyman 1978 (3) SA 582 (T).
- [22] Director of Hospital Services v Mistry 1979

(1) SA 626 (AD) at 635H – 636D.

[23] Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999

(2) SA 279 (T) at 323F – 324D.

[24] Moko, para 27.

[25] Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) para 39-46.

[26] Biowatch Trust v Registrar Genetic Resources and Others (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (3 June 2009), para 43.

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