REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 3399/2022

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED NO

Judge Dippenaar

In the matter between:

LERATO MOELA 1st
Applicant

LEHLOHONOLO PEEGA 2nd Applicant

AND

VICE CHANCELLOR:
UNIVERSITY OF THE WITWATERSDAND 1st Respondent

DIRECTOR OF RESIDENCE LIFE:
UNIVERSITY OF THE WITWATERSDAND 2nd Respondent

ACTING CLUSTER MANAGER, WEST CAMPUS:
UNIVERSITY OF THE WITWATERSDAND 3rd Respondent

DIRECTOR OF PROTECTION SERVICES:
UNIVERSITY OF THE WITWATERSDAND 4th Respondent

DEAN OF STUDENTS:
UNIVERSITY OF THE WITWATERSDAND 5th Respondent

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 7th of February 2022.

DIPPENAAR J:

[1] The applicants sought by way of an urgent application launched on the evening of 30 January 2022 orders "*declaring that the dispossession of the applicants' campus residence and possessions and their eviction by the respondents on 30 January 2022 at The University of the Witwatersrand's West Campus Village Students' Residence, Johannesburg is unlawful*" and *"directing the respondents to restore the applicants' possession with immediate effect".*

[2] The applicants' case was that they were unlawfully spoliated from their rooms on the morning of 30 January 2022 when security personnel forcefully removed them by changing the locks to their rooms in the absence of the second applicant, whilst affording the first applicant only 10 minutes to take his possessions. They were now left without alternative accommodation and are without their possessions.

[3] The respondents (collectively referred to as "the University") challenged the urgency of the application and contended that none of the requirements of spoliatory

relief have been met as it was not established that the applicants were in peaceful and undisturbed possession of the rooms or that the applicants have been unlawfully deprived of such possession. It was further argued that restoration of possession is impossible as the rooms occupied by the applicants have already been allocated to other bona fide registered students who applied for and were granted accommodation for the 2022 academic year.

[4] The University immediately tendered the return of the applicants' possessions which were ready for collection from the third respondent and further tendered delivery thereof to any address indicated by the respective applicants. The applicants had collected certain of their possessions on 31 January 2022.

[5] As the applicants seek final relief the matter falls to be determined on the so-called Plascon Evans test[1]. Where there is a genuine dispute of fact, the respondent's version must be accepted. A dispute will not be genuine if it is so far-fetched or so clearly untenable that it can be safely rejected on the papers.[2]

[6] The facts are by and large common cause. The first applicant is a practicing advocate at the Johannesburg Bar but did not disclose this in his founding affidavit, wherein he described himself as "*an adult male masters candidate student (LLM)*". The second applicant was similarly described as *"an adult male masters candidate student*" without disclosing that he is self-employed and is offering various services in the music industry.

[7] The applicants were conducting post graduate studies in Law and Music respectively. They are however not full time students, have not applied to register nor are they enrolled as students for the coming 2022 academic year and have not applied for or been successfully allocated student accommodation for the 2022 academic year. The first applicant has further been academically excluded from the University for the

[1] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, 1984 (3) SA 623 (A) at 634E to 635C; NDPP v Zuma 2009 (2) SA 277 (SCA) para [26]
[2] J W Wightman (Pty) Ltd v Headfour (Pty) Ltd 2008 (3) SA 371(SCA) para 12

2022 academic year for failure to meet the minimum requirements of his Masters degree.

[8] It was undisputed that the applicants occupied rooms 708 and 312 of the University's West Campus Village Students' Residence since the beginning of the 2020 academic year. The applicants did not re-apply for readmission to the residence for the 2021 academic year and were occupying the rooms in contravention of the University's Conditions of Accommodation and its rules, regulations, policies, procedures and standing orders. The applicants were, as postgraduate students, granted an indulgence to remain at the residence until mid- February 2021 at which time they were to vacate.

[9] Pursuant to the applicants' disregarding various lawful instructions by the University to vacate, misconduct proceedings under the University's Rules for Student Discipline were initiated against them during July 2021 in which they were charged with the failure to obey a lawful instruction to vacate. At the time both the applicants were practicing professionally and earning an income, as is presently the case.

[10] Pursuant to a formal ad hoc inquiry chaired by an independent person, Advocate Lennox, a ruling was handed down on 19 October 2021 in terms whereof both the applicants were found guilty of misconduct in refusing the instructions to vacate. One of the sanctions imposed was the exclusion of the applicants from any University residence for a period of twelve months from the date of the ruling. An order was further made that the exclusion would be suspended for a twelve month period if the applicants complied with the University's instruction to vacate the premises on condition that they were not found guilty of any other act of misconduct during the suspension period. That ruling was provided to the applicants on 20 October 2021.

[11] The applicants failed to vacate the premises, resulting in a letter being sent to them by the University on 17 January 2022 affording the applicants a final opportunity to vacate and informing them that it would take the necessary steps to give effect to the ruling if they did not vacate the rooms by 19 January 2022 and. The applicants sought

more time to vacate, resulting in the University on 20 January 2022 extending its deadline to 25 January 2022. On 25 January 2022 the University sought to give effect to the ruling by unsuccessfully attempt to lock out the applicants. On 30 January 2022, the University successfully gave effect to the ruling, resulting in the launching of the present application.

[12] It was common cause that the residences are for the exclusive use of registered students at the University who applied and qualified for accommodation. The University is at the start of the 2022 academic year and the rooms occupied by the applicants have been allocated to registered students, who have successfully applied for and been allocated student accommodation in terms of the University's rules and policies and are due to take occupation during the course of the registration period which commenced on 31 January 2022.

[13] Considering the history of the matter as referred to, there is merit in the University's contention that any urgency in the application was self-created. On their own version, the applicants were aware of the University's intentions for some 11 days prior to the launching of the application. Considering the contents of the founding papers in which it was contended that the applicants did not have alternative accommodation and the misconduct proceedings were not disclosed, the application was enrolled with extremely truncated time periods. After answering papers were delivered, it became common cause that the applicants do have alternative accommodation in Vosloosrus and Orlando West respectively, although the applicants presented various reasons they did not want to return to their homes. I elected to entertain the application in the interests of justice as not only the interests of the parties but also those of the two students who have been allocated the rooms are at stake. In my view, the applicants' conduct has a bearing on an appropriate costs order, an issue to which I later return.

[14] To obtain a spoliation order, the applicants must illustrate: first, that they were in peaceful and undisturbed possession of the premises and second, that they were

unlawfully deprived of such possession[3]. The limited valid defences to spoliation are[4]: (i) that the applicants were not in undisturbed and peaceful possession at the time of the alleged spoliation and/or that the dispossession was not unlawful; (ii) that restoration is impossible and (iii) where the deprivation in issue constituted an act of counter-spoliation.

[15] The Constitutional Court in *Ngqukumba v Minister of Safety and Security and Others*[5] explained the purpose of the remedy thus*:*

> *The main purpose of the mandament van spolie is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process."*

[16] An apposite starting point is whether the University's conduct was unlawful and the effect of the ruling in the misconduct proceedings which directed that the applicants must be excluded from the University's residence for a period of twelve months from 19 October 2021 following their misconduct.

[17] The University's case was that its conduct was not unlawful and that when it effected the lock out on 30 January 2022 it was giving effect to the ruling, which it was obliged to comply with and could not ignore.

[18] The applicants on the other hand argued that the University's reliance on the misconduct ruling was misplaced and it had no power to evict them from their rooms pursuant thereto, inter alia, as it was allegedly conceded by Adv Lennox in the misconduct ruling that he did not have the power to order their eviction. For the reasons that follow, I do not agree.

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[3] Bisschoff and Others v Welbeplan Boerdery (Pty) Ltd 2021 (5) SA 54 (SCA) para [5]; Kgosana and Another v Otto 1991 (2) Sa 113 (W)
[4] Brown and Others v Morkel [2016] ZAGPPHC 1150 para [17]
[5] 2014 (5) SA 112 (CC) per Madlanga J para [10]

[19] It was undisputed that the applicants are bound by the University's rules and policies. The misconduct ruling was issued in accordance with the University's Rules for Student Discipline and its Conditions of Accommodation.

[20] In terms of s 32 of the Higher Education Act[6] ("the Act") the council of a public higher educational institution may make an institutional statute or institutional rule to give effect to any matter not expressly prescribed by the Act. The University's internal statutes and procedures flow from this provision. Sections 75 and 76 of the University's Institutional Statute respectively regulate Student Discipline and Admissions and Registrations. The relevant rules and conditions include the University's Student Code of Conduct, Conditions of Accommodation and Rules for Student Discipline. When the University called for an inquiry into the applicant's misconduct, it relied on the Rules and Conditions which flow from the provisions of s32 of the Act. Consequently, the University was empowered by an empowering provision to give effect to the misconduct ruling, which flows from the University's rules. When the University gave effect to the misconduct ruling by locking out the applicants it was exercising a public power and powers in terms of the Rules read with s 32 of the Act.

[21] In accordance with the well-established principle in *Oudekraal*[7], adopted by the Constitutional Court in *Kirland,*[8] the exercise of public power must be presumed to be valid and to have legal consequences unless and until they are reviewed and set aside. Such decisions have binding effect merely because of their factual existence.

[22] The misconduct ruling is thus by its mere factual existence, binding on both the University and the applicants. The ruling and the implementation thereof by locking out the applicants, was made after a proper legal process was followed in terms of the University's Rules and the applicants were given an opportunity to make

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[6] 101 of 1997
[7] Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) para [26]
[8] . MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014 (3) SA 481 (CC) paras [100]-[103]

representations at the enquiry, which they elected not to do by not attending the enquiry when called to do so.

[23] It was common cause that the applicants have not challenged the ruling and did take any steps to review and set aside that ruling. The applicants also did not aver in their affidavits that they intend to do so.

[24] The applicants' contentions that the University's Rules and Conditions do not refer to eviction is misconceived. Under the University's Conditions of Accommodation, which the applicants did not dispute are binding on them, the University expressly reserved the right to evict a non-compliant student without notice. The applicants' argument that the University cannot rely on this provision as it was not specifically referred to in its affidavit, similarly lacks merit if the answering papers are read in context. Paragraph 1(b) provides:

> "*Residence accommodation is available only to bona fide full time students of the University. For the purpose of this provision, the term 'full time student' shall exclude any salaried employee of the University and shall further exclude any student who is registered for a combination of courses the totality of the workload for which comprises less than 50% of the workload of a student with a full normal curriculum at the equivalent level of study for the same full-time degree or diploma. The University reserves the right to evict without notice any resident who does not satisfy these requirements and/or other university applicable rules".*

[25] The misconduct ruling confirmed that the applicants are in breach of the University's rules. In relation to the misconduct proceedings and its implementation, a due legal process was followed and it cannot be concluded that there was any wrongful deprivation without resort to legal process[9]. In such circumstances, it cannot be concluded that the University's conduct was unlawful and the applicants have failed to establish that the deprivation of their possession is unlawful.

[26] It follows that the applicants fail at this hurdle. As the conclusion reached is dispositive of the application, it is not necessary to make a determination of the remaining issues.

[9] Midvaal Local Municipality v Meyerton Golf Club [2014] ZAGPPHC 235 at para [16]

[27] The applicants argued that no adverse costs order should be awarded against them if they are unsuccessful. The applicants clearly do not appreciate that as a result of their conduct, bona fide students who have complied with all the relevant requirements are being severely prejudiced and the University is compromised in exercising its statutory duties. There is further no basis to deviate from the normal principle that costs follow the result, specifically having regard to the applicants' conduct in relation to this application. As the issues which have arisen have some complexity, I am persuaded that the employment of senior counsel was warranted.

[28] The conduct of the first applicant regrettably requires comment. The impression sought to be created in the founding papers was misleading in various respects and material relevant common cause facts were not disclosed. When requested during the hearing for an explanation why the first applicant did not disclose that he is a practicing advocate, his explanation was that he had utilised a precedent of another application launched during 2020 when he was a student in drafting the founding papers. This explanation does not bear scrutiny. In addition, although the second applicant during the hearing on 31 January 2022 confirmed that the first applicant was representing him, no cogent basis was provided on which the first applicant was able to do so. The first applicant is not a normal lay litigant. As a practicing advocate and an officer of the court he has a duty to act honestly and to make proper disclosure of all relevant facts. The first applicant's conduct falls far short of the mark.

[29] I grant the following order:

[1] The application is dismissed with costs, including the costs of two counsel where so employed.

[2] The parties are to provide copies of the judgment and the application papers to the Legal Practice Council and the Johannesburg Society of Advocates for consideration.

EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 31 January and 02 February 2022
DATE OF JUDGMENT	: 07 February 2022
APPLICANTS' COUNSEL	: Adv. L. Moele
APPLICANTS' ATTORNEYS	: In Person
RESPONDENTS' COUNSEL	: Adv S Budlender SC Adv. M. Musandiwa
RESPONDENTS' ATTORNEYS	: Vermaak and Partners