

SOUTH AFRICA / JUDGMENT

Manaka v University of the Witwaterstrand (021837/2023) [2023] ZAGPJHC 252 (22 March 2023)

[2023] ZAGPJHC 252

COURT

South Gauteng High Court, Johannesburg

BEFORE

L R Adams

CASE / FILE NUMBER

021837/2023

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT
OF SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG
CASE
NO: 021837/2023

DATE:

22nd March
2023
NOT REPORTABLE
NOT OF INTEREST TO
OTHER JUDGES
REVISED
22.03.23

In the matter between:

MANAKA,
KOKETSO MONOBE
Applicant
and
THE
UNIVERSITY OF THE WITWATERSRAND
Respondent

Coram:

Adams J

Heard: 16

March 2023

Delivered: 22

March 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 11:30 on 22 March 2023.

Summary: Urgent

application – University exercising statutory power – readmission and re-registration of student – application by

student for interim mandatory interdict against University – to compel University to re-register excluded student pending review –

Courts to be wary of restraining exercise of administrative statutory power – requirements for interim

interdict – prima

facie right to be demonstrated –

Uniform

Rule of Court 6 (12) – the applicant should set forth

explicitly the reasons why the matter is urgent – application

should be brought expeditiously – self-created urgent

non-suits applicant – application struck from the roll for lack of urgency.

ORDER

(1)

The applicant's urgent application be

and is hereby struck from the roll for lack of urgency.

(2)

The applicant shall pay the respondent's

costs of the urgent application, such costs to include the costs consequent upon

the utilisation of two Counsel, where so employed.

JUDGMENT

Adams J:

[1]. This is an opposed urgent application by the applicant (Mr Manaka) for interim interdictory relief against the respondent (Wits).

[2]. Pending the determination of the final relief sought in part B of the notice of motion, Mr Manaka seeks an order, on an urgent basis, directing Wits to forthwith allow him to re-register for the third year of the Bachelor of Medicine and Bachelor of Surgery Degree (MBBCh III) in the 2023 academic year. MBBCh III is also referred to as the GEMP 1, which is an acronym of the first year of the Graduate Entry Medical Programme. Mr Manaka also applies for an order permitting him to do everything consequential to the first order as if he was not excluded and/or refused re-

registration in the first place. In that regard, the order sought by Mr Manaka would have the effect of exempting him from attending all the compulsory lectures, case study sessions, excursions, clinical skills pathology lab sessions, learning skills sessions and PD themes sessions that he missed and/or failed to attend during the 2023 academic year thus far as a result of his exclusion and/or the decision not to allow him to re-register for MBChB III at the start of the 2023 academic year.

[3]. Furthermore, if granted the mandatory interdictory relief sought by him on an interim basis, Mr Manaka would be credited with the case study sessions, excursions, clinical skills sessions, pathology lab sessions, learning skills sessions and the PD themes sessions as if he attended those and satisfied all the requirements in respect of the compulsory sessions that he missed.

[4]. In sum, what Mr Manaka seeks on an interim basis, is an order allowing him to repeat MBChB III and to continue as if he had successfully completed that part of the course for the 2023 academic year, which has already been completed.

[5]. In part B, which is a judicial review application, the applicant applies for an order reviewing and setting aside the decision of Wits to refuse him permission to renew his registration for MBChB III for the 2023 academic year and, consequently, for an order directing the University to permit him to re-register for MBChB III for the 2023 academic year. Mr Manaka also applies, in part B, for an order declaring unlawful, irrational and invalid certain rules and procedures of Wits, relating to the Renewal and/or the Refusal of Registration of Students ('the WRC handbook'), notably the rule which provides that the decision of the so called Wits Readmission Committee 2 ('the WRC-2') is final.

[6]. In the alternative, Mr Manaka applies, also in part B, for an order reviewing and setting aside the decision of the Dean of the Faculty of Health Sciences to refuse him permission to register for another degree in the said faculty for the 2023 academic year. Ancillary relief is also sought by the applicant, such as for an order directing Wits to permit him to register for any degree or diploma or certificate of his choice within the Faculty of Health Sciences for the 2023 academic year. The application for the alternative relief has been rendered somewhat academic in that Wits – in a written 'with prejudice' communiqué dated 13 March 2023 addressed to the applicant's attorneys – accepted that they had erred in refusing him permission to enrol for another degree of study in the Faculty of Health Sciences. The applicant was therefore offered an opportunity to register for the degree of Bachelor of Health Sciences (BHS): Biomedical Sciences for the 2023 academic year. In any event, this application for alternative relief is not an issue before me and I need not concern myself with that aspect of the matter any further.

[7]. Wits opposes the urgent application on the grounds that the application is not urgent, as well as on the basis that the applicant has not made out a case for the interim interdictory relief. In that regard, it is the case of Wits that the applicant's application does not meet the jurisdictional requirements for the granting of the said relief. So for example, it is contended by Wits that the applicant has failed to demonstrate that he has a *prima facie* right which is required to be protected by the interim interdict.

[8]. The issue to be decided in this urgent application is therefore simply whether Mr Manaka has made out a case for the interim interdictory relief. Importantly, the question to be considered by this Court is whether Mr Manaka has a prima facie right which should be protected by an interim mandatory interdict. That issue is to be decided against the factual backdrop of the matter as per the facts set out in the paragraphs which follow.

[9]. Until the end of the 2022 academic year and since 2020, Mr Manaka was registered as a student in the Faculty of Health Sciences at Wits University, reading for the MBBCh degree. In 2020, he passed his first year of study towards the said degree, with final marks above 65% in all of the programs and courses for that year. He therefore excelled in his first year of the MBBCh and passed well. The second year of study (MBBCh II) during 2021 did however not go so well for Mr Manaka, who managed a final pass mark for only one of the four programs or courses for that year, that being 67% for Medical Thought and Practice II. He failed the balance of the courses with the following final marks: Human Anatomy – 45%; Molecular Medicine – 45%; and 40% for Physiology and Medical Biochemistry I. This meant that he was required to sit for supplementary examinations in all of these courses, which he passed, whereafter he was permitted to proceed to the third year of study towards the MBBCh degree during the 2022 academic year.

[10]. It is the MBBCh III which is the subject of applicant's complaint in this urgent application. That year of study is divided into three components, namely: (a) The theory component; (b) The practical component, and (c) The assignments component.

[11]. The theory component, which Mr Manaka failed at the end of the 2023 academic year, consist of six so-called tracks; examinations and three end of year examinations (EYE's). In order to pass the year, the applicant was required to achieve: (a) A weighted average of 60% or above in the Theory Component and a 'subminimum' of 50% or above in each track of the six Tracks;

(b) A Practical Year mark of 60% - the applicant attained 73%; and (c) A total Assignment Mark of at least 50%, which the applicant far exceeded by achieving 73%.

[12]. Mr Manaka's difficulty and the reason for his failing were to be found in the fact that, in the Theory Component of the MBBCh III, he scored an overall 'weighted average Theory Mark' of 56.09% and therefore did not meet the 60% minimum required to pass the year. Also, he fell short of the 'subminimum' requirement of the 50% final mark for any and all of the six tracks in that he scored 48% in respect of the 'Clinical Sciences – Internal Medicines, Paediatrics, Obstetrics and Gynaecology, and Surgery', although he did meet the subminimum requirement in respect of the other five Tracks as follows:

- (a) Basic Sciences – Anatomy and Physiology (64%); (b) Microbiology – Virology, Bacteriology, Mycology and Parasitology (52%); (c) Pathology – Anatomical, Chemical, Haematological, Genetics and Immunology (60%);
- (d) Pharmacology (50%); and (e) Themes – Clinical Skills, Community Health; Public Health; PD Theme; Family Medicine; Evidence-based Medicine Biostatistics; and Bioethics (63%).

[13]. In sum, Mr Manaka failed MBBCh III because he failed the Theory Component in that he attained a weighted average of 56.01% and not the minimum required average of 60%, in addition to failing the Tracks in that he scored a final mark below the subminimum of 50% in one of those Tracks. Mr Manaka received his results on 19 December 2022 and on the same day he was advised that he had failed the year 'due to failure in Theory and failure in Tracks'. The missive addressed to him by the University on that date read, in the relevant part, as follows: -

'I regret to inform you that as you have failed to fulfil the minimum requirements of study specified in the Faculty's Rules Book, you are at risk of being refused permission by the Wits Readmissions Committee (WRC) to renew your registration for the degree of Bachelor of Medicine and Bachelor of Surgery in 2023.

If you wish to renew your registration and if there is any information or reason which, in your opinion, could be relevant to the WRC decision, you may set it out on the online form available at <https://self-service.wits.ac.za> > Navigator > Self-Service > Application for WRC. Save with the permission of the Dean, which will be granted in exceptional

circumstances only, the form must be completed by yourself. Where possible you should supply information from independent and objective

sources, for instance, certificates from medical practitioners.

Please use the University Health Form to capture any medical information. This may be found on the website www.wits.ac.za/students/examsresults.

Your reasons and information (if any) must reach the Faculty Registrar not later than 06 January 2023. The WRC-1 will consider the reasons and information submitted by you and make a decision. Unless you specifically request otherwise, a student representative may be present at the Committee meeting as one of its members. If you make no representations to WRC-1, your case will be given no further consideration. Please keep a copy of the form you complete (as well as any documents you submit with it), because the University cannot supply you with one after you have handed it in.

In view of the possibility that you may be refused permission to renew your registration for the degree, you are strongly advised to consider applying immediately to another university or to another educational institution, if you wish to proceed further with your education. Do not wait for the outcome of these proceedings before planning your future.

The outcome of the WRC-1 deliberations will be known on 13 January 2023. You will be able to view the outcome of the ERC-1 deliberations on the self-service portal and an email setting out the reasons will be sent to you. In the event of an unfavourable decision, you will be invited to appear before the Wits Readmissions Committee-2 (WRC-2) to present your case personally. If you do not attend the hearing on the date supplied by the faculty, the original decision from the WRC-1 will hold. The Faculty Office will communicate the WRC decisions to you in writing after your case has been considered (refer to the dates and timelines at <https://www.wits.ac.za/students/exams/results/>).

[14]. I have cited the full contents of the said communiqué for the simple reason that it sets the tone for the procedures subsequently followed by the parties in dealing with the applicant's application for re-registration for the MBBCh III. It also spells out in clear and unequivocal terms the applicable processes and procedures to be followed by Mr Manaka in the event of him seeking re-admission to the Faculty. I interpose here to note that Mr Manaka denies that he received the said communication. I find this hard to believe especially if regard is had to the fact that he seemed to have followed – to the letter – the directions given by the Faculty in the said letter. So, for example, he submitted on or about 2 January 2023 a '2022-2023 Wits Readmissions Application Form', in which he motivated and provided a fair amount of detail as to why, in his opinion, he should be readmitted to the MBBCh III programme in 2023. Moreover, on 5 January 2023 he addressed to the 'Wits Re-Admission Committee' what he termed an 'appeal letter', in which he sets out in even more detail his motivation for and the reasons why he believed that he should be given an opportunity to repeat the third year of study towards the MBBCh degree. The point is that it appears to me that Mr Manaka seemingly knew exactly that he needed to provide his reasons and the information relevant to the WRC decision relating to his readmission by the 6 January 2023, as directed in the letter from the Faculty dated 19 December 2022. It is the therefore unlikely that he did not receive that communication.

[15]. In any event, whether or not he in fact received the letter is immaterial. He followed the processes and procedures outlined therein in order to be re-enrolled to the MBBCh III, and, in my view, the events which subsequently occurred would not have been any different whether or not he received the letter. Mr Manaka's reasons for his failure, as set out in the aforementioned pieces of correspondence

related in the main to personal circumstances and the fact that during January 2022 his family had the unveiling of a tombstone for his late grandmother, who passed away during 2014. This, he stated, had a profound effect on his academic performance during the 2022 academic year, which resulted in him failing the year.

[16]. In the application form, in response to a request that he briefly lists and detail 'the factors that contributed to his failure (e g ill-health, financial difficulties, accommodation problems, family problems, etc)', Mr Manaka stated thus:

'I suspect that I had emotional distress which I think came about when I attended my maternal grandmother's tombstone unveiling. She was a patient with many diseases, including Asthma, Diabetes, High Blood and Heart disease. She eventually passed on due to heart failure and my aunt had to wait for more than 30 minutes for the paramedics to arrive. This made all of us believe that she could have survived had the paramedics arrived on time. Seeing her suffer through her illnesses and diseases is the main reason I chose to study medicine. I guess going to the unveiling ceremony as a third year medical student put me in an emotional upheaval, because I knew I was almost halfway through my journey of becoming a doctor. As part of my healing process, I job shadowed Dr Mpe at the Heart Hospital from the week of my grandmother's birthday week and 2 weeks thereafter. I suppose that accounts for the improvement in my subsequent marks.'

- (2) Loadshedding and the power cuts, which lasted for more than 3 consecutive days added to the difficulty of online learning and effective studying.’

[17]. This response by Mr Manaka is a summary of the reasons why he believes that he did not pass MBCh III. Those are the reasons he gave to the faculty and to the WRC-1 at the beginning of January 2023 and they are the reasons given by him for his failure in this application. As will be elaborated upon later, this explanation was not accepted by Wits as a good enough reason for his not passing third year.

[18]. Also, in response to the request in the application form that he explains why his problems would not affect his later years of study if he was permitted to renew his registration, Mr Manaka responds as follows: -

‘(1) In the future, I have learnt that if I encounter some emotional distress, I should accept and seek help timeously. I obtained 73% for my assignments; met and exceeded the Satisfactory Performance (SF) requirements; was exempted from Part 2 of the OSCE; obtained only 1 Track mark below 50% but above 47%; managed to obtain an average of 60% for the EYE’s and my overall year mark was 64%. I missed the theory component by 3.09% (sic) and believe that should I be afforded a second opportunity, I can make up and exceed the minimum requirement to progress to the following year. Moreover, I intend to engage more in study groups, get a tutor or external help (if necessary) and find more job shadowing opportunities to get practical and real-life exposure to the content. I hope that I would be allowed re-admission to prove that I indeed know my GEMP 1 theory content and that, barring my challenges, I can excel beyond that standard of competency and plead that I will be afforded a second chance. For detailed motivation, please see attached letter. (2) With regard to load-shedding and the power cuts, my parents are working towards getting a backup to minimise the inconveniences.’

[19]. In his letter dated 5 January 2023, which was attached to the application form, Mr Manaka elaborates on and reiterates and elaborates on his aforementioned reasons and motivation for why his application should be favourably considered. He, in that communiqué, was also at pains to point out that, in his view, he had failed the year by a ‘narrow margin’ – 3.91% short on the weighted average final mark for the Theory component and a failure by a mere 2% in only one of the six Tracks. Moreover, so he pointed out, he achieved an overall year end average of 64%.

[20]. It is common cause between the parties that, according to the Wits’ Student Handbook, Mr Manaka had failed MBCh III. Mr Manaka accepts this. However, so he contends, that is not the criteria to be applied when considering whether he ought to be permitted to re-register for MBCh III for the 2023 academic. Such an application, so Mr Manaka argues, should be decided on its own merits, taking into account such considerations and factors highlighted by him in his readmission application, such as the fact that he failed by a ‘narrow margin’.

[21]. In any event, in terms of Rule 2.1 of the Wits’ Readmission Committee (WRC) Handbook, ‘[a] student who fails to meet the minimum requirements of study will not be permitted to renew her/his registration for the same degree, diploma and certificate during the following academic year unless granted permission to do so by the relevant Faculty’s Board of Examiners (BOE) or the

WRC'. Rule 2.2 provides that a student who has failed to meet the minimum requirements of study and who has not been granted permission by the relevant Board of Examiners Committee to renew her/his registration will be informed that s/he will not be permitted to renew her/his registration for the same degree, diploma or certificate unless s/he has made successful representations to the relevant WRC.

[22]. Having followed the procedure prescribed by the WRC Handbook, as alluded to supra, the applicant was informed on 13 January 2023, that his application for re-registration had been unsuccessful. It may be apposite to cite in full the contents of the communication of 13 January 2023 from the Faculty, as it conveys the decision which is the subject of this application and which decision is impugned in these proceedings. It reads in the relevant parts as follows: -

'Dear Mr Koketso Manaka,

The Wits Readmissions Committee-1 (WRC-1) has noted that you failed to meet the minimum requirements of study. It has considered carefully the circumstances surrounding your failure and regrets to inform you that it has decided to refuse permission for you to renew your registration for the degree of Bachelor of Medicine and Bachelor of Surgery, Year of Study 3 in 2023, for the following

reasons:

You have failed five of the six block examinations and one of the three end of year examinations. In addition, you have failed five of the six tracks, with one of these being under the subminimum.

You have not provided any supporting documentation to substantiate any of the reasons that you have given for failure. You have mentioned the loss of your grandmother, but you have not provided any timelines of events in relation to your actual studies.

You are invited to attend a hearing by the Wits Readmissions Committee-2 (WRC-2) on the date specified by the Faculty. Please check the dates on the internet or the faculty noticeboard and confirm your attendance with your Faculty Registrar. If you fail to attend the hearing the original decision of the WRC-1 will hold.

The SRC has indicated that it is willing to assist students and to represent them at the WRC-2 when they make oral presentations.

You should contact the Faculty Office two days after the WRC-2 considers your case to hear the decision.

Yours sincerely,'

[23]. This, as I have already indicated, is the impugned decision which the applicant seeks to have reviewed and set aside in Part B of this application. For starters, the applicant contends that the decision was based on patently incorrect facts, which, according to him, is fatal to the WRC-1's decision to refuse him permission to re-register, as was the decision by the WRC-2, so the applicant submits, to uphold the impugned decision. Mr Manaka sets great store on the fact that

Wits, in making the impugned decision accepted as a fact that he had failed five of the six Tracks, when, in fact and in truth, he had passed five and only failed the one, being Clinical Sciences. Wits' decision to exclude him, so Mr Manaka submits, was clouded by the misapprehension that he had failed five of six Tracks and therefore, (according to their Policy), he demonstrated 'knowledge gaps' in almost all of the critical subject areas.

[24]. Therefore, so the argument continues, Wits failed to consider the merits and demerits of the reasons why the applicant failed to meet the minimum requirements in the Theory component. Had it considered the correct facts and policies and applied its mind to all the facts including the fact that the applicant narrowly failed to meet the minimum requirements to proceed to the fourth year of study, Wits would have arrived at a different decision. This, so the submission is concluded, renders the decision irrational, unreasonable and unlawful and liable to be reviewed and set aside – it was influenced by incorrect facts and rules / principles, and it had reached a decision which in the result could not reasonably have been made by a court properly applying itself to all the relevant facts and principles.

[25]. With that background in mind, I now proceed to deal with whether the applicant has made out a case for the interim interdictory relief. And the very first issue to be considered is whether the applicant has demonstrated that he has a prima facie right which needs to be protected by an interim mandamus. In that regard, it is trite that the test set out in *Setlogelo* requires that an applicant that claims an interim interdict must establish (a) a prima facie right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict; and (d) the applicant must have no other remedy.

[26]. As indicated above, in terms of the Rule 2.1 of the WITS Procedures Relating to the Renewal or Refusal of Students ('the WRC

handbook'), a student who fails to meet the minimum requirements of study will not be permitted to renew their registration for the same degree during the following academic year unless granted permission to do so by the relevant Faculty's Board of Examiners or the WRC. This rule is pursuant to s 37(4)(d) of the Higher Education Act[1], which grants unto a University a discretion to refuse re-admission to a student who fails to satisfy the minimum requirements it has determined for re-admission.

[27]. The right which the applicant asserts in support of his application for interim relief is the right to an administrative decision which is lawful, rational and reasonable. That right, so the applicant contends, was violated by the impugned decision by Wits' WRC-1 on 13 January 2023, which, so the applicant contends, was based on patently incorrect facts.

[28]. Mr Motau SC, who appeared on behalf of Wits together with Mr Edwards, contended that the factual error complained of by the applicant is not of a material nature and therefore cannot and should not, by and of itself, predicate a review and setting aside of the decision. The main reason for the WRC-1's refusal to permit the applicant to re-register for the MBBCh III, so the contention goes, was the fact that the applicant failed the year in that his weighted average final mark for the

Theory Component was just under 4% short of the required minimum pass rate, coupled with the fact that he had not attained the subminimum of 50% in one of the Study Groupings / Tracks for the year. Other considerations included the fact that, of the six Block Assessments for the study year, the applicant had failed five of those in that he did not attain 60% in those five block examinations.

[29]. I find myself in agreement with these submissions. I do not believe that it can be said with any conviction that the WRC-1 made an irrational or an unreasonable decision and that is so even if one is to accept that they made an error by asserting that five of the six Tracks were not passed by the applicant. In their final letter dated 28 February 2023 – from the Chief of Staff & Director: Legal Services – Wits explains in detail the thinking behind the decision by WRC-1, as confirmed by WRC-2.

[30]. The University explains that, according to their Rules and Syllabuses for Degrees and Diplomas in the Faculty of Health Sciences offered in the 2022 Academic Year ('the Faculty Rules'), the University has the power to refuse the readmission of a student who fails to satisfy the minimum requirements of study. Faculty Rule 7.1.3.5(d)(ii) states that a student must pass '[a]ll courses and complete all other requirements that may be made in the rules pertaining to these years of study'. It follows, so the explanation is proceeded with, that any student that fails to meet the minimum requirements of a degree programme does not have an automatic right to renew their registration, and may be academically excluded for a period of at least one academic year.

[31]. Wits also points out that during the 2022 academic year, the applicant failed several block assessments, tracks and an end of year exam. It was also emphasised that, contrary to his assertion otherwise, the applicant did not meet the minimum requirements needed to progress to the next year of the MBBCh on a number of fronts. Importantly, Wits reiterated that one of the considerations in deciding to exclude the applicant from MBBCh III was the fact that it is clear from his academic record that over the 2021 and 2022 academic years, his performance had been poor. Moreover, it was pointed out to the applicant that his explanation for his poor performance was wholly inadequate and did not amount to 'exceptional circumstances' as justification for his poor academic results. Exceptional circumstances are defined in section 5 of 'the Standing Orders for the Granting of Supplementary Examinations, Re-Examination and for the Renewal of Registration' ("the Standing Orders") as 'circumstances which self-evidently have a debilitating effect on the student's capacity to study and which have been brought to the attention of members of staff or Faculty, prior to the final examination session of the particular year of study'.

[32]. From the foregoing, it is therefore, in my view, clear that the impugned decision was made on reasonable and rational grounds and it cannot possibly be suggested that such a decision was unlawful. As correctly contended by the University, as an institution of Higher Learning, there is an obligation on it to maintain its academic standards and to apply its Rules consistently.

[33]. All of the foregoing translate into a failure on the part of the applicant to establish a prima facie right. It seems to me that there is very little prospect, if any, of Mr Manaka persuading the Review Court that his right to a fair and reasonable administrative decision had been infringed. Whilst he has a right to apply for re-admission to the MBBCh III in 2023, that right was subject to the University and Faculty Rules. To establish a prima facie right for purposes of requiring Wits, in the interim, to readmit him, he must show this Court that he could succeed in Part B in reviewing and setting aside the impugned decision on the basis that it was unreasonable and irrational. For the reasons already alluded to, I am not persuaded that he has prospects of success in that regard.

[34]. For this reason alone, the application for interim relief should fail.

[35]. There are further reasons why the relief should not be granted and those related to the further general requirements for interim relief, referred to supra and which are well known, namely: a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; the balance of convenience must favour the grant of the interdict; and the applicant must have no other remedy.

[36]. Unless these requirements are satisfied, this Court is not entitled to grant the interdict sought. Even where they are satisfied, it must be borne in mind that the granting of an interim interdict is 'an extraordinary remedy within the discretion of the Court'[2].

[37]. Moreover, and, as was held in *National Treasury v Opposition to Urban Tolling Alliance*[3] (OUTA), '[a] court must also be alive to and carefully consider whether the temporary restraining order would unduly trespass upon the sole terrain of other branches of Government even before the final determination of the review grounds. A court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review. This approach accords well with the comity the courts owe to other branches of Government, provided they act lawfully'. (Emphasis added).

[38]. The point is, as held in OUTA, that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of an applicant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm.

[39]. As regards a reasonable apprehension of harm and the existence of a suitable alternative remedy, it is so, as contended by Wits, that the applicant has available to him two suitable – and indeed prudent – alternative remedies, namely: (a) to reapply for admission to MBBCh III in 2024; or (b) to apply for admission to a BHSc degree programme, including the BHSc (Biomedical Sciences,

majoring in Pharmacology and Molecular Medicine) in the 2023 academic year, which was offered to the applicant by Wits, as alluded to above. This therefore is another reason why the interim relief sought by the applicant should be refused.

[40]. As for the requirement relating to the Balance of Convenience, I agree with the submission made on behalf of Wits that the refusal of the interim relief will not cause the applicant to suffer any real prejudice. On the contrary, prejudice may be occasioned to the applicant if the interim relief is granted because both Wits (and its Institutional integrity) and the applicant, will be prejudiced if the applicant is allowed to re-register midstream the academic year. It stands to reason that the applicant, who would have missed out on the most part of a whole term, would be severely disadvantaged as against the other third year students, who would have done and completed the course work of the first term. What is more is that the applicant would probably be under even more pressure than in 2022 and risks performing even more poorly and not being allowed to register for the programme with Wits again in future. If minimum standards are not adhered to, the academic integrity and reputation of the institution will be undermined

[41]. Also, if the interim order is granted, it would be a setback for institutional freedom at tertiary level in South Africa. It may very well result in a flood of similar applications by students who have failed to pass their exams, making attempts to 'pass by litigation' commonplace. As was held by this Court (per Keightley J) in the unreported judgment of *Phaahla v The University of the Witwatersrand and 4 Others*[4]: -

'[67] What this demonstrates is that through the mechanism of an interim interdict, Ms Phaahla implicitly seeks a further deviation from the Faculty rules: she wants this court to order that she be allowed to repeat MBChB not in the following year, but over the following two years. This is in addition to Ms Phaahla wanting the court to override the University's application of its rules which, at this stage, has not been declared to be unlawful. This represents a request for a substantial interference with the University's autonomy to regulate its own admissions procedure.

[68] It is of importance not only to the University, but in the public interest, that it be permitted to regulate its affairs. The public ought to have confidence in the integrity of degrees awarded by the University. Unjustified interference in how the University governs the award of its degrees, including its regulation of students' progress towards attaining degrees, erodes public confidence in the institution and in the professionals it produces. In my view, a strong case would have to be made out to warrant such interference in a case like the present. For the reasons set out earlier, I am not persuaded that Ms Phaahla has met this mark.'

[42]. For these reasons, I am of the view that the Balance of Convenience mitigates against the granting of the interim interdict.

[43]. Moreover, and in the circumstances, I am of the view that the applicant has failed to make out a case for interim interdictory relief. The requirements for such relief, notably a demonstration that the applicant has a *prima facie* right requiring protection by an interim interdict, have not been proven by the applicant. The urgent application should therefore fail.

[44]. There is, in my view, another reason why the applicant's application should not succeed and that relates to urgency.

[45]. The salient facts in the matter which are relevant to the issue of urgency are the following. On 19 December 2022 the applicant received his results from the Faculty and he was advised that, because he had failed the year, he was at risk of being refused permission by the WRC to renew his registration for the MBBCh III in 2023. He was explained the correct procedure to be followed in order to apply for readmission, which advice the applicant accepted and followed by applying to WRC-1 for readmission. On 13 January 2023, WRC-1 informed the applicant that his application for re-registration for MBBCh III has been refused. He appealed this decision to WRC-2, which upheld the refusal on 20 January 2023. Thereafter, the applicant explored further processes to have the WRC-1 decision overturned, all of which endeavours were to no avail.

[46]. This urgent application was launched for the first time on 8 March 2023 – some two months after the initial impugned decision was taken. The applicant's explanation for the delay was that he engaged the University in further discussions with a view to resolving the impasse. He was also requiring further documentation from Wits.

[47]. The difficulty which the applicant faces is the fact that as early as 13 January 2023, it is made clear to him – in no uncertain terms – that the University has refused him permission to renew his registration for MBBCh III in 2023. On 20 January 2023, he was advised that WRC-2 had confirmed the aforesaid refusal. It is reasonable to expect the applicant there and then to have instituted his review application and the concomitant application for interim interdictory relief. By then (20 January 2023), it should have been crystal clear to Mr Manaka that he needed to take action in order to protect his alleged right to be treated fairly by the University in relation to his application for readmission. The applicants did not do so. Instead, he engaged further with the University, when it should have been clear that legal action ought to be commenced sooner rather than later. All the same, the explanation proffered by the applicant for not acting expeditiously is, in my view, wholly unacceptable.

[48]. On behalf of the applicant it was submitted that the application is urgent. After he learned on 20 January 2023 that his further application for permission to renew his registration for the MBBCh III in 2023 had been unsuccessful, he continuously engaged with Wits to seek reasons and to further make enquires in relation to the refusal of his application. The point is simply that by 20 January 2023, the applicant should have realised that he needed to launch the urgent application. He did not do so. Therefore, any urgency is self-created. The applicant knew that he had exhausted all internal remedies as far back as 20 January 2023, but only launched the application on 9 March 2023, more than a month later.

[49]. The salient facts in this matter are no different from those in *Afrisake NPC and Others v City of Tshwane Metropolitan Municipality and Others*[5], where Fabricius J held as follows at para 12:

[12] It is my view that Applicant could have launched a review application calling for documents, amongst others in terms of the Rules of Court, in February 2016. On its own version, it was also ready to launch an urgent application by then, even without the so-called critical documents. The threatened internal appeal also did not materialize.

[13]

[15] This Court has consistently refused urgent applications in cases when the urgency relied-upon was clearly self-created. Consistency is important in this context as it informs the public and legal practitioners that Rules of Court and Practice Directives can only be ignored at a litigant's peril. Legal certainty is one of the cornerstones of a legal system based on the Rule of Law.' (Emphasis added)

[50]. For all of these reasons, I am not convinced that the applicant has passed the threshold prescribed in Rule 6(12)(b) and I am of the view that the application ought to be struck from the roll for lack of urgency.

Costs

[51]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*[6].

[52]. I can think of no reason why I should deviate from this general rule.

[53]. Accordingly, I intend awarding costs in favour of the respondent against the applicant.

Order

[54]. Accordingly, I make the following order: -

The applicant's urgent application be and is hereby struck from the roll for lack of urgency.

The applicant shall pay the respondent's costs of the urgent application, such costs to include the costs consequent upon the utilisation of two Counsel, where so employed.

L R ADAMS

Judge of the High Court

Gauteng Division, Johannesburg

HEARD ON: 16 MARCH 2023

JUDGMENT

DATE: 22nd March 2023 – judgment handed down electronically FOR THE APPLICANT: Adv William Mokhari SC, together with Adv Connie Lithole INSTRUCTED BY: T M Mahapa Incorporated, Randburg FOR THE RESPONDENT: Adv Terry Motau SC, together with Advocate Barry Edwards INSTRUCTED BY: MVMT Attorneys, Rosebank, Johannesburg

- [1] Higher Education Act, Act 101 of 1997;
- [2] Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another 1973
- (3) SA 685 (A) at 691C;
- [3] National Treasury v Opposition to Urban Tolling Alliance 2012
- (6) SA 223 (CC);
- [4] Phaahla v The University of the Witwatersrand and 4 Others, Case number: 12206/202 GJ (17 June 2020);
- [5] Afrisake NPC and Others v City of Tshwane Metropolitan Municipality and Others (74192/2013)
- [2014] ZAGPPHC 191 (14 March 2014);
- [6] Myers v Abramson, 1951(3) SA 438 (C) at 455.

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