

SOUTH AFRICA / JUDGMENT

Nkasa and Others v Walter Sisulu University and Another Registrar and Another (2527/2017) [2017] ZAECMHC 23 (11 July 2017) [2017] ZAECMHC 23

COURT

Eastern Cape High Court, Mthatha

BEFORE

S M Mbenenge

CASE / FILE NUMBER

2527/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION, MTHATHA)

CASE

NO: 2527/2017

In

the matter between:

XOLA
NKASA
1st APPLICANT
SIYANDA
EUGIN
DHLAMINI
2ND APPLICANT
MIHLE
NDZIBOMVU
3RD APPLICANT
AWODWA
NDUKUDA
4TH APPLICANT
CWAYITA
DIDIZA
5TH APPLICANT
ATHINI
LUSWAZI
6TH APPLICANT
PHUMLA
FILI

7TH APPLICANT
AFIKILE
DALASA
8TH APPLICANT
SIZOLWENKOSI
MEMELA
9TH APPLICANT
MOSULI
NDZANYA
10TH
APPLICANT
AND
WALTER
SISULU UNIVERSITY & ANOTHER
1ST RESPONDENT
THE
REGISTRAR
WALTER
SISULU UNIVERSITY
2ND
RESPONDENT

JUDGMENT

MBENENGE ADJP:

Statutory

background

[1] Walter Sisulu University (WSU) is, in terms of the Higher Education Act 101 of 1997, a higher education institution. Whilst its principal place of business and main campus is located at Nelson Mandela Drive, Mthatha, it (WSU) has various campuses in other parts of the Eastern Cape Province. The events relevant to this application took place at

WSU's Ibika Campus, Butterworth.

[2] As a creature of statute[1] and thus a public body with its powers limited to those conferred on it by statute, WSU issues, year by year, a general prospectus (the prospectus) to regulate the manner in which it relates with its students and prospective students. The prospectus also sets out the applicable admission requirements and registration procedure.

[3] The prospectus for the 2017 academic year of WSU provides:

“No prospective student may report for registration unless he/she has been notified by the Registrar in writing that he/she has been

admitted to the University.” [2]

- [4] Within WSU's establishment, the functionary possessed with the power to register students is the Registrar. The Registrar decides, based, inter alia, on availability of space, who should be registered during a particular year. The discretion exercised involves the performance of a public power and thus constitutes administrative action within the meaning and contemplation of the Promotion of Administrative Justice Act, 2000.[3]
- [5] Section 3(1) of the PAJA provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. In order to give effect to the right to procedurally fair administrative action, an administrator, must subject to subsection (4)[4], give a person whose right or legitimate expectations may be materially and adversely affected by administrative action a reasonable opportunity to make representations.[5]

The

facts

- [6] At the beginning of 2017 the applicants applied to be enrolled as information technology students with WSU's Department of Engineering Studies. They were subjected to paying the requisite application fee and completed the relevant application forms, which they submitted as part of the application process. The head of the Engineering Studies Department (the Departmental Head) made an endorsement on the forms that the applicants had been "admitted".
- [7] In the view of the applicants the endorsement signified acceptance to study at WSU. They were, however, never issued with acceptance

letters. They claim to have been allowed to participate in academic activities such as attending lectures, and writing tests and

assignments by the Departmental Head who, they allege, informed them "[they] had been admitted for all intents and purposes" and "[they] can proceed with the registration." This, according to the applicants, coupled with the fact that WSU has allowed more than 80% of the student body to be registered without receiving the requisite admission letters, generated in them the expectation "that at some point [they] would finally be called to register", which never came to pass until registration time was over.

- [8] The applicants now seek an order declaring the decision refusing to register them as students unlawful, as also a mandamus directing the first respondent "to register the [applicants] in terms of the admission and registration policies of the respondent (sic) and accord the applicants all the rights and privileges of duly registered students of the first respondent."
- [9] Even though it is acknowledged that the Registrar of WSU cited in these proceedings as the second respondent is the functionary

empowered “to effect any decision regarding registration,” the applicants have alleged that no particular order is being sought against the Registrar. The relief sought is said to be directed at WSU, cited in these proceedings as the first respondent[6], it being “the body that admitted [the applicants] for the study of engineering technology for the academic year 2017.”

[10] The following paragraphs in the founding affidavit, by which the applicants must stand or fall, capture the essence of what the applicants regard as being their cause of action:

“28. The respondent is an organ of state and to that extent it is required by the Constitution to administer its processes in such a way that it respects, protects and promotes the bill of rights, which in this case is our right to education and to a fair and just administrative action.

29. The decision to admit us having been taken by the respondent, respondents is not entitled to review its own decision ...

30. ... In other words once a student has been admitted registration follows in the normal course. Therefore the decision of the respondent to refuse us registration having admitted us is irrational and it being the exercise of public power, it falls short of the rationality consideration required by the constitution.

31. We were not consulted by the respondent nor any of its officials prior to the decision to refuse us registration even though the decision adversely affects our rights. This renders the conduct of the respondent liable to be interdicted on the grounds of illegality and procedural unfairness.”

[11] That is the case which WSU was called upon to meet in answer.

[12] WSU is opposed to the grant of the relief and, to that end, delivered an affidavit deposed to by its Registrar. Shorn of verbiage, WSU’s case is that it was decided not to admit the applicants, hence they did not receive the requisite notice that they had been admitted. The applicants were denied registration, contends WSU, based on sound policy decisions and in accordance with the quota system which determines the number of students that can be admitted to a particular faculty during a particular academic year. The existence of the policy is not in dispute in these proceedings.

[13] According to WSU the endorsement pointing to the applicants as having been “admitted” is a mere internal communication by the Departmental Head to the Registrar who must still decide whether the students concerned should be registered or not, and lacks definitiveness.

[14] Save as aforesaid, there is a dispute of fact regarding whether some officials and/or academic staff of the WSU ever encouraged the applicants to attend lectures, and write tests and assignments. Besides, it is contended that some of the applicants’ details do not appear on WSU’s database, which, according to WSU, belies the allegation that promises were made that the applicants would eventually be registered as students. In my view, none of these issues is dispositive of this application.

The issue determined

- [15] The applicants' case has been presented in a convoluted manner. Whilst the applicants claim that no relief is being sought against the Registrar, it is quite clear from a reading of the papers that the Registrar did take a decision not to register the applicants and that the quest for the order declaring that decision to be unlawful has a bearing on the Registrar's powers. Similarly, the quest for a mandamus compelling the first respondent to register the applicants encapsulated in the fourth prayer to the notice of motion can only be given effect to by the Registrar.
- [16] Worse still is the quest for WSU to register the applicants in terms of the applicable admission and registration policies which is not supportive of the applicants' case. Instead, the formulation of this prayer signifies acceptance by the applicants that there is nothing unlawful about the admission and registration policies of WSU. Had the policies been suffering from any form of illegality, it would have been available to the applicants to challenge such illegality by way of review or declarator. Unless and until the policies have been set aside, they remain valid and of force.[7]
- [17] This case is also not a complaint of students that have been discriminated against; the applicants are not contending that unequal treatment has been meted out to them because other students (80% of the student body) have been taken on and allowed to study without going through the requisite registration processes.
- [18] It is common cause that a decision was taken by the Registrar not to register the applicants. The applicants were not afforded the opportunity to make representations before that decision was made. Upon a benevolent reading of the notice of motion and the founding affidavit that decision is pertinently under attack in these proceedings, precisely because a decision which affected their rights or legitimate expectations was arrived at, so it is contended, without them having been invited to make representations.
- [19] The rights of the applicants can only be considered and revered within the context of the applicable policies in terms of which

students report for registration upon being notified by the Registrar in writing that they have been admitted to WSU - a decision hinging on, inter alia, whether WSU, regard being had to its quota system, is able to accommodate the students. At this level, the applicants have not shown any breach of a right. They have not demonstrated that the applicable policy was not followed in this case.

- [20] The applicants claim that, because more than 80% of the students had been registered without having first received admission letters and promises had been made that they would be eventually receive admission letters, they harboured a legitimate expectation that they would eventually be so registered.

[21] To ground a cause of action, the expectation relied on by a person founding a case on section 3 (1) of the PAJA, must be legitimate in the objective sense, the question being not whether the expectation exists in the mind of the litigant but, whether viewed objectively

such expectation is, in a legal sense, legitimate.[8] An expectation can also not be legitimate if it is unauthorised or flouts the law. [9] The applicants can simply not expect to be registered contrary to the established policies of WSU.

[22] The impugned decision can also not be said to have been irrational or in any manner unconstitutional as contended by the applicants. Nor has the decision been shown to offend the principal of legality.

[23] In all these circumstances, the application falls to be dismissed.

[24] I turn finally to the costs. I was referred to *Biowatch Trust v Registrar, Genetic Resources and Others*. [10] It remains to be seen whether the *Biowatch* principle is of application in the instant matter. As was the situation in *Niekora Harriellal v University of KwaZulu-Natal* [11], there are no constitutional issues that are implicated, the case being a mere review under the PAJA of the administrative decision by WSU not to register the applicants as students. Whilst even legality review is a constitutional issue, the applicants may not simply invoke the *Biowatch* principle without seeking to vindicate a constitutional right. [12] It has also been held that even the mere labelling of litigation as constitutional and dragging in specious references to sections of the Constitution would not be enough in itself; the issue must be genuine and substantial, and truly raise constitutional considerations

relevant to the application. [13] The instant matter does not pass muster. There is thus no reason why costs should not follow the result.

Order

[25] Accordingly, the application is dismissed with costs.

S M MBENENGE

ACTING DEPUTY JUDGE-PRESIDENT

HIGH COURT, MTHATHA

Applicants' counsel:

L Matoti

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Babe and Talapile Inc

Mthatha

First respondent's counsel: J L Hobbs

Instructed by:

Drake Flemmer and Orsmond

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C/O Fikile Ntayiya and Associates

Heard on:

29 June 2017

Delivered on:

11 July 2017

- [1] The Institutional Statute of Walter Sisulu University published in Government Gazette 37235 under Government Notice No. 13 of 17 January 2014 (the Statute)
- [2] Paragraph 1.5.2 of the 2017 prospectus
- [3] Act 3 of 2000 (the PAJA)
- [4] Section 3(4) (a) of the PAJA provides that if it is reasonable in the circumstances, an administrator may depart from a fair administrative procedure.
- [5] Section 3(2) (b) (ii)
- [6] Paragraph 7 in the citation part of the founding affidavit refers to “respondent” instead of “first respondent.” If no relief is being sought against the second respondent then surely reference to “respondent” in the said paragraph must have been intended to be to “first respondent.”
- [7] Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004
- (6) SA 222 (SCA).
- [8] President of the RSA v SARFU 2000(1) SA 1 (CC) para [216]
- [9] University of the Western Cape v MEC for Health and Social Services 1998
- (3) SA 124 (C) at 134 C-G; Gibbs v Minister of Justice & Constitutional Development [2009] 4 ALLSA 109 (SCA) para [26]
- [10] 2009 (6) SA 3232(CC).
- [11] (493-2016) [2017] ZASCA 25 (27 March 2017).
- [12] Justice Alliance of South Africa v Minister of Safety and Security and Another (CCT 02/13) [2013] ZASCA 12.

[13] Biowatch case (supra) para [25].

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Prepared on 12 October 2026 · Esheria