

SOUTH AFRICA / JUDGMENT

Selepe v University of Johannesburg (2022/638) [2022] ZAGPJHC 1062 (21 April 2022)

[2022] ZAGPJHC 1062

COURT

South Gauteng High Court, Johannesburg

BEFORE

Oosthuizen-Senekal CSP

CASE / FILE NUMBER

2022/638

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2022/638

In the matter of

LEBOHANG VINCENT SELEPE APPLICANT And UNIVERSITY OF JOHANNESBURG RESPONDENT

JUDGMENT- Urgent Application

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

[1] This is an application in terms of Rule 6(12)(b) of the Uniform Court Rules. On 11 April 2022 the applicant on an urgent basis issued Notice of Motion requesting the following:

1. Dispensing with the forms and service provided for in the Uniform Rules of Court and directing that the application be heard on an urgent basis in terms of the Uniform Rule of Court 6(12);
2. Directing the respondent to grant the applicant access to the respondent's campus facilities without further delay;
3. Declaring the respondent's Vaccination Policy unlawful and set aside until it complies with COVID-19 Testing Guidelines as published by the Department of Health and the Transitional Measures of the Disaster Management Act of 2002, as published in the Government Gazette 4195 of 4 April 2022;

4. Interdicting the respondent from deregistering the applicant based on its unlawful Vaccination Policy;
 5. Costs of the application.
- [2] The applicant in the matter appeared in person.

Background

of relevant facts

- [3] During 2020 the respondent (“the University- UJ”) formed the Covid 19 Co-ordinating Committee (“the CCC”) to:
- (i) co-ordinate the University's response to the pandemic;
 - (ii) conduct risk assessment and mitigation;
 - (iii) create awareness;
 - (iv) ensure business continuity;
 - (v) keep the University and its stakeholders informed; and
 - (vi) where applicable, to advise on decision-making.
- [4] The University enjoys a general power, sourced in contract and statute, to impose rules and policies that are binding on staff and students. In particular, the University is not only empowered, but also obliged to impose rules and policies to ensure the safety and well-being of staff and students.
- [5] Therefore, the University elected to introduce a policy in terms of which access to university premises was conditional on vaccination status. The University found it reasonable and justifiable to limit the rights of staff and students to bodily integrity and privacy by rendering access to university premises conditional on vaccination. The Vaccination Policy seeks to achieve such goals.
- [6] On 22 October 2021, the Vice-Chancellor (“VC”) notified all employees and students via email that the University has resolved to “develop a proposed UJ COVID-19 vaccination plan to ensure that students have optimal access to learning, research, laboratory and clinical work”.
- [7] On 29 October 2021, the VC sent out further email informing students and staff that the university is still in the process of developing the plan, and that the University is consulting with “other universities and Higher Health, the representative body for this sector on matters related to health”.
- [8] On 25 November 2021 the University approved the mandatory vaccination policy. The vaccination policy was duly communicated to students and employees.

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- [9] On 26 November 2021, the VC communicated that the outcome of the consultations were to “make UJ a mandatory vaccination site”. This was duly communicated to all prospective students prior to registration.
- [10] On 1 December 2021, the UJ council adopted the mandatory COVID-19 vaccination policy to access campuses and facilities.
- [11] On 11 January 2022, UJ again notified students and employees that the policy had been adopted and that it would be implemented in a phased approach.
- [12] On 21 January 2022, the vaccination timelines for both staff and students were sent out.
- [13] On 28 January 2022, a reminder of the said timelines for vaccination was forwarded to all relevant parties.
- [14] The said mandatory vaccination policy renders access to the University conditional on full vaccination and provides exemptions for students and employees that hold religious or philosophical beliefs where non-vaccination is central and for whom vaccinations are medically contraindicated. The exemption period was extended at the end of March 2022 and students and employees are able to apply for exemptions even to date.
- [15] The applicant sought to be registered for BA in Industrial Design at UJ, but since he was unable to pay the stipulated fees by the due date, he was prevented from registering. Court proceedings were instituted ordering by him to direct the University to register the applicant for studies. Prior to finalization of the legal process the parties reached a settlement and the applicant was allowed to register, subject to various conditions. The applicant registered for studies at UJ on 14 March 2022.
- [16] On 30 March 2022, the applicant directed a letter of demand to UJ, in terms of which he demanded that he be permitted to apply for an exemption as stipulated in the Mandatory Vaccination Policy.
- [17] On 1 April 2022, UJ's legal representatives advised him that he could make his submissions for an exemption directly to the UJ General Council, who would facilitate the application after being delivered to the Exemptions Committee for determination.
- [18] On 1 April 2022, the VC announced that the time frames to comply with the Mandatory Vaccination Policy and Implementation Protocol would be extended until the University opened on 11 April 2022.
- [19] On 8 April 2022, the VC announced that the grace period in which to be either vaccinated or secure an exemption had been extended until further notice. This decision was informed by, amongst other factors, the lifting of the National State of Disaster.
- [20] On 12 April 2022, the applicant launched this urgent application seeking to set aside the University's vaccine policy and protocol.

Submissions

by the applicant- Urgency

- [21] The applicant argued that the matter was urgent in nature in order to deter the undue and continued prejudice by the University on the applicant's access to education. He was of the view that should the situation be left unabated, he will not be able to continue with his studies for the academic year.
- [22] Furthermore, it will become increasingly difficult, with the denial of access, for the applicant to catchup with academic work/lectures done prior to his registration on 14 March 2022. The applicant contended that the University will unfairly use its ill-founded policy to shut the door on students and employees from studying and working at the university, who refuse to be vaccinated for whatever reason.
- [23] The applicant argued that the University's conduct of unduly denying him access to campus facilities, creates mental health issues for him due to his inability to attend classes.
- [24] It was contended by the applicant that the Mandatory Vaccination Policy is in contradiction to the Guidelines issued by the Department of Health during October 2020, which governs testing of COVID-19 cases in both private and government centres. The Guidelines excluded the testing of asymptomatic persons and therefore the University's vaccination policy is not in line with the Department of Health's guidelines on testing. According to the applicant he is asymptomatic.
- [25] The applicant further argued that on 5 April 2022 President Ramaphosa lifted the state of disaster and subsequently the amendments to the mandatory protocols and gatherings regulations were published, which the University is not adhering to in persisting with its Mandatory Vaccination Policy.
- [26] The applicant specifically made mention of Regulation 69(2)(b) which allows gatherings of persons, including unvaccinated or those not in possession of a valid certificate of a negative test, to a maximum of 1000 persons indoors or 2000 outdoors. In contravention of the said regulations the University is not allowing the applicant to attend lectures in a studio set up and attended by less than 40 students. He submits this is unreasonable.
- [27] The applicant contended that the University is unreasonable in denying entry to unvaccinated persons, because being vaccinated, does not preclude a person from spreading COVID 19.
- [28] The applicant asserts that the University's preoccupation with its misplaced vaccination statistical targets is also unreasonable and vexatious. The Minister of Health and the President, have set the national vaccination target at 70% for the population of the country in order to achieve group immunity, and the University has already exceeded the targets as 97% employees, 91% undergraduate students and 67% post graduate students are vaccinated throughout its campuses. Therefore, group immunity is achieved by the University and

therefore there is no need to implement the Mandatory Vaccination Policy.

[29] The applicant contended that he made out a case for the relief requested and it be granted on an urgent basis.

Submissions

by the respondent- Urgency

[30] Counsel for the respondent argued that the urgency in the application by the applicant was self-created, because the applicant was aware of the UJ Mandatory Vaccination Policy since his registration at UJ on 7 March

2022. Furthermore, the policy was communicated to prospective students as far back as November 2021.

[31] The respondent further contended that the compliance for exemption for mandatory vaccination was also extended on 8 April 2022 and further until further notice. Notwithstanding the extension for exemption the applicant chose not to proceed with complying with the process of obtaining exemption and instead instituted these urgent legal proceedings.

[32] Counsel for respondent argued that the need for this application and the sole urgency of the application is associated with the actions of the applicant. The urgency relates to the applicant's desire to seek access to the UJ campuses to advance his studies.

[33] However, the applicant has various options available to him, that would allow him access, which he simply ignored. These include:

1. being vaccinated;
2. making application for exemption from vaccination; and
3. securing a negative Covid test before seeking access to the UJ facilities.

[34] It was submitted by the respondent that the prejudice that the applicant alleges he will and has suffered is accordingly entirely of his own making. In particular, the applicant registered and enrolled as a student after UJ adopted the vaccination policy and furthermore, he did not seek to challenge the vaccination policy when it was adopted and announced in December 2021. Lastly, when the applicant was registered as a student in March 2022, he did not seek exemption, and as such he did not launch a challenge against the vaccination policy. He waited nearly a month before launching this application.

[35] Counsel stated that the applicant has still not applied for an exemption in accordance with the policy, despite the fact that during March 2022, he was referred to Mr Dries Pretorius to submit his exemption application, which was not done.

[36] The respondent submitted that the applicant seeks relief that is not possible in the circumstances. The applicant seeks relief that suits him without consideration of the obligations that the University owes to the greater good of the public, students and employees at UJ. Therefore, the respondent submitted that the application to be dismissed due to lack of urgency.

Case law and evaluation

[37] Rule 6(12)(b) of the Uniform Court Rules requires applicants, in all affidavits filed in support of urgent applications, to “set forth explicitly”:

1. the circumstances which render the matter urgent; and
2. the reasons why they claim that they cannot be afforded substantial redress at a hearing in due course.

[38] In *Luna Meubelvervaardigers (Edms) Bpk v Makin* 1977 (4) SA 135 (W) Coetzee J held that mere lip service to the requirements of Rule 6(12)(b) is insufficient and that an applicant must make out a case in the founding affidavit to justify the extent of the departure from the normal procedure.

[39] Even if the applicant can show that there is, on its founding papers, an urgent need for the court’s intervention (which is not the case here, as shown below), that is not the end of the enquiry. A delay in bringing the application, or self- created urgency, is a basis for a court to refuse to hear a matter on an urgent basis.

[40] It is common cause that the applicant prior to registration on 7 March 2022 was aware of the UJ Mandatory Vaccination Policy. This was communicated by the University to its prospective student and employees during December 2021. On 21 January 2022 a further notification was sent out to all affected persons, stating that the policy was adopted. On 28 January 2022, a reminder was also sent out regarding the timelines set to adhere to the policy.

[41] It is further common cause that the applicant was aware and informed of the vaccination policy, at the time he was denied access to the campus prior to 15 March 2022. The applicant stated in his founding affidavit, that on 15 March 2022, he met with his HoD at the campus, regarding measures, in order for him to catchup with his workload. During this meeting the Vaccination Policy of the University was discussed, as he wanted to submit an exemption application as required by the University.

[42] Following the discussions a letter was sent to the University regarding exemption. The respondent referred the applicant to the Exemptions Committee for determination of the request. This referral was dated 1 April

2022. Since then the applicant did not attempt to resolve the matter internally.

- [43] Of importance is that the respondent extended the grace period for application for exemption on 8 April 2022 and until further notice. Notwithstanding the extension, the applicant decided not to address and refer the issue to the University's Exemptions Committee, but rather institute legal proceedings. It is evident that the applicant is able to obtain substantial redress by utilizing the University's internal procedure relating to exemption applications contained in the Mandatory Vaccination Policy of the University.
- [44] The University is not denying the applicant access to the campus, the applicant can access the campus provided that he has proof of vaccination, or that he has applied for an exemption or that he provide a negative PCR test. The applicant is refusing to adhere to a policy issued by the Council and Senate of the University. Prior to enrolment at the University the applicant was fully aware of the Vaccination Policy, and as such accepted the terms of access in that regard.
- [45] Furthermore, I am of the view that the urgency, if such exists in the matter, is clearly self-created. The applicant was registered at the University on 14 March 2022, he waited nearly a month to approach this court on an urgent basis. Even leaving aside the delay of a month in launching the application- which in of itself is a fatal and an example of self-created urgency- the applicant placed the respondent under severe pressure to file an answering affidavit. This is unacceptable and the applicant is abusing the Court's process and the rules on urgency. If the application was bona fide, the applicant would have exhausted all internal remedies provided for before approaching the court on an urgent basis.
- [46] On the reasons stated above I am of the view that the application is not urgent.

Costs

- [47] The University argued that a cost order should be made in the matter. The basic principles governing granting of cost orders in civil litigation is that the judicial officer has the discretion in granting same, but that costs should generally follow the result.
- [48] The applicant had a number of options available at no cost to himself and failed or refused to utilise them. I bear in mind that the respondent has to utilise its limited financial resources and time to deal with a student who refuses to pursue internal remedies and to do so on an extremely urgent basis. The applicant has adopted an obdurate attitude knowing that unnecessary expenditure by the respondent prejudices not only the students but the University's budget and its programmes.

Order

- [49] In the premises of the above I make the following order:

1. The application is dismissed for want of urgency.
2. The applicant is order to pay the cost of the application on a party and party scale.

CSP OOSTHUIZEN-SENEKAL

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the applicant: Mr. Lebohang Vincent Selepe

Appearing in person

For the respondent: Adv. M Dafele

Instructed by Lawtons Africa

DATE OF THE HEARING: 20 APRIL 2022

DATE OF THE JUDGMENT: 21 APRIL 2022

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