

SOUTH AFRICA / JUDGMENT

Moela and Another v Habib and Another (2020/9215) [2020] ZAGPJHC 69 (19 March 2020)

[2020] ZAGPJHC 69

COURT

South Gauteng High Court, Johannesburg

BEFORE

S E Weiner

CASE / FILE NUMBER

2020/9215

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2020/9215

In

the matter between:

LERATO

MOELA

First

Applicant

MATSOBANE

SHAUN MATLHWANA

Second

Applicant

and

ADAM

HABIB (VICE-CHANCELLOR: UNIVERSITY OF THE WITWATERSRAND)

First

Respondent

JEROME

SEPTEMBER (DEAN OF STUDENTS: UNIVERSITY OF THE WITWATERSRAND)

Second

Respondent

JUDGMENT

Weiner J

Introduction

[1] The World Health Organisation (WHO) this morning warned that ‘Africa must wake up and prepare for the worst’. Not only South Africa, but the world is caught in a maelstrom unprecedented in our lifetime. The containment of SARS COV-19 (‘SARS COV-19’) is a matter of significant national importance. The threat of SARS COV-19 overwhelming the South African health system, has enjoyed an extraordinary amount of publicity, and it is essential that everyone do whatever is required to prevent the health system from being overwhelmed and assisting in flattening the infection curve.

[2] The applicants are students at the University of the Witwatersrand (‘the University’) residing at University residences. The Senior Executive Team (‘SET’) of the University, in conjunction with the Chairman of the University’s Council, issued a directive on 16 March 2020 that all residences were to be closed students must vacate their residences within 72 hours. The relief the applicants sought in their notice of motion was that the respondents – Adam Habib, the Vice-Chancellor of the University of the Witwatersrand and Jerome September, the Dean of Students for the University of the Witwatersrand (the ‘Vice-Chancellor’ and ‘Dean’ respectively) – must satisfy themselves that the students have been tested for SARS COV-19 and are safe to go home. The second part of the relief that the applicants sought was that the respondents

must ‘extend’ the evacuation notice ‘until a mechanism is devised to limit the rapid spread of the virus’.

The applicants contended that it is universally accepted that SARS COV-19 is a life-threatening disease if it remains undetected and untreated. They alleged that the University’s directive was a ‘negligent and reckless response to this pandemic’.

[3] The applicants submitted further that such action poses a serious threat to life which offends against their justiciable rights protected under s 11 and s 27 of the Constitution of the Republic of South Africa, 1996.[1] These relate to the right to life and the right to access to health care. The applicants claim that their right to health care compels the University to assume responsibility of having students tested for SARS COV-19. They contended further that they have other rights protected by the Constitution and that there is a reasonable apprehension that those rights would be violated, as the University is not taking the correct precautionary measures.

[4] During argument, the applicants abandoned the relief they originally sought, and claimed under alternative relief that they should be allowed to remain in their residences and self-isolate. I will however deal with the relief that was originally sought as, in view of media

reports, confirmed by the respondents, many students at various universities are preparing to defy their university's directive. I therefore believe this matter has a wider public interest. The measures taken by the University are detailed and based upon the opinions of many experts in this field, as well as the Directives and regulations issued by the President of the Republic of South Africa (the 'President') which may be of assistance to the students, as well as the public at large.

- [5] The applicants have only cited the Vice-Chancellor and Dean as respondents. The relief that the applicants seek is that this Court directs the Vice-Chancellor and Dean to refrain from 'evacuating' students from residences, without satisfying themselves that students have been tested for SARS COV-19 and 'are safe to go home'. The decision to suspend the academic programme, and to close the residences, was a decision made by the SET of the University, in conjunction with the Chairman of the University's Council. It was not a decision made by the Dean and/or the Vice-Chancellor alone. The Vice-Chancellor and Dean cannot, on their own, alter this decision, and the relief that the applicants seek cannot be implemented by the Vice-Chancellor or Dean. The respondents thus claim that for this reason alone, the application should be dismissed.
- [6] The respondents have filed a detailed answering affidavit, which sets out the background to the decision by the University that students must vacate the University residences. As this judgment has been prepared as a matter of urgency, I will quote directly from such affidavit, where appropriate. Certain portions have been summarised by me.

[7] The Dean states that—

'It seems as if the applicants labour under the impression that the Vice Chancellor and I have some control over testing for SARS COV-19, and that we can arrange for students to be tested. This is wrong. Not the Vice Chancellor, the SET, the Council or me have any control over who is tested. The NICD [the National Institute for Communicable Diseases] is generally the responsible entity for testing and it has a protocol in place which stipulates when it is that a person qualifies to be tested...

...individuals can be tested by a private laboratory at their personal cost. If the applicants believe that they qualify to be tested, they should try to persuade the NICD alternatively a private laboratory to test them, but they may struggle because current guidelines in South Africa require a person to first have symptoms to qualify for testing...

Because we have no control over who is tested, the order that is sought against us cannot be complied with. In addition, testing for SARS COV-19 is the prerogative of the individual student. The University cannot compel any student to have tests done or to insist that students share the results with the University. It seems that they want approximately 40 000 students tested at the University's expense. There is no such obligation on the University. I am advised that through a private laboratory, the tests cost approximately R1 200 per individual. This would require the University to expend R48 million which it is simply not in a position to do. Further, because the private laboratories and the NICD will only perform the test if the patient is symptomatic, it is not

possible for the University to procure private testing of non-symptomatic students like the applicants.’

- [8] In relation to the second part of the relief that the applicants sought, that is, the closure of the residences and the requirement that students leaving the residences should be postponed ‘until a mechanism is devised to limit the rapid spread of the virus’, the Dean stated that—

‘[T]he University has obtained expert advice from the members of its Faculty of Health Sciences (“FHS”), the NICD and other government bodies on how best to limit the spread of SARS COV-19. The unanimous advice received by the University on how to limit the spread of SARS COV-19 is to create social distancing within the University community, amongst other interventions. The University has been advised that this is best done by suspending the academic programme and closing down the residences. The irony of what the applicants seek is that the very thing that they complain about (closing the residences) is the thing that will limit the spread of SARS COV-19. In fact, keeping the residences open may well increase the risk of further infections. Currently the global viral load in the student community is very low. The longer universities wait, the greater the risk of increased infections. This is precisely why the experts agree that students should be sent home sooner rather than later...

...the applicants seem to labour under the impression that the University is obliged to take steps to ensure the safety of people with whom the applicants may come into contact when they return home. It is on this basis that the applicants ask the Vice Chancellor and me to ensure that it is safe for them to go home. we [do not] have responsibility [for this] because we do not have the skills, capacity or means to do that. Ensuring the safety of the general population is a matter that central government deals with, not universities.’

- [9] The applicants’ concern is that when they return home, if they are infected, they may infect others. The respondents contended that the solution to the applicants’ concern is not resolved by granting the relief sought by the applicants. Instead, it could be resolved by the applicants going into self-isolation either at home or in a state facility. The respondents state that, ‘by imposing isolation on themselves, the applicants will dramatically reduce the risk of anyone else from becoming infected.’

- [10] The Dean sets out in detail what ‘the University has done in preparation for a SARS COV-19 outbreak, and in dealing with matters when it became known that a student had come into contact with a non-student who subsequently tested positively’. The Dean presented a picture of the thorough and comprehensive planning and response, which ‘negatives the applicants’ suggestion of recklessness’.

- [11] In dealing with what the University’s response to the pandemic, the Dean stated as follows:

‘When the President of South Africa declared a national state of disaster, imposed travel bans and restrictions on public gatherings “the world changed”. Given the seriousness of the situation that is evidenced by the President’s speech, the University was required to react responsibly and that

meant closing the University and the residences. It is of some moment that during the President's speech the University was mentioned. The point of the University being mentioned in the speech is that it demonstrates, as I explain below, that the events at the University had be escalated to the highest levels of government. The actions of the University are recommended and supported by government in its attempts to contain [SARS COV-19]...

Since early January 2020, the University's Executive Management team, which includes me, have been monitoring developments globally regarding SARS COV-19 and have been in regular contact with professors in FHS and subsequently with the National Institute of Communicable Diseases to identify best practices for managing SARS COV-19, if it reached the University community...'

[12] On 6 February 2020, the SET of the University communicated to students and staff, that as a precautionary measure, a temporary protocol for all students or employees returning from China had been put in place. Those students and employees were requested to notify the Dean or the Deputy Vice-Chancellor: Human Resources, Transformation and Advancement ('DVC') respectively of any return from China. This was because China had been identified as the source of the SARS COV-19 outbreak and the University was already putting in measures to identify and detect any risks to the University.

[13] On 6 March 2020, the Vice-Chancellor's office sent out a further communique to the University community. What was outlined in this communique is that the SET:

13.1. Developed a protocol to manage any reported case of the virus at the University. In terms of this protocol, students that displayed

symptoms of SARS COV-19, were required to report this to the Dean, and staff members were required to report such symptoms to Professor

Ruksana Osman, the DVC.

13.2. Developed a University continuity plan that could be implemented if the University had to be shut down for a short period of time.

13.3. Monitored and engaged with University community members who travelled to and from high risk areas.

13.4. Emphasised standard hygiene practices to protect against infection and the spread of SARS COV-19.

13.5. Information posters had been placed on the University campuses in regard to precautionary measures over and above the email communiques already referred to.

13.6. Hand sanitisers were made available at various key points at the University.

[14] Following requests from employees and students, on 8 March 2020 the SET decided to deactivate the University's biometrics system temporarily and to allow access to the University premises through access card swipes.

- [15] On 8 March 2020, and unbeknown to the University at the time, a student in the Graduate Entry Medical Programme 1 (the 'GEMP1 Student') met an individual that returned from Italy. FHS was informed that the GEMP1 Student and this individual hugged at the time of meeting and walked in a park.
- [16] On 9 March 2020, the GEMP1 Student attended at medical school, collected notes from the fifth floor and studied in Room 29 on the third floor, and had limited contact with other students in the class.
- [17] On 10 March 2020, the GEMP1 Student attended at medical school, collected lecture notes from the fifth floor and in the morning studied in room 29 on the third floor.
- [18] In the afternoon of 10 March 2020, the GEMP1 Student attended a Clinical Skills Session on the third floor in Station 9 of the Skills Unit at medical school.
- [19] At that stage, the GEMP1 Student's position was not an issue of concern to the University, as the University was unaware that she had interacted with the individual that had returned from Italy. The GEMP1 Student was asymptomatic.
- [20] The members of the SET kept in regular contact with NICD and on 10 March 2020, at a further meeting, the SET deliberated extensively on matters pertaining to SARS COV-19 and its potential impact on the University community in the short, medium and long term. As at that stage, no one from the University had tested positive for SARS COV-19 and the University was not aware of anybody in the University community being in contact with a person with SARS COV-19.
- [21] At the 10 March 2020 meeting, the SET established a committee called the Wits SARS COV-19 Management Committee ('WCM') led by the DVC. This management committee also included the Dean of Students, the Dean of the Faculty of Health Sciences, the University's Director: Occupational Health and Safety, the University's Director: Services, the Executive Director: Human Resources and the University's Head: Communications and other staff members who were co-opted as and when appropriate.
- [22] The WCM convened its first meeting on 10 March 2020. Following suggestions from the University community and in line with the NICD protocols, the University made available hand sanitisers more widely at entry and exit points of buildings, pedestrian gates, in bathrooms and lifts.
- [23] The WCM also decided to ensure that regular information would be shared with the University community via email, social media and a dedicated webpage.
- [24] A feedback channel was also introduced to garner responses, comments and suggestions from the University community.

- [25] The WCM also decided that posters and digital platforms would be utilised to share content regarding, amongst others, good hygiene practices, the importance of washing one's hands properly, not sharing utensils and keeping a safe distance from people who are sneezing or coughing.
- [26] The FHS communicated directly with students and staff in FHS, given that some of them would work in hospitals and healthcare facilities.
- [27] The WCM decided to request members of the University community not to travel for non-essential purposes. Employees of the University that were required to travel internationally were required to inform their respective heads of their travel arrangements and their proposed return dates and heads of school were requested to implement necessary protocols (including a period of quarantine, if necessary) prior to such persons returning from international travel.
- [28] Similarly, students were called upon to inform the Dean of their return from international travels.
- [29] The WCM required that all heads of school were to be notified of any visitors who were due to arrive at the University from other countries, before the visitor arrived.
- [30] It encouraged employees who showed signs of illness to take sick leave and to go for tests and look at being quarantined, if the illness persisted and SARS COV-19 was suspected.
- [31] The GEMP1 Student did not attend University on 11 March 2020.
- [32] The WCM met on that day to discuss prevention, detection, containment and mitigation of SARS COV-19, as well as protocols and processes that needed to be in place should a SARS COV-19 outbreak develop at the University. Communications were then sent out to the University community.
- [11] In an email sent to the University community on 11 March 2020, the SET and the University's SARS COV-19 management committee stated as follows:
- 'The Wits COVID-19 management committee convened this morning to discuss the University's preparedness to respond to the emerging infectious disease. The committee discussed matters related to the prevention, detection, containment and mitigation of COVID-19, as well as protocols and processes that need to be in place should a COVID-19 case or outbreak develop.'
- [33] They stated that they had an emergency response plan, which the WCM would use as a basis from which to develop appropriate responses to SARS COV-19. The WCM would actively monitor the spread of SARS COV-19 and adapt the University's plans accordingly.

[34] At that stage, there were only 13 South African cases of SARS COV-19, and as far as the University was aware, there were no critical cases in the country. Cases in South Africa were ‘imported cases’, that is, they were contracted abroad before the travellers entered South Africa. The WCM advised the University community as to what the most sensible thing to do at the time was, which was as follows:

- ‘1. To take care of your personal hygiene – wash your hands often, thoroughly (sing two happy birthdays whilst washing)
2. Keep a safe social distance (about 1 metre) from a person who is coughing or sneezing.
3. If you happen to have a cough, fever, splutter and have difficulty breathing visit your healthcare professional and follow their advice. Call ahead so that they are prepared to receive you.
4. Do not share your germs, so cover your mouth and nose if you are coughing or sneezing.
5. If you feel that you are still at risk or if your healthcare professional believes that you may have COVID-19, contact the NICD

directly on this number: 0800 029 999. There are no over the counter testing kits – the tests have to be analysed in a laboratory.’

[13] In regard to masks, it was suggested that they should only be worn by those coughing or sneezing and if there is a risk of passing the infection on to others. The WCM also referred to the fact that there were many reports on Twitter, Facebook and other social media, as well as traditional media, that might be fake news, the contents of which might not be true. The email set out references to credible sources, such as the websites of the NICD and WHO, as well as links to articles by Professor Cheryl Cohen of the NICD and by the Wits Professor of Vaccinology, Shabir Madhi.

[14] The Dean set out further that:

‘On 12 March 2020, the GEMP1 Student was informed that the individual that returned from Italy [whom she had met with] had tested positive for COVID-19. The GEMP1 Student then called Dr Lulua, who is, inter alia, the GEMP1 coordinator and updated her of these developments. The GEMP1 Student advised Dr Lulua that she was well, but had placed herself in quarantine. She was also encouraged to get hold of her general practitioner and the NICD.

On 12 March 2020, and out of an abundance of caution, the fact that [the] GEMP1 Student was in contact with the individual that tested positive for SARS COV-19 was communicated to all persons that may have been in close contact with the GEMP1 Student during lectures and they were requested to notify Dr Lulua if they displayed any symptoms.

On 12 March 2020, the WCM arranged for a further communique to be sent out regarding specific protocols relating to people from the University community that were travelling.

The GEMP1 Student on 12 March 2020 visited Sandton Medi-Clinic and samples were taken from her and were sent to Lancet for testing.

Early in the morning on 13 March 2020, the WCM advised the University community that the GEMP1 Student had been quarantined after it was found that she had come into contact with an individual that had tested positive for SARS COV-19.’

[35] In this communique, the WCM stated as follows:

‘The COVID-19 management committee would like to advise the Wits community that a medical student has been quarantined after it was found that the student came into contact with a person who had been identified with COVID-19.

The student is being monitored closely and has not displayed any symptoms of COVID-19. The student has been screened and the test results are expected later today. However, as a precautionary measure the Faculty has cancelled the clinical activities scheduled for the student’s class today.

We will keep you updated as soon as we have any further information.’

[36] The University described this as a precautionary measure because at that stage it was not clear how many other GEMP1 students had primary contact with the GEMP1 Student.

[37] According to the Dean, on 13 March 2020, the University sent out a further communique. This email informed students that one of the students had had contact with a person who had tested positive for SARS COV-19. In consequence the student was quarantined pending medical examination.

[38] On 15 March 2020, the GEMP1 Student received a call from the laboratory to advise her that she tested positive for SARS COV-19. On that morning, Professor Martin Veller (Prof Veller), the Dean of the FHS, received information that the laboratory results indicated that the GEMP1 Student tested positive for SARS COV-19. The GEMP1 Student is not a student housed in one of the University’s residences.

[39] The Dean sets out that, in consequence—

‘[T]he Vice-Chancellor engaged in discussions with Ministers Nzimande and Mkhize, the Ministers of Higher Education and Health respectively.

Minister Mkhize suggested that the University takes direction and aligns to the Department of Health’s strategy in response to COVID-19. Subsequently, the Vice Chancellor engaged with the Deputy Director-General of the Department of Higher Education and Training and the acting Director-General of the Department of Health, to obtain their views on the proposed communique that the University wished to issue on 15 March 2020. Both officials suggested minor changes to the proposed communique. It was also agreed with the acting Director-General of the Department of Health that the Vice Chancellor would establish a task team to meet with the Department of Health to take advice on further steps for the University to take. The Department

of Health delegated the responsibility to engage with the University on the task team to the NICD who advised on the way forward.

The Vice-Chancellor was also informed that the President would later in the day (15 March 2020) be releasing a statement about the national strategy adopted in regard to SARS COV-19.’

[40] A communication was sent to the students on 15 March 2020. The students were advised that:

40.1. The GEMP1 contact classes had been cancelled and the academic programme would continue online;

40.2. All GEMP1 students were instructed to go into self-quarantine with immediate effect for 14 days;

40.3. The Dean would coordinate arrangements for students who lived in residences and who required self-isolation; and

40.4. Contact details for students who required more information were provided.

[41] On Sunday, 15 March 2020, the SET convened an urgent meeting which included 10 senior executives from the University, including the Vice Chancellor and Professor Martin Veller, the Dean of FHS.

[42] The Dean sets out that at the meeting it was resolved that:

42.1. ‘All contact teaching and University activities involving face-to-face interaction would be postponed, including tests, for Monday 16 March 2020;

42.2. Students would be requested to remain at home or to confine themselves to their rooms in residence;

42.3. Students would be encouraged to follow the social distancing policy and to limit interaction where possible;

42.4. Special arrangements would be made for students who usually eat in dining halls (with those in isolation having meals delivered to their rooms);

42.5. Employees would be expected to come to work but to maintain social distance. Where possible, meetings and group work would be conducted telephonically or by video conferencing, in accordance with NICD protocols;

42.6. All graduations would be postponed until further notice;

42.7. A temporary moratorium had been placed on inbound and outbound travel, and people that recently travelled into South Africa would not be allowed to enter the University; and

42.8. Plans that would be in place from Tuesday, 17 March 2020, would be communicated after the University consulted with, amongst others, the Departments of Health and Education and Training.’

[43] These resolutions were communicated to the University community in the evening of 15 March 2020 via email.

[15] On 16 March 2020, the FHS sent a communique to its students. This communique was from Professor Daynia Ballot on behalf of the School of Clinical Medicine SARS COV-19 Response Team. The communique stated as follows:

‘It is important that we continue to communicate with each other about the topic of the new corona virus, or COVID-19 or SARS-CoV-2, the name to describe this new challenge facing all of us....

It is necessary for those of us at risk to monitor for any symptoms: fever, cough, sore throat and/or shortness of breath. Please note, we are entering the season where influenza and other respiratory tract viruses are common, therefore, not all respiratory symptoms are necessarily related to COVID-19. It is important for all of us to be vigilant in our social distancing, hand washing and preventative measures.

Case definitions in a developing COVID-19 outbreak are continuously changing and being updated. Please use the following definitions and note the steps to take:

1. Primary contact: Those who were in close contact with a positive confirmed case of COVID-19 . If you were in close contact with such a person (within 1 meter distance and longer than 15 minutes of contact time) you will need to self-isolate (if with symptoms) or self-quarantine (without symptoms) for 14 days. If symptomatic, please seek medical attention.
2. Secondary contact: Those who have had close contact (within 1 meter distance and longer than 15 minutes of contact) with a primary contact will not need to self-quarantine (without symptoms). If however, you become symptomatic, please self-isolate and seek medical attention for further advice.
3. No known, obvious or intentional interaction which would place you in the above two categories. You may have respiratory symptoms (flu), but you have no close contacts with anyone who is at risk.

...

The School of Medicine is here to help any student with issues related to COVID-19. We will continue to keep you updated concerning the academic and clinical programme, as well as continue to share your concerns with the leadership of the School, placing safety and our well-being as paramount. Please contact your Course Coordinator if you are in categories 1 or 2, [i.e. primary or secondary contact] or have any concerns.’

[44] The school of clinical medicine also made an information booklet available to its students. Attached to the email was a flow chart for steps to follow if the student displayed symptoms of SARS COV-19 or may have been exposed to SARS COV-19. Self-Quarantine guidelines were also attached.

[45] The Dean further stated in his affidavit that:

‘On 16 March 2020, and in line with the recommendation of government, the SET met with the NICD, experts in infectious diseases, and representatives from the Department of Higher Education and Training. Pursuant to the guidance obtained from the experts at this meeting, and taking into account the best interests of the University community, the following decisions were made, and the Chairman of the University’s Council was present when these decisions were made:

1. The University’s mid-term break would be brought forward and would commence on 17 March 2020 (four days earlier than previously scheduled);
2. As a result, all academic activities for the week of 16 March 2020 would need to be rescheduled;
3. The plan was to reopen the University on 30 March 2020, subject to what was happening in regard to the containment of the pandemic (subsequent discussions with government may require this issue to be revisited to ensure that contact teaching does not occur before the end of the Easter weekend); and
4. All students occupying residences would be requested to vacate within 72 hours. Students were advised that if they anticipated any challenges in this regard, they could liaise with the SET (at the time it was anticipated that a few international students may raise concerns about having to vacate the premises).

[46] These decisions were communicated to the University community on the evening of 16 March 2020. Prior to this communication, the decisions were communicated to all the members of the University’s Council, and according to the Dean, ‘none of them expressed any concerns with the decisions.’

[47] All students were therefore required to leave their residences by the evening of 19 March 2020. Late in the evening of 16 March 2020, the applicants addressed an email to the Dean. The Dean stated that ‘the email only came to my attention after 07h30 on 17 March 2020 and came to the attention of the Vice Chancellor shortly after 06h15’.

[48] Prior to this decision to suspend the academic programme and close the University’s residences, members of certain Unions, including NEHAWU (the National Education, Health and Allied Workers’ Union) had expressed concern about the safety of their members in the face of the pandemic. The author of the email [sent to the university] who is a representative of NEHAWU, set out that he was grateful that the SET was taking SARS COV-19 seriously, but he recorded that employees should not be expected to be at work, and there

should be a full closure of the University until a safer operating model was agreed and implemented.

[49] The Dean states that—

‘Members of the Unions (including NEHAWU) also met with the SET on 16 March 2020 and were adamant their workers should not be expected to work before the second semester commenced. They expressed concern that some of their members were vulnerable and would be exposed to greater risk by virtue of pre-existing health conditions. Thus, the staff who normally clean and maintain the residences and the dining halls would not be working. If the residences are not operating, not being maintained and cleaned, and if the dining halls are not operational, it is not possible for students to remain in the residences. To extend the period in which the University residences should remain open, would not only create further risks for students but also for vulnerable members of staff who would be required to service the residences.’

[50] The respondents therefore submitted, that it is clear from what is set out above that contrary to the applicants’ suggestion that the University has acted negligently or recklessly, the University has acted in accordance with expert advice and the government’s strategy in response to the pandemic, with due care and in the best interests of the University community as a whole.

[51] The Dean and the Vice-Chancellor believe that the University is doing its part by closing, and that the applicants should do their part by following the processes prescribed, and by imposing self-isolation on themselves if they believe they are infected.

[52] Experts have advised the University that the NICD’s practice of only testing patients with symptoms is justified. If this was not the position, the testing centres would be overwhelmed and would not cope with the demands of many wanting to be tested when it was not necessary to do so. If the University does what the applicants initially sought, this would have an adverse impact on the fight against the pandemic.

[53] The basis of the applicants’ fears were described by the first applicant, in argument, as follows:

1. He had recently had a meeting with a student from the medical school;
2. The GEMP1 Student who had tested positive had been present at the University and may have come into contact with him and/or other students;
3. The second applicant catches a bus from his residence and may have been exposed to the virus on the bus;
4. The second applicant’s residence is near to the medical school. On questioning, it was established that the residence is approximately two kilometres away from the medical school.

[54] As I stated to the applicants during their argument, the majority of people in the South Africa (and globally) are in the same situation as the applicants. We have all had meetings or been in contact with other people who may have been exposed to someone with SARS COV-19, or who may have it themselves. The suggestions by the applicants that the way in which the University should deal with this by testing all students in residences before they are sent home, is simply not feasible. There are approximately 6 000 students in the residences. One has to take into consideration that at present, only 1 student at the University (in the medical school, which is 2 kilometres from the main campus of the University) has tested positive for SARS COV-19.

[55] The respondents contended that the relief sought by the applicants is unsustainable for, inter alia, the following reasons:

55.1. Firstly, the applicants' founding affidavit fails to make out a case and fails to prove that they have any right to the relief they seek.

55.2. Secondly, the applicants fail to prove that any of their rights have been violated, or that they have a reasonable apprehension that those rights would be violated. The applicants do not set out a basis on which either the Vice-Chancellor, the Dean, or the University owe the legal obligations that they seek to impose. Neither of the applicants alleged that they have symptoms associated with SARS COV-19, or that they were in contact with the GEMP1 student enrolled at the University medical campus that has thus far tested positive. There have been no reports that any other student (besides the GEMP1 Student) tested positive for SARS COV-19. The respondents thus contend that there is no reason to believe that they may be infected with SARS COV-19 and that they require to be tested.

55.3. Thirdly, the initial relief claimed by the applicants is not limited to them, but would extend to the whole student body that is in residence. The applicants abandoned that prayer, probably on the basis that they do not have any locus standi to seek relief on behalf of other students. However, if they succeed in the alternative relief, that is, that they remain in residence and self-isolate, the University will have to extend such relief to all students in residence, which would defeat the very object that the University and the country at large is trying to achieve. As set out above, this relief is also logistically impossible by virtue of the fact that the staff who are in charge of such residences, and who see to the cooking and cleaning at such residences, will not work.

55.4. Fourthly, the applicants accused the University of being negligent and having a reckless response to SARS COV-19. The respondents submitted that those allegations of recklessness are regrettable, not least because the applicants are law students who should appreciate the seriousness of making such allegations. The applicants were invited by the respondents in the answering affidavit to withdraw such allegations. The applicants did not do so, but repeated same in their replying affidavit. The allegations were however withdrawn during the hearing.

- [56] According to the respondents, the applicants have exaggerated the position in stating that the GEMP1 student had contact with 350 students. In the relevant email, the University recorded that it is reaching out to 350 students who could be affected. These were all GEMP1 students. It does not follow from that that the GEMP1 Student had contact with each of the 350 students. Primary contact was limited to about 30 students and this was established after discussion with the GEMP1 Student shortly after her results had become known, and only very few of these were University residence students.
- [57] The respondents denied that the applicants were informed that they had to vacate without any precautionary measure to combat the further 'potential spread to society'. The applicants do not take cognisance of the fact that the University engaged with its internal experts, as well as with the NICD and the relevant departments of government. The respondents referred to a press article from which it is clear that government has been in regular discussions with the tertiary institutions in the country and support the closure of the University and the residences.
- [58] From what is set out above, the applicants cannot succeed in any of the relief that they seek. It is clear that the University has followed precisely all protocols recommended by WHO, the NICD, the President and the renowned experts in this field.
- [59] In regard to costs, the respondents sought an order of costs against the applicants on the basis of the allegations that were made about the University acting recklessly and without regard for the students. The students came to court, they did not simply take the law into their own hands, they sought relief, and the fact that the relief has not been granted, in my view, is not sufficient to order a costs order against the applicants. They are both students, who are unemployed, and would not be able to satisfy any costs order. They did withdraw the allegations of recklessness and showed remorse in this regard. The respondents contended that if the costs order was granted, it might dissuade other students from approaching the court for similar relief. In my view, this is not a basis on which a court should decide that a party should pay costs.
- [60] The world has changed, and we are all in a quandary as to how to go about our daily lives in view of the pandemic. I would implore the applicants and all other students seeking to ignore the Directives issued by the University, in the spirit of Ubuntu, to follow the protocols issued by the University, the President, the NCID and the WHO. This is an unprecedented time for all of us. We are stronger if we work together. Nkosi sikelel' iAfrika

In the result the following order is granted:

1. The application is dismissed.
2. There will be no order as to costs.

S E WEINER

JUDGE OF THE HIGH COURT

Date of hearing: 17-18 March 2020

Date of judgment: 19 March 2020

Appearances:

Counsel for the Applicants: In person

Counsel for the Respondents: Adv. Green

Instructing Attorneys: ENSafrica

[1] Section 11 'Life' provides: 'Everyone has the right to life. Section 27 (1) Everyone has the right to have access to— (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive

realisation of each of these rights. (3) No person may be refused emergency medical treatment.

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