REPUBLIC OF SOUTH AFRICA

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

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

13 July 2023
....
DATE SIGNATURE

CASE NO: 7895/2022

In the matter between:

NATHANIEL TSAKANI MAKHUBELE	First Applicant
TSAKANI MAKHUBELE	Second Applicant

and

VICE CHANCELLOR AND PRINCIPAL, UNIVERSITY OF THE WITWATERSRAND	First Respondent
DEPUTY VICE CHANCELLOR: SYSTEM AND OPERATIONS: UNIVERSITY OF THE WITWATERSRAND	Second Respondent
DEAN, FACULTY OF HUMANITIES, UNIVERSITY OF THE WITWATERSRAND	Third Respondent
MESHACK NDORO	Fourth Respondent
GAFIEDA PYLMAN	Fifth Respondent
SINDISILE MOOLMAN	Sixth Respondent
CASSIM HILL	Seventh Respondent
AYANDA ZWANE	Eighth Respondent

JUDGMENT

S BUDLENDER AJ:

[1] The second applicant, Ms Makhubele, was registered at the University of the Witwatersrand for a Bachelor of Education (B.Ed. degree). The first applicant is Ms Makhubele's father, Dr Makhubele

[2] Ms Makhubele completed the academic requirements for the degree.

[3] However, the University has refused to allow Ms Makhubele to graduate with the B.Ed degree and has refused to allow her to enrol for a B.Ed Honours degree. The University maintains that its refusal is permissible because there has been a protracted failure to settle outstanding fees due for Ms Makhubele's B.Ed degree.

[4] The applicants contend as follows:

[4.1] Dr Makhubele is liable for Ms Makhubele's fees to the University in terms of a divorce order.

[4.2] While amounts were at one stage outstanding in respect of Ms Makhubele university fees, that position was changed by (a) an acknowledgement of debt by Dr Makhubele in favour of the University in September 2022 in relation to the fees concerned; and/or (b) the partial cession by Dr Makhubele in favour of the University of a court order in his favour for R1.4 million.

[4.3] Therefore, there is no basis for the University to continue to refuse to allow Ms Makhubele to graduate with the B.Ed degree or to refuse to allow her to enrol for a B.Ed Honours degree.

[4.4] The applicants contend that Ms Makhubele is grossly prejudiced by the University's unlawful conduct because until she graduates, she cannot pursue her teaching career.

The previous applications

[5] This is the third time that the applicants have approached the urgent court regarding this matter in the past eighteen months.

[6] The first occasion was in February 2022.

[6.1] In that application, the applicants sought to compel the University to permit Ms Makhubele to finalise her last year of her B.Ed degree.

[6.2] Ultimately, the application was resolved between the parties. The University permitted Ms Makhubele to complete her B/Ed studies, subject to various conditions.

[6.3] It appears that there is some dispute regarding precisely how that resolution occurred and what its terms were. For present purposes, nothing turns on this.

[7] The second occasion was in April 2023.

[7.1] There the applicants sought an interim order compelling the University to allow Ms Makhubele to graduate with her B.Ed degree during April 2023.

[7.2] The application was dismissed by my brother, G Meyer AJ. An order was issued on 21 April 2023, followed by reasons on 31 May 2023.

[7.3] The judgment runs to 22 pages. It is not necessary for me to deal with the detail of the reasoning. It suffices to say that G Meyer AJ found that the University acted lawfully in refusing to allow Ms Makhubele to graduate and in refusing to allow her to enrol for the B .Ed Honours degree.

[8] This prompted the third approach by the applicants to the urgent court, in June 2023. That is the application that served before me. The relief sought by the applicants was essentially as follows:

[8.1] joining the University of the Witwatersrand as the first respondent (prayer 2);

[8.2] declaring that the orders issued by G Meyer AJ were invalid and of no force or effect and are set aside, alternatively rescinded and set aside (prayer 3);

[8.3] declaring that the University lacks or lack the authority, without a court order, to prevent Ms Makhubele from graduating in July 2023 and registering for the B. Ed honours programme (prayer 4); and

[8.4] pending the determination of Part B, the University be directed to permit Ms Makhubele to graduate in July 2023 and to register for the B. Ed honours programme (prayer 5).

[9] In all three applications, argument for the applicants was presented by Dr Makhubele. Though Dr Makhubele is not a lawyer, I allowed this.

The issue of possible recusal

[10] It is necessary to deal, at the outset, with a preliminary issues. It arises as follows.

[10.1] This matter was initially set down before me on 13 June 2023.

[10.2] On the morning of 12 June 2023, at my request, my registrar wrote to the parties as follows:

"1. Acting Judge Budlender has asked me to write to the parties as follows.

2. Acting Judge Budlender is sitting on urgent court this week. On Friday, the senior judge – Judge Holland-Muter – allocated the urgent roll to the urgent judges concerned. One of the matters allocated to Acting Judge Budlender is the matter of Makhubele v University of the Witwatersrand.

3. Acting Judge Budlender wishes to draw the following to the parties' attention:

a. Acting Judge Budlender has occasionally acted as counsel in for the University of the Witwatersrand. None of the matters in which he acted concerned the issues that arise in the present case.

b. *Acting Judge Budlender is presently on brief in one matter for the University of the Witwatersrand. No hearing has been scheduled in the matter and it does not concern the issues that arise in the present case."*

[10.3] I requested that this letter be written because it seemed to me important that – as is the practice in the Constitutional Court and other courts – once there is any association between a judge and a party, that should be formally disclosed. This is to allow the other party to consider its position.

[10.4] When the matter was called on 13 June 2023, there was no objection to me hearing the matter. Nor was there any request for recusal or any expression of concern about the contents of the letter.

[10.5] With the agreement of the parties, I ultimately heard the matter on 16 June 2023. There was again no request for recusal or any expression of concern about the contents of the letter.

[10.6] During the hearing I enquired from the University's counsel whether it was necessary to give judgment immediately; or whether if I found in the applicants' favour in due course, the University would still be able to accommodate Ms Makhubele and allow her to graduate. The University's counsel made clear in open court that the latter position was correct.

[10.7] I therefore reserved judgment and indicated that I hoped to deliver it in the week of 17-21 June 2023. Regrettably, this proved impossible due

to personal circumstances beyond my control and the judgment is instead only being delivered on 13 July 2023. I apologise sincerely to the parties for this delay. However, it was at all times clear to me that, if I found in the applicants' favour, the University could allow Ms Makhubele to graduate and indeed would be obliged to do so – even if this meant a separate and additional graduation ceremony. This would in turn allow Ms Makhubele to pursue her teaching career.

[10.8] On the evening of 12 July 2023, as I was in the process of finalising my judgment on the merits, I received an email indicating that further documents had been uploaded to Caselines in this matter. Those fdocuments included a further affidavit filed by Dr Makhubele. It appears that this is intended to be in support of another urgent application, seemingly intended to be brought before the urgent court.

[11] For present purposes, only two aspects of the further affidavit need to be addressed.

[12] First, it appears from the affidavit that, on 6 July 2023, Dr Makhubele wrote to my registrar enquiring as to when the judgment would be delivered. Regrettably, that letter was never sent to me – hence the lack of any response, for which I apologise.

[13] Second, in the affidavit, Dr Makhubele for the first time contends that I was duty bound to have recused myself from the matter because I am counsel for the University in an unrelated matter.

[13.1] While no formal request has been made to me to recuse myself, it seems to me that I am now duty-bound to consider that question.

[13.2] This is especially so as Dr Makhubele is not a lawyer and I do not wish to adopt an overly technical approach in a manner that may prejudice the applicants on this score. I therefore turn to deal with that issue.

[14] Dr Makhubele's complaint does not relate to any previous occasion on which I have acted for the University.

[15] Instead, his complaint relates to the single matter which I indicated I was on brief for the University.

[15.1] That matter is a defamation claim against the University arising from a public event held at the University.

[15.2] I drafted an exception in the matter, which was issued in August 2022, almost a year ago. Since then the matter has been dormant.

[16] The question is whether, in these circumstances, I should recuse myself. I have had regard to the relevant authorities on this score. These include the decision in *SARFU II*,[1] where the Constitutional Court laid down the principles that apply, and the helpful decision in *Muladzi*,[2] where the SCA dealt with the situation where an attorney for a party is also the attorney of the presiding judge and

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[1] *President of the Republic of South Africa & others v South African Rugby Football Union & others* 1999 (4) SA 147 (CC)

[2] *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others* 2017 (6) SA 90 (SCA)

considered multiple foreign precedents on this score.

[17] The test laid down in *SARFU* is clear:

> *"The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."*[3]

[18] Given the urgency of this matter, it is not possible to traverse all of the principles in detail. It suffices to say, by way of summary, that I do not consider that there is any basis for me to recuse myself having regard to the following:

[18.1] First, the applicants did not timeously allege that they have a reasonable apprehension that I would or might be biased, nor did they even raise any concern on this score. They did not do so when the matter was called before me on 13 June 2023 or when it was heard by me on 16 June 2023. This despite the letter to the parties of 12 June

[3] *SARFU II* at para 48

2023. Instead, the applicants waited until the proverbial last minute – a month later – to raise the issue and then did so somewhat obliquely. This delay in raising of the issue, without explanation for the delay, by itself weighs against there being any reasonable apprehension of bias.[4]

[18.2] Second, this is not a matter I allocated to myself.[5] Rather, it was allocated to me by the senior judge Holland-Muter J, as was explained to the applicants in the letter written on 12 June 2023.

[18.3] Third, the matter in which I am on brief for the University does not relate in any way to the present application or the issues in this application. It is also a matter that is somewhat stale, in the sense that nothing has transpired in it for close on a year. There is no suggestion of the matter giving a close, ongoing relationship between me and the University.[6]

[19] I therefore do not consider that a reasonable, objective and informed person would on the correct facts reasonably apprehend that I have not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. This means that there is no basis for me to recuse myself.

[20] In all the circumstances, it is not necessary for me to give consideration to further issues that may distinguish this case from *Muladzi*, including whether referral advocates might be said to have a greater degree of independence

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[4] See: *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC) at paras 70-74

[5] Contrast *Muladzi* at paras 59-60.

[6] Contrast *Muladzi* at para 50

from their clients than attorneys.

The merits

[21] In determining the merits, the starting point is to consider the extent of the overlap between the relief now sought before me and the relief sought before G Meyer AJ and dismissed by him.

[22] The substance of the core relief in both matters is essentially identical. The relief sought – and indeed the purpose of the application – is to obtain an interim order directing that, pending the determination of Part B, the University be directed to permit Ms Makhubele to graduate from her B.Ed degree and to register for the B.Ed honours programme. That is the relief that G Meyer AJ held was unsustainable and dismissed.

[23] It is therefore clear that, for so long as the judgment and order of G Meyer AJ stand, this is an insuperable obstacle to the applicants obtaining relief before me.

[23.1] This because of the doctrine of res judicata. The SCA explained as follows in *Prinsloo v Goldex*:[7]

> *"The expression 'res iudicata' literally means that the matter has already been decided. The gist of the plea is that the matter or question raised by the other side had been finally adjudicated upon in proceedings between the parties and that it therefore cannot be raised again. According to Voet 42.1.1, the exceptio was available at common law if it were shown that the judgment*

[7] *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another* 2014 (5) SA 297 (SCA).

> *in the earlier case was given in a dispute between the same parties, for the same relief on the same ground or on the same cause (idem actor, idem res et eadem causa petendi) ...”*[8]

[23.2] These requirements are manifestly met in the present case. The parties are the same and the relief sought is essentially the same.

[24] Indeed, in fairness to the applicants, they seem to recognise that this is so. That is presumably why they now seek, in prayer 3 before me, to declare that the orders issued by G Meyer AJ were invalid and of no force or effect and are set aside, alternatively rescinded and set aside.

[25] The question then is whether the applicants have made out a proper case for this prayer 3 relief. Their case in their founding papers is set out in paragraphs 18 to 19. It involves essentially two complaints:

[25.1] The first complaint is that the University itself was not joined as the first respondent in the matter. This is contended to mean that the order of G Meyer AJ is “*invalid [and] of no legal force or effect as it is unbinding against the applicants … or the Respondents who are the University’s executive, management and employees cited because of their day-to day involvement in the matter [and who] lack a direct and substantial interest in the matter*.”

[25.2] The second complaint is that the Respondents were not properly before the court as the deponent and university’s legal representatives did not put up a resolution or proof of authority to oppose the matter.

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8 *Prinsloo* at para 10.

[26] With regard to the first issue:

[26.1] It is correct that lack of jurisdiction is a basis to rescind a court order:

> *"[I]f a judgment or order has been granted by a court that lacks jurisdiction, such order or judgment is a nullity and it is not required to be set aside. However, I agree with the view expressed in Erasmus Superior Court Practice, that if the parties do not agree as to the status of the impugned judgment or order, it should be rescinded. That is the position in the instant matter where the appellant applied to have the order set aside on the premise that the court did not have jurisdiction. Therefore, the usual requirements for a rescission application in terms of the common law or rule 42 do not apply."*[9]

[26.2] It is also correct that the applicants asked for an order joining the University as a respondent and that G Meyer AJ dismissed all the relief sought by the applicants – including the joinder order.

[26.3] It is not clear to me why the applicants did not join the University as a respondent at the outset. Nor is it clear to me how much attention the joinder of the University was given during the hearing before G Meyer AJ.

[26.4] But for present purposes, little turns on this. The applicants' case is essentially that an applicant can (a) fail to join a (purportedly)

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[9] *Travelex Limited v Maloney and Another* [2016] ZASCA 128 (27 September 2016) at para 16.

There is some debate in the cases about whether, when a judgment is a nullity, a litigant is obliged to comply with that judgment unless and until it has been set aside; or whether it is entitled to disregard it. In *Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni* 2022 (10) BCLR 1254 (CC) at paras 27 and 34, the Constitutional Court held that it was not necessary to resolve this debate. That debate also does not need not be determined for the purposes of this application.

necessary party; (b) belatedly seek to do so; and (c) when the application is dismissed on substantive grounds, complain that the court lacked jurisdiction because the joinder order was not granted. That is a most surprising contention and one for which I cannot find any authority.

[26.5] Moreover, and critically, whether or not the University could or should have been joined, any order granted in favour of the applicants would have had to be carried out by the Vice-Chancellor and his subordinates. But the Vice-Chancellor and other officials were joined and actively participated.

[26.6] The contention that the order was therefore a nullity or not binding on the applicants or respondents is therefore without foundation.

[27] With regard to the second issue:

[27.1] It is well established a deponent does not need to be authorised to depose to an affidavit on behalf of a party.

[27.2] This was made clear by in *Eskom v Soweto City Council*:[10]

> *"The evidence of Rossouw cannot be ignored because he is not 'authorised'. If Attorney Bennett has authority to act on respondent's behalf, he may use any witness who in his opinion advances respondent's application. A witness, also when a deponent, may testify even if he has no authority to bring, withdraw or otherwise deal with the application itself. …*

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[10] 1992 (2) SA 703 (W) at 706A-C

If then applicant had qualms about whether the 'interlocutory application' is authorised by respondent, that authority had to be challenged on the level of whether Attorney Bennett held empowerment. …"

[27.3] It was later re-affirmed by the SCA in *Ganes*:[11]

"… In my view it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised.…"

[27.4] The complaint about lack of authority to depose is therefore misplaced.

[27.5] The complaint that the attorneys for the respondents were not authorised to act for the respondents is equally misplaced. Again the decisions in *Eskom* and *Ganes* make this clear – they establish that a complaint about lack of authority on the part of legal representatives must be raised via Rule 7.[12]

[27.6] It is not clear to me whether the Rule 7 procedure (or some more informal procedure) was followed before G Meyer AJ to raise a complaint of lack of authority. The careful judgment of G Meyer AJ certainly makes no reference to the issue.

[27.7] But even assuming, in favour of the applicants, that the issue was raised before G Meyer AJ and that he erred in failing to deal with it, this is not a basis for the rescission of the order of G Meyer AJ, nor does it render his order unlawful. At best it would be a basis for an appeal against that

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[11] *Ganes v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at para 19

[12] Id.

judgment. That cannot provide a basis for the relief now sought before me.

[28] It follows that neither of the applicants' bases for their prayer 3 relief – declaring that the orders issued by G Meyer AJ were invalid and of no force or effect and are set aside, alternatively rescinded and set aside – have any merit.

[29] This means that the order of G Meyer AJ dismissing the interim relief stands.

Conclusion

[30] The application before me must therefore fail. I can see no reason that costs should not follow the result.

[31] In the circumstances, I make the following order: The application is dismissed, with costs.

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S BUDLENDER
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING:	16 June 2023
DATE OF JUDGMENT	13 July 2023