

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 7895/2022

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: NO |

15 November 2023 _____

DATE

SIGNATURE

In the matter between:

UNIVERSITY OF WITWATERSRAND

First Applicant

**VICE CHANCELLOR AND PRINCIPAL,
UNIVERSITY OF THE WITWATERSRAND**

Second Applicant

**DEPUTY VICE CHANCELLOR: SYSTEM AND
OPERATIONS: UNIVERSITY OF THE WITWATERSRAND**

Third Applicant

**DEAN, FACULTY OF HUMANITIES,
UNIVERSITY OF THE WITWATERSRAND**

Fourth Applicant

MESHACK NDORO

Fifth Applicant

GAFIEDA PYLMAN

Sixth Applicant

SINDISILE MOOLMAN

Seventh Applicant

CASSIM HILL

Eighth Applicant

AYANDA ZWANE

Ninth Applicant

and

NATHANIEL TSAKANI MAKHUBELE	First Respondent
TSAKANI MAKHUBELE	Second Respondent
and	
<i>In re</i>	
NATHANIEL TSAKANI MAKHUBELE	First Applicant
TSAKANI MAKHUBELE	Second Applicant
and	
UNIVERSITY OF WITWATERSRAND	First Respondent
VICE CHANCELLOR AND PRINCIPAL, UNIVERSITY OF THE WITWATERSRAND	Second Respondent
DEPUTY VICE CHANCELLOR: SYSTEM AND OPERATIONS: UNIVERSITY OF THE WITWATERSRAND	Third Respondent
DEAN, FACULTY OF HUMANITIES, UNIVERSITY OF THE WITWATERSRAND	Fourth Respondent
MESHACK NDORO	Fifth Respondent
GAFIEDA PYLMAN	Sixth Respondent
SINDISILE MOOLMAN	Seventh Respondent
CASSIM HILL	Eighth Respondent
AYANDA ZWANE	Ninth Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Tenth Respondent

JUDGMENT

FISHER, J

Introduction

[1] This is an application for security for costs brought in the face of what can only be termed an onslaught on the University of the Witwatersrand (the

University). The nine applicants who represent the University have been brought before this court in successive urgent applications by Mr Nathaniel Tsakani Makhubele and purportedly by the second respondent, his daughter Tsakani. To avoid confusion, I will refer to the second by her first name.

[2] It is necessary to set out the procedural background in this matter in some detail. I now turn to do this.

Procedural background

[3] The genesis of this extraordinary crusade was simple enough. Tsakani attended the University for her Bachelor of Education degree during the period 2019 to 2021. When the time came for her to complete her Bachelor of Education degree there were fees of approximately R 100 000 outstanding.

[4] In terms of the contract between Tsakani and the University and the University's rules and statutes, the University may refuse to allow a student to renew their registration or graduate should they have fees outstanding.

[5] Mr Makhubele alleges that in terms of his divorce settlement with Tsakani's mother he is obliged to pay for Tsakani's tertiary education. This is the basis on which he first maintained that he had a tenuous interest in the matter.

[6] It is relevant at this juncture to state that the University is not in these proceedings seeking to claim its fees. It seeks merely to maintain the application of its rules. Its position is simple and one germane to most if not all tertiary education institutions.

[7] The University has an obligation to ensure that it is managed in a manner which will guarantee its long-term sustainability. The collection of fees is integral to this obligation. It bears further mention that the University operates on a non-profit basis.

[8] Mr Makhubele is dissatisfied with this position. This dissatisfaction has led to him bringing several applications in the urgent court on his own behalf and that of Tsakani on 28 February 2022, 18 April 2023, and 24 October 2023.

- [9] Mr Makhubele is no stranger to the courts. He is litigious and this crusade against the University is but one of his forays. Mr Makhubele informed me that he has a Phd in Business Studies from the University.
- [10] The papers drawn by him in this matter are lengthy and repetitive. Whilst the legal approach taken in the many notices of motion, affidavits and heads of argument filed is universally without merit, he is dogged and prolific.
- [11] He shows in his arguments a determination to make baseless and nonsensical submissions at length. These submissions show some method however. They exhibit an engagement with case law which is liberally cited and quoted in his heads of argument. This engagement with the cases and legal principles reveals a profound lack of understanding of the law.
- [12] Whilst I heard Mr Makhubele at length, his arguments were meritless and at times nonsensical. His behaviour in court was bombastic and abusive. He seems to be of the view that he is entitled to advance any argument he sees fit and that he must be heard regardless of its merits or even sense. I had to impress upon him my role in controlling court proceedings whilst balancing the right of all parties to a fair hearing.
- [13] It is necessary, before I go into the myriad of processes which have been inflicted on this court and the University, to say something about my perception of the part played in this matter by Tsakani.
- [14] She said nothing in the hearing other than to confirm that she was the second respondent.
- [15] Up until the application before me, the acting judges hearing the proceedings when confronted by Mr Makhubele in court on the basis that he wished to represent his daughter, allowed him to do so.
- [16] My close reading of the papers has led me to the firm view that this representation is not in the interests of Tsakani. The legal quagmire that she is embroiled in because of Mr Makhubele's misguided advice and representation is regrettable and highly prejudicial to her.

- [17] Mr Makhubele emerges in these papers as following an agenda which has little to do with the protection of his daughter's rights and much to do with his avoidance of paying the amounts due to the University and his daughter and his own vindication.
- [18] The fact that he owes his adult daughter her maintenance in the form of the payment of her university fees is but one reason why he should not be allowed to represent her in court.
- [19] Accordingly, at the start of Mr Makhubele's address to me I advised him that I would not allow him to represent the interests of Tsakani. She was in court and did not ask that she be heard in her own case.
- [20] To my mind it is imperative that Tsakani's interests in this matter be protected by allowing her to obtain proper independent advice.
- [21] Accordingly, I postponed the proceedings against Tsakani and indicated that I would hear the application such as it may pertain to Mr Makhubele only.
- [22] Predictably, Mr Makhubele was displeased with this turn of events. He said that he wished to apply for my recusal – presumably on the basis that I would not allow him to represent his daughter in my court.
- [23] He argued that for this purpose he required a postponement of his own case.
- [24] He argued that he too was a lay-litigant and that he also needed to take legal advice. Why this should latterly have become necessary merely because the application was not to be entertained by me against his daughter was not explained. I might add that he, had the previous day, filed further heads of argument which raised new matter. Furthermore, as part of his initial approach he had argued that the latest urgent application brought in the urgent court of 24 October 2023, and allocated to me as part of the opposed roll, should be argued together with the application for security for costs. I declined to do so and directed that only the application in terms of rule 47 be argued.

- [25] I heard Mr Makhubele in relation to the postponement. As I have said the purpose of the postponement was to formulate a substantive application to seek my recusal. I saw no merit in the application for postponement and refused it.
- [26] The reasons for this refusal are that there was no basis established for the postponement; a refusal on the part of Mr Makhubele to tender costs; substantial prejudice to the University should its application not proceed in a context which it argued were abusive of the court's process and vexatious and the fact that the application was patently raised in bad faith by a disgruntled litigant who had been fully prepared to proceed but sought to avoid a hearing when an order was made which displeased him. The fact that such order pertained to his daughter's rights and did not affect his position at all is relevant to the application for postponement as Mr Makhubele was not prejudiced in his hearing.
- [27] Mr Makhubele has brought three urgent applications for relief relating to Tsakani's ability to register for Honours and graduate.
- [28] Although the relief in each of the urgent applications launched by the respondents differs slightly, in that in certain instances an additional prayer is added seeking new relief, the core relief is the same being that the University be compelled to permit the applicant to graduate in whatever graduation ceremony is upcoming in relation to when the application is brought (in this latest application it is the ceremony taking place on 12 December 2023, that is the target) and that she be allowed to register for Bachelor of Education Honours degree in January 2024. It is from these impending ceremonies and the starting of the academic year that that the application in each instance is said to be urgent.
- [29] The first resort to the urgent court by the respondents was in February 2022 (the February 2022 application). The February 2022 application was settled on the basis that the first applicant signed an acknowledgment of debt for the fees outstanding at the time in the approximate amount of R100 000. As a

consequence, Tsakani was allowed to register for and complete her final year of the Bachelor of Education degree.

[30] Mr Makhubele has reneged on the acknowledgement of debt. Accordingly, the University as it was entitled to do implemented its policy of not allowing Tsakani to graduate or register for an honours course.

[31] A second urgent application was then brought in April 2023 (the April 2023 application) seeking that the university be compelled to allow Tsakani to graduate at one of the graduation ceremonies scheduled to take place in April 2023 and register for the Honours degree for the 2023 academic year. The notice of motion was later amended to seek that the University provide Tsakani with residential facilities.

[32] The April 2023 application came before Meyer AJ and Mr Makhubele was heard on behalf of Tsakani and purportedly on his own behalf. Meyer AJ gave judgment in the matter on 31 May 2023. The following emerges from the judgment.

- a. It was noted that the February 2022 application and the April 2023 applications were both brought on very short notice to the University.
- b. The April 2023 application was brought as part of and under the case number of the February 2022 case which has remained the case number. Mr Makhubele merely filed a supplementary affidavit and amended the relief.
- c. Meyer AJ granted an indulgence on the basis that he allowed the supplementary affidavit to stand as a founding affidavit for the April relief.
- d. Mr Makhubele argued the bizarre proposition that the University was obliged to institute debt recovery proceedings against him and not Tsakani and that in failing to allow Tsakani to graduate and register for a new course the University was in contempt of an order of the

Regional Divorce Court, which pursuant to the settlement agreement signed in the divorce had ordered him to pay his daughter's educational costs. I interpose to mention that Tsakani was eight when the settlement was signed and the agreement does not mention tertiary educational fees but only school fees.

- e. Meyer AJ allowed Mr Makhubele to argue on his own behalf and requested that he ensure that Tsakani attended court to represent herself.
- f. Mr Makhubele tendered a second acknowledgment of debt which the University refused. I interpose again to remind that he now claims that the debt has prescribed and is owed by neither him nor Tsakani.
- g. He has tendered also cession of a judgment in his favour for R 1.4 million. This, the University declined on the basis that its rules did not provide for payment of that kind. I interpose to mention that this court order was again tendered in this application and in a fresh application brought this morning (15 November 2023). I will deal with this in due course.
- h. Tsakani did address Meyer AJ but briefly and on the basis that she sought an indulgence from the University but proffered no defence.
- i. The court found that the conduct of the University was lawful and in accordance *inter alia* with section 32(1) of the Higher Education Act (the Act),¹ and its own Statutory enactments and rules which Tsakani was bound by.
- j. Meyer AJ held that no right had been established and neither had the absence of an alternative remedy or irreparable harm.

[33] Mr Makhubele was undeterred. In June 2023 he brought an urgent application to set aside the judgment of Meyer AJ on the basis that the University was not properly before the court (the urgent rescission application) and asked as interim relief that Tsakani be allowed to graduate in the forthcoming July 2023

¹ 101 of 1997.

graduation ceremony and be allowed to register for Honours. An added prayer was that the University make “suitable arrangements” for Tsakani to catch up with work missed.

[34] The day after the filing of the June 2023 application Mr Makhubele inexplicably filed a document which purports to be a “conditional withdrawal of the June 2023 application” in which an attempt was made to characterise the application as an application for leave to appeal.

[35] This notwithstanding he persisted with the June application in the urgent court and this time was heard by Budlender AJ in the urgent court of 16 June 2023.

[36] When judgment was not delivered as soon as he wished, he brought a fourth urgent application on a matter of hours notice on 12 July 2023 seeking, inter alia, an order that the proceedings before Budlender AJ be declared null and void and set aside and be heard *de novo* by the Deputy Judge President or any other judge appointed by him and that that the judge hearing the matter be ordered(presumably by the DJP) to give an *ex tempore* judgment at the hearing.

[37] The application was emailed to the Deputy Judge President at 22h30 on 12 July 2023 for hearing on 13 July 2023.

[38] Budlender AJ then undertook to deliver the judgment before 14 July 2023.

[39] Budlender AJ delivered the judgment on 13 July 2023 and the July application was removed from the urgent roll.

[40] The following emerges from the judgment of Budlender AJ:

- a. The relief sought was again the graduation and registration for Honours.
- b. In the July application it was raised that Budlender AJ should have recused himself, because he had acted for the University on an occasion which fact he had disclosed to the parties before the matter

was argued. Budlender AJ was thus constrained to deal with this issue in the judgment as well.

- c. Budlender AJ allowed Tsakani to be represented by Mr Makhubele at the hearing.
- d. On the merits Budlender AJ found that the core issue – being the right of the University to refuse to allow the graduation and the registration for Honours had already been decided.
- e. The point repeatedly raised as to the non-joinder of the University was decided on the basis that it was sufficient to join the Vice Chancellor and his subordinates. The raising of this point is in any event ironical in that it was Mr Makhubele who cited the applicants.

[41] Mr Makhubele then filed a notice of application for leave to appeal the judgment of Budlender AJ which was later purportedly amended (on August 2023) and ran to 10 pages.

[42] He also purportedly filed an amended application for leave to appeal the judgment of Meyer AJ. He has purportedly sought to amend the notice of application for leave to appeal the judgment of Meyer AJ on no less than three occasions two being in August and September of 2023.

[43] This notwithstanding the respondents have failed to prosecute the applications for leave to appeal.

[44] Then in October 2023 the applicant launched yet another urgent application again asking as core relief that Tsakani be allowed to graduate and register for Honours this time in January 2024 again seeking to amend the notice of motion in the February 2022 application. Again, the joinder point is raised. A declaration that the debt to the University has prescribed is sought as is a declaration of constitutional invalidity of the Act and the Statutes of the University.

[45] In October 2023 Mr Makhubele on behalf of the respondents purported also to deliver an application in terms of rule 30 and an application in terms of rule

30A. The rule 30A application was subsequently withdrawn and the rule 30 application was withdrawn during oral argument.

[46] In response to the October application the University filed this application for security for costs.

[47] Mr Makhubele in response to the application for security for costs filed a notice in terms of rule 6(5)(d)(iii) in which he purported to raise alleged law points *in limine* including prescription which is an issue in the main application. None of the “points” raised have any basis whatsoever.

[48] When the October 2023 came before Wepener J in urgent court on 24 October 2023, the above points, those being the points in the October 2023 urgent and the issues in respect of the various notices and the rule 47 application, were canvassed.

[49] Since the rule 47 application procedurally ought to be dealt with first, argument apparently commenced on this application. It seems that Mr Makhubele then stated that he needed time to consider the applicants’ heads of argument. The matter was then postponed to this week (13 to 17 November) in which Wepener J was the senior judge.

[50] The matter was allocated to me and heard on 13 November.

[51] For good measure and Mr Makhubele also belatedly purported to file in swift succession what he terms a third and fourth supplementary affidavits filed in quick succession on 11 November – i.e. two days before the hearing. As I have said supplementary heads of argument in which new matter was raised was filed the day before the hearing.

[52] Mr Makhubele objected before me to not being given the opportunity to raise these points first in argument and before the University’s counsel advanced her argument. He was persistent in his point relating to the prescription and would not hear reason when told that that point was procedurally to be ventilated in the main application.

[53] It is immediately apparent that the core relief sought as to the graduation and registration for Honours may not be claimed by Mr Makhubele. It is Tsakani who has the *locus standi* to claim such relief.

[54] The relief which Mr Makhubele seeks for himself is declaratory in nature and to the effect that a debt owed by him personally under an acknowledgment of debt signed in respect of the amount due has prescribed because, goes his argument, the debt of Tsakani for fees has not been claimed within its three-year prescription period and the acknowledgment of debt is accessory.

Legal principles

[55] Under the common law an *incola* of the Republic cannot as a general rule be called on to give security for costs. But if a court is satisfied that the application brought is vexatious, reckless or abusive of the court's process a party can be ordered to furnish security for costs².

[56] The court has an inherent jurisdiction to stop or prevent abuse of its processes and one of the ways open to it is to require the furnishing of security for costs. This power is exercised in exceptional circumstances.³

[57] In *Phillips v Botha*,⁴ the Supreme Court of Appeal described the following definition of an abuse of civil process derived from an Australian case as "terse but useful":

"The term 'abuse of process', connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of a legal claim upon which a Court is asked to adjudicate, they are regarded as an abuse for this purpose".⁵

Discussion on case made out for security for costs

² *Mears v Brooks's Executor and Mears's Trustee* 1906 TS 546 at 550; *Pillemer v Israelstam and Shartin* 1911 WLD 158; *Crest Enterprises (Pty) Ltd v Barnett and Schlosberg NNO* 1986 (4) SA 19 (C) at 22A–E; *Ramsamy NO v Maarman* 2002 (6) SA 159 (C) at 173A–G.

³ *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) at 80H–J.

⁴ *Phillips v Botha* [1998] ZASCA 105; 1999 (2) SA 555 (SCA).

⁵ *Id* at para 24.

- [58] Reference to the procedural history in this matter shows that there has not been a month in 2023 where the University has not been pummelled with meritless process contrived by Mr Makhubele.
- [59] The University makes the point that it has two costs orders against the respondents which run to hundreds of thousands of rands. It has had no choice but to employ the services of attorneys.
- [60] Mr Makhubele in argument made the suggestion that it should use the resources of the Wits Law Clinic to defend itself. This absurd submission was made seriously and is an example of how far-removed Mr Makhubele's understanding of the realities of litigation are.
- [61] The October application amounts to the same constantly recycled case that the University must be ordered to go against its Statute and rules and allow for a person who has bound herself to these statutes and rules to graduate and enrol for a new course.
- [62] The point has been decided twice by this court on precisely the same facts. The argument sought to be made in the October application is that the debt for fees has prescribed and thus it must be regarded as never having been owing and the University is accordingly not entitled to invoke its rules as to non-payment.
- [63] On this argument, once three years have passed every student must be allowed to graduate whether their fees are paid or not. They must also be entitled to have further tuition notwithstanding that they have not paid for their first degree.
- [64] The absurdity of this position is manifest in any sane consideration of the law.
- [65] On his own version, Mr Makhubele and his daughter are penniless. He is unable to meet his financial obligations to the University and has been steadfastly delinquent.
- [66] In argument, Mr Makhubele eventually tendered security – again in the form of the judgment debt which he himself has been unable to execute on.

- [67] He has made out no case in relation to his ability to meet the mounting costs to the University of this extraordinary crusade. He presented a statement of his assets which makes the claim that he has assets worth nearly R 40 million but no means of achieving liquidity to meet his obligations. No detail as to how these assets are made up is revealed save that he says he has two immovable properties. When pressed he conceded that the properties are bonded.
- [68] The University asks that Mr Makhubele and Tsakani be ordered to furnish security for costs in the October urgent application jointly and severally in the amount of R 150 000 or such amount as is determined by the registrar and that the October application be stayed pending the furnishing of the security. It is furthermore sought that the respondents are be directed jointly and severally to pay punitive costs of the application for security on the scale as between attorney and client.
- [69] Mr Makhubele sought to argue at some length that the requirements for a final interdict had to be met to allow for an order for security for costs. He sought also to elide the requirements of rule 47 with those of an interim interdict. This is obviously without merit.

Further activity after argument and conclusion

- [70] As I was finalising this judgment, I noted that the applicant had this morning (15 November 2023) sought to file yet another application in the form of a counter application in which he seeks to tender security in the form of the very acknowledgment of debt which he says has prescribed and again the money judgment. He asks furthermore that such order of security must be conditional on the applications for leave to appeal; part B of the notice of motion in the February 2022 application, the main application and this rule 47 application.
- [71] Mr Makhubele will not stop until he is stopped by this court. His stamina in churning out meaningless and abusive process is mind-boggling. I am furthermore satisfied that the abusive conduct against the University is not only misguided but is borne out of malevolence. Unfortunately, the rights of the second respondent are implicated in Mr Makhubele's machinations.

[72] I have not seen a more misguided approach to legal process. I am persuaded that the only manner in which this abusive conduct towards a non-profit organisation of higher learning can be contained is to order that security for costs be furnished.

[73] In light of the contrivances in relation to the attempts to furnish worthless security in the form of judgment debts, it is proper that I direct the form of the security to be given.

Order

[74] In all the circumstances I make the following order:

- [1] The application for security for costs succeeds against the first respondent and he is ordered to provide security for costs in the amount of R 150 000 in the form of a bank guarantee suitable to the University.
- [2] All proceedings under this case number are stayed pending the furnishing of such security.
- [3] The application for security for costs against the second respondent is postponed *sine die*.
- [4] The first respondent is to pay the costs of this application on the scale as between attorney and client.

D FISHER
JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 15 November 2023.

Heard: 13 November 2023

Delivered: 15 November 2023

APPEARANCES:

For the Applicants: Adv B Bhabha

Instructed by: Vermaak Marshall Wellbeloved Inc.

For the First Respondent: The respondent appeared in person.