

SOUTH AFRICA / JUDGMENT

Morudu v University of the Free State (5797/2022) [2023] ZAFSHC 415 (20 October 2023)

[2023] ZAFSHC 415

COURT

Free State High Court, Bloemfontein

BEFORE

Mhlambi

CASE / FILE NUMBER

5797/2022

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Source record**IN THE HIGH COURT****OF SOUTH AFRICA,****FREE STATE****DIVISION, BLOEMFONTEIN****Reportable: YES/NO****Of Interest to other****Judges: YES/NO**

Circulate to Magistrates:

YES/NO

Case No: 5797/2022

In

the matter between:

JONAH

MORUDU

Applicant

and

THE

UNIVERSITY OF THE FREE STATE

Respondent

HEARD

ON:

20 July 2023

JUDGMENT

BY: MHLAMBI, J

DELIVERED ON: 20 October 2023

- [1] The applicant seeks an order compelling the respondent to confer upon him the qualification of a diploma in Construction Science and Building Surveying at its next graduation ceremony. The orders sought are couched as follows in the notice of motion:

“1. The respondent is ordered to perform all such acts as may be necessary in order to confer and bestow upon the applicant, at its next graduation ceremony or at such other time as may be convenient, the Diploma in Construction Science and Building Surveying.

2. Concomitant with such conferring, to issue to the applicant a Diploma confirming that the applicant had completed the said course and has qualified for conferral of such Diploma upon him.
3. That the respondent be ordered to pay the costs of this application.
4. Further and or alternative relief.”

- [2] The respondent opposed the application on the basis that the respondent could not lawfully or practically award the diploma as such an act would be in contravention of the provisions of the Higher Education Act.[1] The respondent pleaded in limine that there was a material non-joinder because the Minister of Higher Education and Training, the Council on Higher Education and SAQA had not been cited as parties.

- [3] In his founding affidavit, the applicant stated that he enrolled with the university as a full time student at the beginning of 2002. He registered for the degree of Bachelor of Science, majoring in Quantity Surveying (B.Sc. (QS) and started his studies in January 2002.[2] At the time he enrolled for the degree, the university also offered a Diploma in Construction Science and Building Surveying, subject to the requirement that the prescribed modules stipulated by the Faculty of Natural and Agricultural Sciences of the university be passed.[3]

- [4] The diploma was only available on request to a student who completed the prescribed and applicable modules of the first three years of study for the B.Sc. (Q.S.) or B.Sc. (Construction Management degrees), or the open learning programme for the B.Sc.(Q.S.) or the B.Sc. (Construction Management), and has completed a minimum of 240 credits, but because of academic or other reasons, could not complete the prescribed study programme. This presented a university qualification to a student in recognition of modules that had been completed which were applicable and acceptable in the labour market. A student could not register for this diploma first-off. Registration and acceptance thereof must be for the degree course. Application to be allowed to enter and qualify for the diploma must be submitted to the Registrar, student academics service.[4]

[5] The applicant completed all of the modules which were required to enable him to qualify for a diploma in Construction Science and Building Surveying by completing sufficient modules to obtain 376 credits whilst the minimum requirement for the Diploma was 240 credits.[5]

[6] In 2017 and 2019 he attempted to re-enrol for the degree of B.Sc.(Q.S.) and was informed that he had exceeded the maximum

residential period allowed for enrolment in the programme. The curriculum that he previously enrolled for, was no longer valid and he would not receive recognition of the credits for the modules completed.[6]

[7] On 23 November 2021, the applicant addressed a letter to the respondent through his attorneys communicating his wish not to enrol for the B.Sc.(Q.S.) course but, as he qualified for a diploma in Construction Science and Building Surveying, enquired whether the respondent would be prepared to issue the diploma to him.[7] In response, the respondent advised that the diploma was discontinued and the qualification could therefore not be awarded.[8]

[8] The respondent stated that the applicant started his studies in 2001, had an incomplete record for 2002 and resumed his coursework from 2007 to 2012.[9] For students enrolled for the B.Sc.(Q.S.) degree in 2012, the maximum study period was 6 years.[10] By the end of 2012, the applicant was accommodated beyond the maximum study period of 6 years for the degree B.Sc. (Q.S.).[11] When the applicant left the university at the end of 2012, he should have been aware that he could not resume and complete his B.Sc. (Q.S.) degree at a later stage. It was, therefore, necessary for him to have applied for the exit diploma.[12]

[9] By the time the applicant decided to apply for the diploma, it was no longer offered.[13] A considerable period of time had lapsed since the applicant passed his modules and wanted the respondent to consider his application for the diploma.[14] The respondent was not unwilling to assist the applicant but it could not lawfully or practically award the diploma, nor would it be competent for the court to order the respondent to do so in the circumstances.[15] The respondent could not confer historic qualifications retrospectively.[16]

[10] According to the respondent, qualifications such as the diploma were generally registered with the South African Qualifications Authority (SAQA) for a period of 3 years at a time.[17] The diploma in question was first registered with SAQA in 2006 and was re-registered in 2009, 2012 and again in 2015.[18] The university was not responsible for the registration or removal of qualifications with SAQA and the diploma's accreditation had fallen away on 31 December 2014 which made it impossible in law for the diploma to be conferred.[19]

[11] The respondent attached to its answering affidavit annexure "OA7" which was a printout of the diploma's information obtained from the SAQA's official public website. The printout stated that the diploma was a registered qualification that had passed the end date. The registration status is recorded as "Passed the End Date-Status 'RE-registered'" and the SAQA

decision number was SAQA 06120/2018. The registration start date was 2018/07/01 and the registration end date was 31 December 2018. The last date for enrolment was 31 December 2019 and the last date for achievement was 31 December 2023.[20]

- [12] October In paragraphs 2.60 to 2.62 of the answering affidavit, the respondent stated the following:

“2.60 Based on information obtained from SAQA, all qualifications registered on the NQF remain valid even if they have reached the end registration date and that the Diploma could still be conferred.

2.61 However, as the university understands the legislative requirements after the Diploma’s accreditation status fell away with effect from 31 December 2014, the Diploma cannot be conferred.

2.62 Considering the above I respectfully submit that it was moot for the Diploma to be on SAQA’s website.”

- [13] It is also recorded in Annexure “OA7” that the respondent was the originator; the CHE or the Council for Higher Education the primary or delegated Quality Assurance functionary and the HEQSF (Higher Education Qualifications Sub-Framework) the NQF Sub-Framework. It was recorded that the qualification did not replace any other qualification and was not replaced by any other qualification. The purpose and rationale of the qualification are succinctly set out and the qualifiers would practise as assistants to a quantity surveyor and perform the basic functions of an on-site Building Surveyor in business, industry and responding to the needs of the community.

- [14] It is common cause that the applicant complied with all the requirements for the diploma in Construction Science and Building Surveying while enrolled with the respondent.[21] It is clear that the respondent’s resistance to the applicant’s claim is based largely on its interpretation of the Higher Education Act (HEA).[22] Relying on section 65 (D)(1) of this Act, it stated that “The University interprets Section 65(D)(1) to mean that only qualifications which are accredited and registered can be offered and

awarded. [23] From the above, it seems that the Diploma lost its accreditation with the CHE on the HEQSF system with effect from 31 December 2014 and should was(sic) thus rendered moot with SAQA.”[24]

- [15] Section 65(D)(1) provides that no person may offer, award or confer a degree, or a higher education diploma or a higher education certificate, provided for on the HEQSF unless such degree, diploma or certificate is registered on the sub-framework for higher education on the National Qualifications Framework contemplated in section 7 (b) read with section 13 (1) (h) of the National Qualifications Framework Act (NQFA)[25].

- [16] The respondent then came to the conclusion that directing the respondent to confer the diploma would result in compelling the

respondent to contravene the clear prescripts of the Higher Education Act. [26]The respondent might have to answer to the CHE and/or the Minister and endanger its accreditation as an institute of higher learning.[27] Furthermore, the respondent would be guilty of an offence for contravening section 66(1) of the HEA and liable on conviction to a sentence that might be imposed for fraud.[28]

- [17] This is clearly wrong. The particular section neither affects the respondent nor the applicant in any negative way whatsoever. What it does, is accentuate the position of SAQA and the relevance of the National Qualifications Act. In terms of this Act, SAQA must advance the objectives of the National Qualifications Framework (NQF) contemplated in the Act, oversee the further development and implementation of the NQF, and coordinate the sub-frameworks. Its functions are, amongst others, to develop and implement policy and criteria, after consultation with the Qualifications Councils (QC's), for the development, registration and publication of qualifications and part qualifications, to register a qualification or part qualification recommended by a QC if it meets the relevant criteria; and to develop policy and criteria, after consultation with the QCs, for assessment, recognition of prior learning and credit accumulation and transfer.
- [18] On the other hand, the QC must, in order to achieve the objectives of the NQF, perform its functions subject to the Act and collaborate with the SAQA and other QCs with regard to qualifications for its sub-framework and ensure the development of such qualifications or part qualifications as are necessary for the sector, which may include appropriate measures for the assessment of learning achievement; and recommend qualifications or part qualifications to the SAQA for registration.
- [19] On 31 December 2014, when the accreditation was withdrawn, the respondent admitted that the applicant had complied with the academic requirements for the diploma.[29] However, the applicant failed to comply with the condition that he had to apply to the registrar of the first respondent to receive the diploma. The applicant's counsel correctly pointed out that the agreement between the parties did not contain a time-bar clause which stipulated that the applicant would be required to direct a request to the respondent within a specific timeframe for the conferring of the diploma; and that the respondent appeared to have accepted that such a request was made.
- [20] The contents of Annexure "OA7" are in line with the provisions of section 13(h) of the NQF Act and, on the face of the document, the indications are that the registration of the qualification or part-qualification was recommended by the appropriate quality council, i.e. the CHE. The respondent conceded that all the qualifications registered on the NQF remain valid even if they had reached the end registration date and that the diploma could still be conferred, based on the information obtained from SAQA. If that be the case, no reason exists why the SAQA, the Minister and the Quality Council should be joined as parties to the application.

[21] Counsel for the applicant argued that the HEQSF could not be applied with retrospective effect which would be the result if the respondent's interpretation of section 65(D)(1) of the HEA is accepted. That section should be interpreted not at the date when the relevant qualification is conferred, but on the date that the student became eligible to be awarded such qualification. Any other manner of interpretation would lead to an absurdity. The general rule is that a statute is to be construed as operating only on facts that come into existence after its passing. Relying on *Veldman v Director of Public Prosecutions, Witwatersrand Local Division*,^[30] he submitted that, generally, legislation is not to be interpreted to extinguish existing rights and obligations unless the statute

provides otherwise or its language clearly shows such a meaning. That legislation will affect only future matters and not take away existing rights, is basic to notions of fairness and justice which are integral to the rule of law, a foundational principle of the constitution.

[22] I am in agreement with this proposition and that when the NQFA and HEQSF were published on 14 December 2012 and 17 October 2014 respectively, the applicant had already complied with the requirements of the diploma. The legislation did not take away his

existing rights. A perusal of the NQFA shows clearly that one of its aims is the advancement and recognition of learning as an essential attribute of a free and democratic nation and a prerequisite for the development and well-being of its citizens. To refuse the applicant recognition of his achievements and his compliance with the requirements of the diploma (an aspect that is admitted by the respondent) would be acting contrary to the rule of law.

[23] I am persuaded that the respondent's resistance to the orders sought by the applicant is without merit and should be rejected. The application should therefore succeed. It is trite that the successful party is entitled to the costs.

[24] I, therefore, make the following order:

Order:

The application succeeds with costs.

MHLAMBI, J

On behalf of the Applicant: Adv. R van der Merwe Instructed by: Badenhorst Attorneys 15 Groenvlei Avenue Bloemfontein On behalf of the respondent: Adv. JMC Johnson Instructed by: Phatsoane Henney Attorneys 35 Markgraaff Street Westdene Bloemfontein

[1] 101 of 1997.

[2] Paragraph 9 of the Founding Affidavit.

[3] Paragraph 13 of the Founding Affidavit.

[4] Annexure "FA2" on page 25 of the Index Papers; Paragraph 14 of the Founding Affidavit.

- [5] Paragraph 17 of the Founding Affidavit.
- [6] Paragraph 19 of the Founding Affidavit.
- [7] Paragraph 25 of the Founding Affidavit.
- [8] Paragraph 26 of the Founding Affidavit and annexure “FA8” on page 151 of the Indexed Papers.
- [9] Paragraph 2.4 of the Answering Affidavit.
- [10] Paragraph 2.72 of the Answering Affidavit.
- [11] Paragraph 2.73 of the Answering Affidavit.
- [12] Paragraph 2.74 of the Answering Affidavit.
- [13] Paragraph 2.77 of the Answering Affidavit.
- [14] Paragraph 2.78 of the Answering Affidavit.
- [15] Paragraph 2.82 of the Answering Affidavit.
- [16] Paragraph 2.81 of the Founding Affidavit.
- [17] Paragraph 2.55 of the Answering Affidavit.
- [18] Paragraph 2.56 of the Answering Affidavit.
- [19] Paragraph 257 of the Answering Affidavit.
- [20] Paragraphs 2.58 and 2.59 of the Answering Affidavit.
- [21] Para 16.1 of the AA.
- [22] 101 of 1997.
- [23] Para 2.64 of the AA.
- [24] Para 2.65 of the AA.
- [25] 67 of 2008.
- [26] Para 2.66 of the AA.
- [27] Para 2.67 of the AA.
- [28] Para 2.68 of the AA.
- [29] Paras 14.1 and 16.1 of the AA.
- [30] 2007(3) SA 210 (CC) para 26.

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