



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

OF INTEREST

Case no: 264/2022

In the matter between:

YAMKELA MELANE

Applicant

and

**THE DEPUTY REGISTRAR:
GOVERNANCE & LEGAL SERVICES
OF FORT HARE UNIVERSITY**

First Respondent

**THE CHAIRPERSON OF THE DISCIPLINARY COMMITTEE
OF THE UNIVERSITY OF FORT HARE**

Second Respondent

**THE CHAIRPERSON OF THE DISCIPLINARY APPEALS
COMMITTEE OF THE UNIVERSITY OF FORT HARE**

Third Respondent

**THE VICE CHANCELLOR OF THE UNIVERSITY
OF FORT HARE**

Fourth Respondent

**THE DEAN OF STUDENTS OF THE UNIVERSITY
OF FORT HARE**

Fifth Respondent

**THE REGISTRAR OF THE UNIVERSITY
OF FORT HARE**

Sixth Respondent

JUDGMENT

Govindjee J

Background

[1] The applicant ('Mr Melane') was involved in an incident at Cougar Hog Carwash on 24 July 2021. He lost control of his motor vehicle while attempting to avoid another individual and collided with an adult female student ('Ms Mtsiki'), causing her severe injuries.¹ He was charged by the University of Fort Hare ('UFH') with misconduct in contravention of Rules 19(1) and 19(7) of its disciplinary code.² He was found guilty by the second respondent ('the DC chairperson') and expelled for one year, in addition to being required to write a letter of apology to the complainant. His registration for the 2023 academic year was suspended pending payment of four physiotherapy sessions for the complainant.

[2] Mr Melane lodged an appeal against this outcome on various grounds, including the appropriateness of the sentence imposed. The Disciplinary Appeals Committee ('DAC') heard the appeal on 14 March 2022. It rejected the grounds of appeal and decided that Mr Melane should be permanently expelled by UFH or de-

¹ Ms Mtsiki was knocked unconscious and hospitalised for a month, suffering grade five splenic and kidney injuries, a right arm radial fracture, a vertebral body fracture and a bilateral superior public fracture.

² The charge reads as follows: 'You, being a registered student, are hereby charged with misconduct in terms of DR 19(1) and (7) of the Rules in that you, without just excuse, engaged in conduct which is improper, unbecoming or disgraceful and liable to bring discredit upon the University in that, on or about the 24th of July 2021, at or about Cougar Hog Car Wash in Alice, you committed the criminal offense of "hit and run" in that you ran over Onazo Mtsiki with your motor vehicle and fled the scene, such conduct falling within the definition of misconduct as defined in the Rules'.

registered as a student and removed from its system or database with immediate effect.

[3] Mr Melane launched an urgent application seeking to suspend the implementation of the findings and outcomes of the DC and DAC, to enable him to resume 'all rights, duties and privileges associated with being a registered student of the University of Fort Hare immediately pending the final determination of the relief sought in Part B of this application'. During May 2022, and by agreement between the parties, Mr Melane obtained an interim order pending the finalisation of the Part B review, which essentially challenged the DAC outcome. He has since been able to continue with his studies via online based learning. The interim order was, in addition, 'subject to the applicant diligently pursuing Part B of his application, complying with all prescribed time periods in terms of the Uniform Rules, alternatively, as agreed to between the parties and / or as directed by the Court'. The determination of the Part B relief was postponed to a date to be arranged with the Registrar, with costs of the interim relief application reserved.

[4] At the commencement of the present proceedings, counsel reached agreement on the following, to be made an order of court:

- '1. The implementation of the Disciplinary Appeals Committee's ('DAC') finding dated 14 March 2022 is suspended pending the completion of the Applicant's 2023 academic year.
2. Pending the implementation of the DAC's finding referred to in paragraph 1 above, the Applicant is allowed to continue as a student at the University of Fort Hare on the following basis:
 - 2.1 The applicant is permitted to continue his studies via online based learning, off-campus only;
 - 2.2 The applicant may only attend campus with the prior written approval of the first respondent. Such approval will not be unreasonably withheld in the event that the applicant's attendance on campus is required for purposes of his academic studies, as determined by the first respondent. Any approval for the

applicant to attend campus for any other reason will be in the first respondent's sole discretion.'

The issue

[5] Given that agreement, the only outstanding issue remains the question of costs. *Mr Dwayi*, for the applicant, argued that 'the *Biowatch* rule' ('the rule') was applicable, so that each party should pay their own costs of the application (Part A and Part B).³ The rule has, in the context of an attack on a statutory provision, been articulated as follows:⁴

'[O]ne should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the State ... lest such orders have an unduly inhibiting or "chilling" effect on other potential litigants in this category. This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this Court, no matter how spurious the grounds for doing so may be or how remote the possibility that this Court will grant them access. This can neither be in the interests of the administration of justice nor fair to those who are forced to oppose such attacks.'

[6] *Mr Ackermann* submitted that the matter did not raise a genuine constitutional issue, so that the rule was inapplicable, alternatively that *Mr Melane's* conduct warranted a costs order in favour of UFH. The matter was argued on the basis that, despite the further settlement agreement, *Mr Melane* was unsuccessful in obtaining the primary relief he had sought, namely to review and set aside the decision of the DAC.

A genuine constitutional issue?

[7] The Constitutional Court has confirmed that an unsuccessful litigant engaged in constitutional litigation against the state ought not to be ordered to pay costs as a

³ See *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14 ('*Biowatch*').

⁴ *Motsepe v Commissioner for Inland Revenue* [1997] ZACC 3 para 30.

general rule. The principle clearly extends to disputes as to whether any conduct is inconsistent with the Constitution and, as a result, unlawful and invalid.⁵

[8] In *Affordable Medicines Trust and Others v Minister of Health and Another* ('*Affordable Medicines*'),⁶ the Constitutional Court explained that costs should not be awarded against the applicants unless the litigation could be described as 'frivolous' or 'vexatious', or if conduct on the part of the unsuccessful litigant deserved censure in the form of a costs order.⁷ The ultimate goal is to do that which is just having regard to the facts and circumstances of the case.⁸ Further details as to the appropriate balance to be struck, and the basis for this, have been provided by the Constitutional Court in *Biowatch*:⁹

'The rationale for this general rule [that if the government wins, each party should bear its own costs] is three-fold. In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure.'

⁵ *S v Boesak* [2000] ZACC 25 para 14.

⁶ *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3 ('*Affordable Medicines*') para 138.

⁷ In *Biowatch* above n 3 para 24, the Constitutional Court used the term 'manifestly inappropriate' to explain this reason for deviation from the typical rule. In *Lawyers for Human Rights v Minister in the Presidency and Others* [2016] ZACC 45 para 18, the Court, in addition to 'frivolous' and 'vexatious', referred to 'improper motives' or where there are other circumstances that make it in the interests of justice to order costs.

⁸ *Affordable Medicines* above n 6 para 138.

⁹ *Biowatch* above n 3 para 23.

[9] Importantly, *Biowatch* confirms that courts should not easily find reasons for deviating from the general approach of not awarding costs against an unsuccessful litigant in proceedings against the state, where matters ‘of genuine constitutional import’ arise.¹⁰ Different opinions have emerged as to the meaning of this notion in the context of costs orders against unsuccessful parties litigating against the State. It is clearly not enough to merely allude to sections of the Constitution of the Republic of South Africa, 1996 (‘the Constitution’) or to simply allege that the litigation is constitutional in nature. The issues must be ‘genuine and substantive’ and ‘truly raise constitutional considerations relevant to the adjudication’.¹¹

[10] There is Constitutional Court authority, albeit in a minority judgment, for the view that matters that turn only on the facts in the application of established legal principles should also not be favoured with this label. As Madlanga J put it in *Mbatha v University of Zululand*:¹²

‘... in a scenario where it is clear that the substance of the contest between the parties is purely factual, it cannot be said to raise a constitutional issue purely because an applicant says it does ... a constitutional issue remains one even if it may turn out to be unmeritorious. That is not the same as saying that what in essence is a factual issue may somehow morph into a constitutional issue through the simple facility of clothing it in constitutional garb.’

[11] In *Minister of Safety and Security and Another v Schuster*,¹³ the SCA came to the conclusion that suing the police for damages for wrongful arrest and detention is not the same as testing one’s constitutional rights, concluding as follows:

‘This case turned solely on the facts ... To apply the “*Biowatch*” principle in such cases would open the floodgates for opportunistic claims which may nevertheless fall short of being categorised as “frivolous” or “vexatious”. It would promote risk-free litigation. The potential consequences are deeply disturbing. To deprive the successful appellants, the Minister and

¹⁰ *Biowatch* above n 3 para 24.

¹¹ *Biowatch* above n 3 para 25. Also see *Harrielall v University of KwaZulu-Natal* [2017] ZACC 38 (‘*Harrielall*’) para 11: the rule applies in the case of genuine ‘constitutional matters’ involving organs of state, rather than only in the case where a right in the Bill of Rights is in issue.

¹² *Mbatha v University of Zululand* [2013] ZACC 43 paras 221, 222.

¹³ *Minister of Safety and Security and Another v Schuster and Another* [2018] ZASCA 112.

the NDPP, and, by extension, the fiscus itself, of costs in the present matter would be unjust and inequitable. It would also lack a rational foundation.’

[12] By contrast, in *Harrielall v University of KwaZulu-Natal*,¹⁴ the Constitutional Court bemoaned the failure on the part of courts to embrace the rule, highlighting that the general rule relating to costs in constitutional matters applied in every constitutional matter involving organs of State.¹⁵ The Constitutional Court added the reminder that the rule was restricted to ‘genuine constitutional matters’ and, with reference to *Affordable Medicines*, subject to limited exceptions.¹⁶

[13] *Harrielall* confirms that the rule must be followed, absent these exceptions.¹⁷ On the facts in that matter, the SCA had decided not to follow the rule on the basis that ‘no constitutional issues were implicated’, and because the case was simply a review under the Promotion of Administrative Justice Act¹⁸ (‘PAJA’) of an administrative decision of the university. The Constitutional Court considered that approach to be incorrect.¹⁹

‘The constitutional issues raised by the case are two-fold. First, a review of administrative action under PAJA constitutes a constitutional issue. This is so because PAJA was passed specifically to give effect to administrative justice rights guaranteed by section 33 of the Constitution. Moreover when the University determined the application for admission, it exercised a public power ... According to jurisprudence of this Court, the review of the exercise of public power is now controlled by the Constitution and legislation enacted to give effect to it. It is not controversial that a review of administrative action amounts to a constitutional issue...’

¹⁴ *Harrielall* above n 11.

¹⁵ *Harrielall* above n 11 para 11. It is trite that UFH is a public institution through which the State discharges its constitutional obligation to make access to further education realisable and is an organ of State: see *Harrielall* above n 11 para 15.

¹⁶ *Harrielall* above n 11 para 12. The exceptions are frivolous or vexatious litigation and conduct on the part of the litigant that deserves censure by the court which may influence the court to order an unsuccessful litigant to pay costs.

¹⁷ *Harrielall* above n 11 para 14.

¹⁸ Act 3 of 2000.

¹⁹ *Harrielall* above n 11 paras 17-18.

[14] In *Mandela v The Executors, Estate Late Nelson Rolihlahla Mandela and Others*,²⁰ the SCA considered the application of the rule in circumstances where the relief sought did not appear to be of a constitutional nature. The SCA decided that the essence of the matter was a challenge based on legality and that, as such, it implicated the constitutional principle of legality (as well as the appellant's rights to property in s 25 of the Constitution).²¹

[15] This is not to suggest that higher courts have always adopted such a generous approach or interpretation. In *Motala v The Master of the North Gauteng High Court, Pretoria*,²² for example, the SCA held that while the review of a public officer's decision was a constitutional issue, this was not the end of the matter because the issues at hand had to be 'genuine and substantive, and raise constitutional considerations relevant to their adjudication'. In refusing to apply the rule, the SCA considered the review of the Master's decision to be 'no more than a civil challenge to an adverse administrative action which the appellant sought to overturn to the benefit of his own private pocket'.²³ In reaching this decision, the SCA placed emphasis on the absence of a 'radiating impact on other private parties', the absence of 'constitutional imperatives and considerations such as the interpretation of legislation...' and the absence of a 'discrete legal point of public importance which falls to be decided...'.²⁴

[16] In *MEC for Local Government, Environmental Affairs and Development Planning, Western Cape & Another v Plotz NO and Another*,²⁵ the SCA refused to apply the rule on the basis that the litigation was undertaken to assert a commercial interest of the trust, rather than to assert constitutional rights.

²⁰ *Mandela v The Executors, Estate Late Nelson Rolihlahla Mandela & Others* [2017] ZASCA 02 para 32.

²¹ *Ibid.* The SCA added that even though there had been a delay found by the court to be objectively unreasonable, this did not amount to frivolous or vexatious litigation in the sense contemplated by the jurisprudence of the Constitutional Court.

²² *Motala v The Master of the North Gauteng High Court, Pretoria* [2019] ZASCA 60 para 98.

²³ *Ibid* para 99.

²⁴ *Ibid.*

²⁵ *MEC for Local Government, Environmental Affairs and Development Planning, Western Cape & Another v Plotz NO & Another* [2017] ZASCA 175 para 33.

[17] It must also be noted that, in this Division, courts have not always accepted the applicability of the rule in matters involving university students, despite the argument that the right to further education triggered a 'constitutional issue'.²⁶ By contrast, in *Hotz and Others v University of Cape Town*,²⁷ the Constitutional Court overturned costs orders issued by the High Court and SCA in litigation between a university and its students.

[18] A recent decision of the Constitutional Court on the issue of 'a constitutional issue' reveals a further complexity. The application concerned a claim instituted in a representative capacity by the mother and natural guardian of a minor child who was diagnosed with cerebral palsy as a result of hypoxic ischemic injury during birth. The Constitutional Court refused leave to appeal on the basis that the matter did not raise a constitutional issue. Despite this finding, a unanimous bench applied the rule without engaging with the conceptual differences, if any, between a matter not raising a constitutional issue for purposes of obtaining leave to appeal, on the one hand, and yet falling within the boundaries of the rule for purposes of costs. This was apparently based purely on the absence of exceptional circumstances that would warrant the payment of costs on the part of the applicant.²⁸ A similar approach appears to have been adopted in *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another*.²⁹

Analysis

[19] A court of first instance has a discretion to determine the costs to be awarded in light of the particular circumstances of the case.³⁰ The 'nature of the issues', rather than the 'characterisation of the parties' is the starting point.³¹ Here, the issues at hand relate, generally, to the right to education in terms of s 29 of the Constitution

²⁶ See *Toyi and Others v Nelson Mandela University* [2021] ZAECPEHC 17 para 25. Cf *Mbuthuma and Another v Walter Sisulu University and Others* [2019] ZAECMHC 79; 2020 (4) SA 602 (ECM) para 58.

²⁷ *Hotz and Others v University of Cape Town* [2017] ZACC 10 ('Hotz') para 27 and following.

²⁸ *TM obo MM v Member of the Executive Council for Health and Social Development, Gauteng* [2022] ZACC 18 para 63.

²⁹ *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* [2021] ZACC 35 para 87.

³⁰ *Affordable Medicines* above n 6 para 138.

³¹ *Biowatch* above n 3 para 16. Costs should not be determined based on parties' financial position.

and the principle of legality or just administrative action.³² As *Mr Dwayi* pointed out, the founding affidavit, in dealing with the issue of a prima facie right, placed reliance squarely on ss 29 and 33 of the Constitution, arguing that an interim interdict ‘will halt the ongoing infringement of my section 29 and 33 constitutional rights ...’.

[20] While the matter may not have been of concern to other students, the issue affected the applicant’s right to education and, on my understanding of the applicable approach and the available authorities, qualifies as a genuine constitutional challenge.³³ Despite the applicant’s failure to obtain relief, to hold differently would have a chilling effect on similarly placed litigants in the context of constitutional justice.³⁴ The matter is, therefore, properly located in a constitutional setting.

[21] It remains to be decided whether any of the exceptions that justify a departure from the rule find application given the facts of the matter. The exceptions have been detailed in *Lawyers for Human Rights v Minister in the Presidency and Others*.³⁵ A court must consider the ‘character of the litigation and [the litigant’s] conduct in pursuit of it’, even where the litigant seeks to assert constitutional rights. ‘Vexatious’ litigation is ‘frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant’. It is initiated without probable cause by a person who is not acting in good faith to annoy or embarrass an opponent. Legal action that is not likely to lead to any procedural result is vexatious. A ‘frivolous complaint’ has no serious purpose or value.³⁶

[22] Without engaging with the merits of the matter, it may be noted that the applicant’s case was premised, in part, on the DAC’s findings as to his lack of remorse and that, given the available record, this challenge was not frivolous or vexatious, or brought in bad faith.³⁷ *Mr Ackermann* very properly also brought the decision in *Rennies Distribution (Pty) Ltd v Bierman NO*,³⁸ in respect of the *audi* principle and an increase in disciplinary sanction on appeal, to my attention. This

³² For a similar analysis, see *Hotz* above n 27 para 31. Also see *Ferguson and Others v Rhodes University* [2017] ZACC 39 (*‘Ferguson’*) para 24.

³³ See *Hotz* above n 27 para 33.

³⁴ *Hotz* above n 27 para 34.

³⁵ *Lawyers for Human Rights v Minister in the Presidency and Others* above n 7.

³⁶ *Lawyers for Human Rights v Minister in the Presidency and Others* above n 7 para 19.

³⁷ *Ferguson* above n 32 para 27.

³⁸ *Rennies Distribution (Pty) Ltd v Bierman NO* (2008) 29 ILJ 3021 (LC).

was a further challenge to the DAC decision and again supports the conclusion that the application was not frivolous or vexatious or brought in bad faith.

[23] I have also given consideration to *Mr Ackermann's* argument that the applicant's failure to diligently pursue Part B of his application, in contravention of the interim order, is sufficient to justify an exception to the application of the rule. In my view, that reference in the interim order was linked to permission for the applicant to continue his studies online, with limited campus attendance, pending the Part B application. The applicant ran the risk that his failure to diligently pursue the Part B application, and comply with the prescribed time periods, might have resulted in UFH approaching the court for a variation of the interim order.

[24] That did not occur and, considering the authorities, the applicant's failures in that respect do not, on their own, elevate his conduct to the kind that warrants the loss of the protection afforded by the rule. In similar vein, the applicant's conduct that resulted in the charges levelled against him before the DC, and his failure to review the decision of the DAC, are irrelevant for present purposes. Justice and fairness would best be served if each of the parties were ordered to pay their own costs.

Order

[25] The following order will issue:

1. The implementation of the Disciplinary Appeals Committee's ('DAC') finding dated 14 March 2022 is suspended pending the completion of the Applicant's 2023 academic year.
2. Pending the implementation of the DAC's finding referred to in paragraph 1 above, the Applicant is allowed to continue as a student at the University of Fort Hare on the following basis:
 - 2.1 The applicant is permitted to continue his studies via online based learning, off-campus only;

2.2 The applicant may only attend campus with the prior written approval of the first respondent. Such approval will not be unreasonably withheld in the event that the applicant's attendance on campus is required for purposes of his academic studies, as determined by the first respondent. Any approval for the applicant to attend campus for any other reason will be in the first respondent's sole discretion.

3. Each party to pay its own costs, also in respect of the Part A proceedings.

A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 27 July 2023

Delivered: 08 August 2023

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