



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case no: 730/2022

In the matter between:

DINKWANYANE KGALEMA MOHUBA

APPELLANT

and

THE UNIVERSITY OF LIMPOPO

RESPONDENT

Neutral citation: *Mohuba v University of Limpopo (730/2022) [2023] ZASCA 139*
(27 October 2023)

Coram: ZONDI, MOTHLE, WEINER and GOOSEN JJA and UNTERHALTER
AJA

Heard: 28 August 2023

Delivered: 27 October 2023

Summary: Whether the relationship between a university and a student is contractual or administrative in nature – refusal by a university to confer a degree on a student – termination of the student's registration – whether separation order in terms of rule 33(4) of the Uniform Rules of Court should have been granted – question raised in the special plea should have been allowed to stand over for determination in the trial.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Ledwaba AJ, sitting as court of first instance):

1 The appeal succeeds.

2 The order of the high court upholding the special plea and dismissing the appellant's claim against the respondent is set aside and is substituted with the following order:

'The issues raised in the special plea are to be determined in the trial.'

3 The matter is remitted to the high court for trial.

4 Each party shall pay its own costs occasioned by both the hearing of the special plea in the high court and the appeal.

JUDGMENT

Zondi JA (Mothle and Weiner and Goosen JJA and Unterhalter AJA concurring):

[1] This is an appeal against the judgment and order of the Limpopo Division of the High Court, Polokwane (the high court) (Ledwaba AJ) upholding the respondent's special plea that the contractual relief sought by the appellant was incompetent and dismissing the appellant's action with costs. The appeal is before this Court with the leave of the high court. The issue is whether the high court was correct to uphold the special plea and dismiss the appellant's claim.

[2] The appellant is Mr Dinkwanyane Kgalema Mohuba and the respondent is the University of Limpopo, as defined in terms of s 1 of the Higher Education Act 101 of 1997 (the university). At the time of the dispute, the appellant was employed by the university as Executive Director for Marketing and Communication. During August 2016, the appellant applied for enrolment, and was accepted by the university, as a

student for the degree of Doctor of Commerce (the degree). In due course, the appellant submitted his thesis proposal for consideration and approval by the Central Higher Degrees Committee (Committee). It was approved on 13 June 2017. On 12 February 2018, the Acting Director: School of Economics and Management recommended the assessment of the thesis. The Committee met on 12 March 2018 to consider the assessment reports and after considering the reports, it recommended that the degree be awarded to the appellant.

[3] On 14 March 2018, the university received a complaint from a member of the university Senate (the Senate) in which he expressed concern that the appellant, who was in full time employment at the university, was recommended for the award of the degree, after having been registered with the university for less than two years. The complainant was concerned that the university's statutory requirements regarding the conferment of degrees might have been breached in the process. On 3 April 2018, the university received a similar complaint from a member of the Committee. The gist of the complaint was that the appellant did not meet the requirements stipulated in various statutes of the university relating to the completion of a doctorate. The university caused these complaints to be investigated, after which it refused to confer the degree on the appellant, and later terminated his registration on 5 October 2018.

[4] Aggrieved by the university's decisions to refuse to confer the degree upon him and to terminate his registration as a doctoral student, the appellant, on 24 July 2019, instituted action against the university in the high court in which he claimed specific performance of the contract entered into by him and the university. He sought an order directing the university to confer the degree on him. His claim was founded on contract and was pleaded in paras 4-7 of the particulars of claim as follows:

'4. [T]he plaintiff and the defendant entered into a tacit contract of which the material terms were that the defendant would award the said degree upon the plaintiff once the plaintiff had been registered as a student of the defendant for the period prescribed by the defendant's Senate and completed the work and attained the standard of proficiency determined through assessment as required by the Senate.

5. The plaintiff was duly registered as a student of the defendant for the period prescribed by the Senate and completed the work and attained the standard of proficiency determined through assessment as required by the Senate and was in all respects entitled to the conferment of the said degree during the defendant's Easter 2018 graduation ceremony.

6. The defendant, in breach of the said contract, refused to confer the degree during the said ceremony and then repudiated the agreement during October 2018 when the defendant summarily terminated the plaintiff's enrolment as student and refused that the plaintiff be re-registered as such.

7. The plaintiff rejects the defendant's said breach and repudiation and elects to hold the defendant to the contract between the parties.'

[5] The basis for the appellant's claim was that upon acceptance of his application for enrolment as a doctoral student, a tacit agreement was concluded between him and the university. The terms of the agreement, the appellant averred, were that he had to be registered with the university as a student for the period prescribed by the university Senate, complete the work and attain the standard of proficiency determined through assessment as required by the Senate. He alleged that he had met all these conditions. He contended that, upon meeting all these requirements, the university was obliged to confer the degree upon him during the university's Easter 2018 graduation ceremony.

[6] The appellant averred that, in breach of the agreement, the university refused to do so, and during October 2018, it summarily terminated his enrolment as a student and refused to accept his re-registration application. The appellant alleged, further, that the university's conduct constituted a repudiation of the contract. He sought an order directing the university to confer the relevant degree upon him (the specific performance remedy).

[7] The university filed a special plea in which it averred that the appellant's claim for specific performance of the contract was incompetent. It contended that its decision to refuse to confer the degree on the appellant and its decision to terminate his registration as a student constituted administrative action as envisaged in the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The university therefore

asserted that the appellant should have applied for the review and setting aside of its decision. This was so, the university argued, because that decision remained valid until set aside by way of judicial review under PAJA. The allegations underlying this contention were the following:

'3.1 The plaintiff applied and was registered for the Doctorate Degree in terms of the defendant's rules in 2016.

3.2 Pursuant to an investigation the defendant's Executive Committee of Senate took a decision to terminate the plaintiff's registration for the Doctorate Degree on the 5th of October 2018.

3.3 The decision to terminate the plaintiff's registration is valid and extant and has not been set aside.

3.4 The defendant is prohibited from awarding the Doctorate Degree until the decision to terminate his registration taken on 5 October 2018 has been set aside.

3.5 The defendant's refusal to award the plaintiff the Doctorate Degree in issue constitutes an administrative action which remains valid until set aside by a competent authority.

4. It is a preremptory requirement that review proceedings in terms of PAJA must be instituted in accordance with Rule 53 of the Uniform Rules of Court.

5. The plaintiff did not institute review proceedings in terms of Rule 53 within the prescribed time period in compliance with section 7(1) of PAJA.

6. In the circumstances, the plaintiff was not entitled to institute the present action for relief that is subject to and regulated in terms of PAJA.'

[8] The university accordingly sought the dismissal of the appellant's claim with costs, alternatively the stay of the action pending the final resolution of review proceedings.

[9] In the amended plea on the merits the university sought to justify its decision not to confer a degree on the appellant on the grounds that the appellant had failed to comply with s 65B of the Higher Education Act 101 of 1997 (the Act) and the university rules relating to admission and registration requirements for all degrees and certificates. The university alleged that the appellant:

'9.2.5.1. did not have sufficient knowledge of the field of study in issue to enrol for doctoral study as required in terms of paragraph G53.3 of the [university's] admission rules; *alternatively*

9.2.5.2. did not complete a doctoral thesis as required in terms of paragraph G 56.1 of the [university's] admission rules; *further alternatively*

9.2.5.3. did not fulfil the requirements to be awarded [a] doctoral degree in the opinion of the senate and assessment panel as contemplated in paragraph G60.3 of the [university's] admission rules.'

[10] The matter proceeded to trial. Before the hearing, the parties agreed that the special plea was to be dealt with on a separated basis before any other issues, in accordance with the provisions of rule 33(4) of the Uniform Rules of Court. It is not apparent from the judgment whether the high court made a separation order. The high court made no formal ruling to that effect, but the trial nevertheless proceeded in accordance with the agreement. The high court eventually upheld the special plea and dismissed the appellant's claim with costs.

[11] The high court appears to have accepted that the relationship between the appellant and the university is contractual in nature and that the remedy of specific performance was available to the appellant in the event of breach of the contract. However, it refused to grant the appellant specific performance on the ground that the appellant was no longer a student after the university had cancelled his registration. This was so, reasoned the high court, because the Act, in particular s 65B, and the university rules require a person to be registered as a student at the time the degree is conferred and these statutory provisions preclude the university from conferring a degree on a person whose registration as a student has been cancelled. It would be unlawful, proceeded the high court's reasoning, for a university to confer the degree on the appellant in circumstances where he was no longer registered as a student with the university.

[12] The appellant challenges the findings and conclusions of the high court. It is submitted on his behalf that the termination of the appellant's registration as a student is not, for purposes of his claim, an administrative act. It is simply a form of repudiation of the contract. The appellant accordingly argues that the high court erred in refusing to grant him specific performance on the ground that it would have been unlawful for the university to confer a degree on student who is no longer registered with the university.

[13] The conditions under which the university confers degrees are regulated by the Act, its Institutional Statutes and General Rules. The relevant provision of the Act is s 65B(2) which provides as follows:

'Save as provided in section 65C, no diploma or certificate may be awarded and no degree may be conferred by public higher education institution upon any person who has not–

- (a) been registered as a student of such public higher education institution for the period prescribed by the Senate of such institution; and
- (b) completed the work and attained the standard of proficiency determined through assessment as required by the senate of the public higher education institution, subject to section 7.'

[14] In terms of rule G53 of the General Rules of the university, a doctorate may only be awarded on the basis of a completed thesis. In terms of rule G60, a doctorate may only be awarded after the candidate has been registered for the degree at the university for at least two academic years before presenting his or her thesis. In terms of the Higher Education Qualifications Sub-Framework (HEQSF), the duration for a PhD is a minimum of two years of full-time study.

[15] It is difficult to follow the reasoning of the high court for refusing to grant specific performance and for upholding the special plea. The high court conceived the relationship between the university and the appellant as one of contract but it upheld the special plea in which the university had contended that the relationship between it and the appellant was entirely one of public law. That reasoning cannot be supported because if the relationship between the university and the appellant is to be understood as one of contract, the special plea should have been dismissed in which event the high court should have proceeded to consider whether the appellant was entitled to specific performance. As a party who was seeking specific performance, the onus was on the appellant to allege and prove the terms of the contract and compliance with any antecedent or reciprocal obligation. He had also to allege non-performance by the university which amounted to a repudiation, alternatively breach of the contract. If the appellant could not prove the contract on which he relied as well as compliance with its terms, his claim for specific performance had to fail. If on the other hand, the court was satisfied that the

appellant had established the terms of the contract, that he had complied with any antecedent obligation, including statutory requirements, and that the university had repudiated the contract, it had to grant specific performance unless there existed factors which justified the refusal of the remedy.¹

[16] During the hearing before this Court, a considerable amount of time was spent debating the nature of the relationship between a student and the university, whether it is contractual or properly framed as a matter of public law. In the view that I take of the matter, it is unnecessary to resolve that debate. In any event, the high court found that the relationship between a student and the university is contractual and it approached the case on that basis.

[17] The order of the high court upholding the special plea and dismissing the appellant's claim cannot stand. I do not think that the procedure of the special plea is appropriate to resolve the questions raised by the university in the special plea. Given the course that the matter has followed, the high court would have been justified in declining to decide the matter on the special plea. It should have allowed the question raised by the special plea to stand over for decision by the trial court, as it appears that the question is interwoven with the evidence that will be led at the trial.

[18] The relationship between a student and the university is not straightforward (*Sibanyoni v University of Fort Hare*²; *Mkhize v Rector, University of Zululand and Another*³). It cannot be characterised as one that is either entirely of a private law or public law nature (*Lunt v University of Cape Town and Others*⁴). There appears on the face of it, to be elements of both. What this means for the appellant's cause of action is a matter best left trial, when all the evidence has been led. On the pleadings at this stage, whether a decision taken on the basis of the university's statutes amounts to administrative action that must be set aside, is an issue that needs to be considered in the light of all the facts proven at trial (*South African National Parks v*

¹ *Haynes v King Williamstown Municipality* 1951 (2) SA 371 (A) at 378F-379B; SWJ Van der Merwe *Contract-General Principles* 4 ed (2011) at 331.

² *Sibanyoni v University of Fort Hare* 1985 (1) SA 19 (CKS) at 301.

³ *Mkhize v Rector, University of Zululand and Another* 1986 (1) SA 901 (D) at 904.

⁴ *Lunt v University of Cape Town and Others* 1989 (2) SA 438 (C).

*MTO Forestry (Pty) Ltd and Another*⁵). Hence the high court should not have decided the special plea but rather left the issue for trial.

[19] This case is not a proper case in which a separation order should have been granted. The high court should have exercised its discretion against the grant of the separation order, as the issues to be decided are inextricably linked.⁶ The separation order in this case does not facilitate the convenient and expeditious disposal of the litigation. It follows that the matter must be remitted to the high court. The parties would then be free to take such steps, as advised, with regard to the further conduct of the proceedings.

[20] As regards costs both parties accepted that the agreement to proceed with the matter on a separated basis was ill-considered in view of the fact that the issues to be decided at the trial are inextricably linked. They agreed therefore that each party should pay its own costs occasioned by both the hearing of the special plea in the high court and the appeal.

[21] In the result the following order issues:

1 The appeal succeeds.

2 The order of the high court upholding the special plea and dismissing the appellant's claim against the respondent is set aside and is substituted with the following order:

'The issues raised in the special plea are to be determined in the trial.'

3 The matter is remitted to the high court for trial.

4 Each party shall pay its own costs occasioned by both the hearing of the special plea in the high court and the appeal.

D H ZONDI
JUDGE OF APPEAL

⁵ *South African National Parks v MTO Forestry (Pty) Ltd and Another* [2018] ZASCA 59; 2018 (5) SA 177 (SCA).

⁶ *Denel (Pty) Ltd v Vorster* [2004] ZASCA 4; 2004 (4) SA 481 (SCA) para 3.

APPEARANCES

For Appellant:

PF LOUW SC

Instructed by:

DS Sello Attorneys, Polokwane
Webbers Attorneys, Bloemfontein

For first Respondent:

V NOTSHE SC

Instructed by:

Motalane Inc, Pretoria
Matsepes Inc, Bloemfontein