IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No: **A171/2022**

In the matter between:

UNIVERSITIES ALLIANCE SOUTH AFRICA (NPC) Applicant

and

CHAIRMAN OF THE COUNCIL OF THE UNIVERSITY OF THE FREE STATE First Respondent

CHAIRMAN OF THE SENATE OF THE UNVERSITY OF THE FREE STATE Second Respondent

UNIVERSITY OF THE FREE STATE Third Respondent

CORAM: LOUBSER J *et* HEFER AJ

JUDGMENT BY: HEFER AJ

HEARD ON: 27 NOVEMBER 2023

DELIVERED ON: 14 MARCH 2024

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[1] The impact of the Covid-19 pandemic across the world and more in particular in South Africa, is still fresh in the minds of most people. Even today, the courts are often faced with litigation where the impact on contractual and other obligations as well as the economy plays a central role.

[2] In this matter, the Court is now called upon to adjudicate upon the validity and lawfulness of the Mandatory Vaccination Policy in respect of students and employers, implemented by the University of the Free State on 14 February 2022 and subsequently suspended by the council of the University of the Free State on 14 July 2022.

[3] The Covid-19 pandemic in South Africa was part of the pandemic of the Corona Virus Disease 2019 caused by the severe acute respiratory syndrome Corona Virus 2 (SARS-CoV-2).

[4] During March 2020, Minister of Health Zweli Mkhize had confirmed the spread of the virus to South Africa with the first known patient being a male citizen who

tested positive upon his return from Italy. On 15 March 2020, the President of South Africa, Cyril Ramaphosa, declared a national state of disaster and announced measures such as immediate travel restrictions and the closure of schools from 18 March 2020. On 17 March 2020 the National Corona Virus Command Council was established, to lead the nation's plan to contain the spread and mitigate the negative impact of the corona virus. On 23 March 2020, a national lockdown was announced starting on 27 March 2020.

[5] President Ramaphosa announced that from 1 May 2020, a gradual and phased easing of the lockdown restrictions would begin, lowering the national alert level to 4. From 1 June 2020, the national restrictions were lowered to level 3. The restrictions were further lowered to alert level 2 on 17 August 2020. From 21 September 2020, restrictions were lowered to alert level 1.

[6] During December 2020, the country experienced a second wave of Covid-19 infections, mostly with infections from the SARS-CoV-2 Beta variant. On 17 February 2021, the National Covid-19 Vaccination Program was officially rolled out.

[7] Following the release of the "Consolidated Directions on Occupational Health and Safety Measures in certain workplaces" (**"the Directions"**), on 11 June 2021, regarding the application of the Occupational Health and Safety Act 85 of 1993 (**"OHSA"**), many employers started implementing Covid-19 mandates in the workplace.

[8] During August 2021, Mr Nathan Pillay, a PhD student registered and studying at Stellenbosch University was informed by his father, who is in the employment

of the University of Stellenbosch (SU), that Covid-19 vaccinations would likely be required for staff members as a condition of employment.

[9] On suspicion that similar measures would be taken to force students to vaccinate, Mr Pillay established an awareness campaign, "*Maties against Mandates*", on Facebook on 18 September 2021. This campaign sought to:

(a) create awareness surrounding the prospect of mandatory vaccinations at SU;

(b) alert students and staff to potential risk associated with Covid-19 vaccines in a bid to encourage informed decisions;

(c) provide a platform through which those opposed to Covid-19 mandates could interact and collectively engage the university; and

(d) should the need arise, instruct legal representatives.

[10] During October 2021 Mr Pillay was notified of the existence of a group opposing a draft vaccination policy at the University of the Witwatersrand (Wits). After liaising with this group, he became acquainted with one Marc Litao, with whom Mr Pillay eventually established the Applicant.

[11] The Telegram group "UNIVERSITIES ALLIANCE SA" was founded by Mr Litao during October 2021. As staff and students from other universities were notified of intending Covid-19 mandates, Universities Alliance developed into a network of groups for individual universities connected to the original Universities Alliances Group.

[12] Members of the communities of four additional universities joined the Universities Alliance campaign during November 2021 consisting of a group of students from NWU, the UFS, the University of Pretoria (UP), and the Rhodes University.

[13] The Applicant and its members opposed these policies on the premise that the role of vaccines, which according to the Applicant, only confer limited benefits, as a measure to combat Covid-19 should not be conflated with the role of the vaccine mandates, which serve no practical purpose and are harmful, according to the Applicant, in a variety of ways.

[14] By late November 2021 the ostensible consultative processes at various institutions were according to the Applicant, becoming exhausted.

[15] During late November and December 2021, the Omicron variant was a prevalent source of infection during South Africa's fourth wave of Covid-19. For scientific and medical reasons (as advanced by the Applicant), it was expected by Universities Alliance and others that Omicron's advent would lead to a revision of Covid-19 vaccination policies in universities and workplaces.

[16] On 26 November 2021, the council of the University of the Free State, (UFS) approved the Mandatory Vaccination Policy (the policy) in respect of all students and employees of the UFS

[17] According to the Applicant, in particular the mildness of the variant, its immunising effect on the population, its greater transmissibility and the very limited efficacy of available Covid-19 vaccines in relation to reducing

transmissibility of this variant, rendered Covid-19 mandates unfit for their intended purpose.

[18] According to the Applicant, it was thus expected that universities would share this view and, at the very least, re-open their consultative processes to account for the fact that the medical and scientific landscape had changed drastically since the formulation of the policies in mid late 2021. These circumstances, it was thought, rendered policies such as that of the Respondent wholly redundant, and furthermore lend themselves to non-adversarial resolutions.

[19] Instead, according to the Applicant, early 2022 saw concerted – and coercive – efforts by the universities, particularly the Respondents, to implement and enforce mandates that had been formulated before the attenuation of the SARS-CoV-2 virus.

[20] On 14 February 2022, the policy was implemented at the UFS by the respondents.

[21] The Applicant alleges that by March 2022, it realised that universities, including the Third Respondent, had no intentions whatsoever of considering the lack of efficacy of available vaccines against Omicron or the vastly reduced severity, hospitalization and death associated with the variant.

[22] On 3 March 2022, a letter of demand with alleged supportive medical evidence was sent to the Respondents in which the following was pointed out:

(i) that the Omicron variant of the SARS-CoV-2 virus which at that stage accounted for almost all new cases, was far less dangerous than

preceding variants and merely induced mild symptoms, if any at all, in the overwhelming majority of cases in South Africa;

(ii) that the Omicron variant has been acknowledged to have a truly vaccinating / inoculating effect on populations, insofar as infection imbues percipients with natural immunity at very low risk and the virus has spread sufficiently widely and rapidly to reach most of society. Students in particular benefited from this phenomenon on account of their relative lack of vulnerability to Covid-19 in the absence of comorbidities;

(iii) that numerous seroprevalence studies and estimates suggested that an overwhelming number of South Africans already possessed natural immunity to Covid-19, and thus had no need for the Covid-19 vaccination;

(iv) that the suite of South African Health Product Regulatory Authority (SAHPRA) at that stage approved vaccines offering minimal protection against Omicron, and little more against the Delta variant;

(v) real world data did not support the notion that available vaccines offer any meaningful protection in terms of reductions of infections or transmission. Numerous countries with high vaccination rates, which were almost entirely or highly vaccinated nations, had still observed increases in case numbers and hospitalisations in spite of the vaccine rollouts; and

(vi) that numerous studies have shown that the viral loads of unvaccinated and vaccinated individuals were comparable, and such individuals from both categories were equally likely to transmit the disease.

[23] The Respondents replied via their firm of attorneys, Bowman's, that the policy would remain in place.

[24] On the 17th of May 2022 the Applicant once again wrote to the Respondents in which letter the Applicant reiterated that:

(i) the National State of Disaster has since been revoked;

(ii) the country was experiencing drastically reduced rates of severe illness, death and hospitalisation – with a commensurate easing of the burden on health resources;

(iii) new evidence attested to the reduced virulence of the Omicron variant along with the BA.4 and BA.5 sub-variants, in comparison to previous variants;

(iv) the efficacy of the Pfizer-BioNtech Covid-19 vaccine in stopping the transmission Omicron and its subvariants was then understood to be below 50%, three months post-vaccination; and

(v) the public health situation did not, at any point since February 2022, require or justify the enforcement or continuation of a policy formulated in November 2021.

[25] According to the Applicant, although the Respondents did suspend the policy measures on 15 July 2022, it was stressed that the policy would remain in place for future implementation. According to the Applicant, no acknowledgment of wrongdoing from the Respondents was forthcoming, nor were attempts made to redress violations of rights or harm reduced to stakeholders by the policy.

Nature of the application:

[26] According to the Applicant, the Covid-19 disease and the South African government's response thereto are well documented. The pandemic has been experienced by all South Africans and needs little further explanation.

[27] This is an application in terms of Rule 53 to review, declare invalid and unlawful and hence to set aside the policy currently in force at the campuses operated and controlled by the Respondents.

[28] The Applicant and its members view the policy as an unnecessary and draconian measure which breaches the fundamental human rights of the Respondents' employees, students and third parties who access the Respondents' campuses.

[29] According to the Applicant, it seeks to protect the rights of its members, including access to higher education, by obtaining an order reviewing and setting aside the enforcement of the policy approved by the Respondent on 26 November 2021 and implemented on 14 February 2022.

[30] The Applicant asserts that the policy, which affects students, staff members and third parties at Respondents' premises, unjustifiably violates many basic human rights as established in the Bill of Rights.

Purpose of the application:

[31] According to the founding affidavit:

> *"[65] The main purpose of this application is to gain access to the records pertaining to the decisions taken by the Respondent to implement – and, subsequently, effects amendments to – the policy, as well as their decision not to rescind the policy on multiple occasions in view of the continuous emergence of new medical and scientific evidence pertaining to Covid-19 and associated vaccines.*
>
> *[66] This application further seeks the review and the rescission of the Respondents' vaccine mandate on the basis that:*
> *[66.1] the policy is unlawful and invalid, and*
> *[66.2] the administrative process followed by the Respondents was fatally flawed."*

Opposition by Respondents:

[32] According to the Respondents, there are five elements to the relief which the Applicant (UASA) seeks. All of them, according to the Respondents, are fatally flawed:

(i) First, UASA seeks orders setting aside historical decisions made by the UFS with regard to the Covid-19 vaccination policy. This question is

according to the Respondents moot whereas the policy was suspended during July 2022 before the application was launched. It is not in force anymore;

(ii) Secondly, UASA seeks a declaration that any policy of compulsory vaccination in respect of SARS-CoV-32 or Covid-19 is unconstitutional, unlawful and invalid. Whereas it is a hypothetical issue it is, according to the Respondents, not a competent subject of a declaratory order. It also goes beyond what a Court would properly order, because it depends on the facts which will exist at some future time if and when the introduction of a compulsory vaccination policy is considered. Whether such a policy is lawful will depend on matters such as:

(a) the nature of variant of the virus at the time in question, including its transmissibility, virulence and the risk it creates to human life or health;
(b) the effectiveness of the available vaccines in preventing infection and transmission of the disease;
(c) the availability of effective alternatives to vaccination;
(d) further advances in scientific and medical knowledge; and
(e) the terms of the policy.

(iii) Thirdly, UASA seeks an order that the UFS may not in future introduce any policies which may effect the basic human rights of students, personnel and third parties which engage with it. According to the Respondents, a Court will not grant an open-ended order of that kind – or the more so where there is no evidence that the UFS will introduce such a policy in future;

(iv) Fourthly, UASA seeks an order that the UFS must comply with the requirements of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). According to the Respondents, the UFS is already obliged to comply with PAJA. If it fails to do so, those affected will have a remedy;

(v) Fifthly, UASA seeks (in the alternative) an order which is just and equitable, but does not specify what order it will seek in that regard. According to the Respondents, this is not a permissible way to conduct litigation.

[33] According to the Respondents, UASA fails to appreciate that by its nature, the policy is a document which has been and will continue to be reappraised and revised as circumstances change and as scientific advances take place. This is similar to the manner in which the Government had to respond to the Covid-19 pandemic via the Disaster Management Act and regulations under the Act, by instituting measures which will change from time to time as circumstances change. Further, the Respondents contend the policy recognises this where paragraph 1.1 thereof states the following:

> *"The UFS recognises the preliminary nature of all scientific knowledge, and to that*, *in similarity with all other pandemics and viruses, the updating of knowledge will lead to an improved understanding of how to respond to such viruses scientifically and medically. As a University that follows science, we will stay abreast of any changes and respond accordingly."*

[34] According to the Respondents, the policy was revised with effect from 18 March 2022 and was suspended with effect from 15 July 2022.

[35] *"By the time this matter is heard, and thereafter, there may be a new variant of the virus, or a scientific breakthrough relating to the best response to the virus, which could inform whether the policy should be put into operation or whether it should be changed"*, according to the Respondents.

[36] With the above in mind, it is the Respondents' contention that the application is fatally flawed from the outset because:

(i) There is no live issue between the parties: the Covid-19 pandemic had ended, the natural state of disaster had ended, and the University's policy with regards to those matters had been suspended;

(ii) The dispute is therefore moot; and

(iii) The application is in any event redundant.

[37] I agree with Mr *Budlender*'s, appearing behalf of the Respondents, submission that the question of when a declaration of rights may be obtained and when a matter is moot, may dispose of the entire matter. For that reason, I deem it apposite that these aspects should be dealt with first.

Mootness and declaratory relief:

[38] *"Mootness is not an absolute bar to the justiciability of an issue, and a court may entertain a matter even where no live dispute exists, if the interest of justice so dictate. The Constitutional Court in various matters has set out the factors to be considered when deciding whether or not to hear the matter. These are:*

(a) whether any order which is made will have some practical effect either on the parties or on others;

(b) the nature and extent of the practical effect that any possible order may have;

(c) the importance of the issue;

(d) the complexity of the issue;

(e) the fullness or otherwise of the arguments advanced; and

(f) resolving the disputes between different courts."[1]

(Footnotes not included)

[39] In **Independ Electoral Commission v Langeberg Municipality**[2], the Constitutional Court said the following in regards to the practical effect factor:

> *"This court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this court may make will have some practical effect on the parties or on others."*

[40] In **President of the Republic of South Africa and Another v Hugo**[3], Didcott J said as follows:

> *"This case is covered and governed, I believe, by that part of our recent decision in JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others where we held that constitutional questions fell within the field of the judicial discretion which controlled*

[1] South African Legal Practice Council v LM Mokhele (1138/2022) [2023] ZASCA 117 (14 December 2023).
[2] 2001 (3) SA 925 (CC), par. [11].
[3] 1997 (4) SA 1 (CC), par. [54].

the grant of declaratory orders, and laid down as a general policy the rule that the discretion ought not be exercised in favour of answering any such question once it will have become, in the circumstances of the case, 'merely abstract, academic or hypothetical'."

[41] With reference to the **JT Publishing**-matter, the Court further said as follows:

"And neither of the applicants for the declaration stood any longer to gain the slightest benefit or advantage from it. No wrong done to either on the strength of the impugned provisions could still be righted. The danger had passed that anything which needed to be stopped might occur under their authority."[4]

[42] Didcott J then further said as follows:

"Here we see a comparable state of affairs, where events have likewise overtaken the issue raised. Unlike the legislation assailed in the earlier case, the presidential decree challenged in this one has not been repealed or stands formally. That is a difference more apparent, however, than real. The decree was neither <u>intended nor designed to continue operating indefinitely</u> …"[5] (own emphasis)

[43] In **Minister of Tourism and Others v Afriforum NPC and Another**[6], a similar issue arose in relation to the Covid-19 state of national disaster, with the same result. The Minister sought leave to appeal against an order of the Supreme Court of Appeal that a direction which he had made in terms of the

[4] Par. 55 H – I, p. 25.
[5] Par. [56], p. 29
[6] (CCT 318/21) [2023] ZACC 7

regulations under the Disaster Management Act was unlawful. While the appeal was pending, the state of the disaster had been terminated.

> *"Counsel for the Minister conceded that the matter was moot but submitted that nevertheless it was in the interest of justice for this court to grant leave to appeal. In support of this, counsel pointed out that a judgment of this court could give guidance on whether a Minister is entitled to use the B-BBEE level status in respect of the leave under the DM Act. There is no merit in this point. The Minister's defence to the attack by Afriforum and Solidarity was very specific. It related to the state of disaster, or DM Act and the regulations had been promulgated to regulate certain matters to the state of disaster. The state of disaster has been terminated. It may take a long time before South Africa is faced with another state of disaster."*[7]

[44] In the matter of **Solidariteit Helpendehand NPC and Others v Minister of Co-operative Governance and Traditional Affairs**[8], the Supreme Court of Appeal referred to the general principle:

> *"The general principle is that a matter is moot when a court's judgment will have no practical effect on the parties. This usually occurs where there is no longer an existing or live controversy between the parties. A court should refrain from making rulings on such matters, as the court's decision will merely amount to an advisory opinion on the identified legal questions, which are abstract, academic or hypothetical and have no direct effect; one of the reasons for that rule being that a court's*

[7] p. 13, par. [26]
[8] 2023 JDR 0964 (SCA)

purpose is to adjudicate existing legal disputes and its scarce resources should not be wasted away on abstract questions of law."[9]

[45] The Court further said that:

"It is so that the courts, in a number of cases, have dealt with the merits of an appeal, notwithstanding the mootness of the dispute between the parties. Those cases involved legal issues of public importance … that would affect matters in the future and on which the adjudication of this Court was required."[10]

[46] It was the Appellants' contention in the latter matter, that even though the national state of disaster may have been lifted, and the impugned regulations were long since repealed and no longer in force before the matter came before the High Court, the Minister's powers under the DMA ought not to escape scrutiny. It was further contended that the impugned regulations had forbidden the practice of worship with the threat of criminal sanction, including the possibility of incarceration. Therefore, the Appellants urged the Supreme Court of Appeal to hear the matter as that Court's decision on the lawfulness of the impugned relations would effect the rights of those accused persons and may prevent further and costly litigation related to the prosecution of those persons.

[47] Saldulker JA said the following, in this regard:

"There is no discrete issue before us. … To adjudicate on the circumstances that gave rise to the limitation or right to freedom of religion that no longer exists, would be to do so in a vacuum.

[9] p. 5, par. [12].
[10] p. 6, par. [14].

Therefore, if the court were to decide on the validity of the limitations, there would be no effect other than a mere declaration that the limitation was either valid or not. Such a declaration would in all likelihood have no effect on future regulations introduced either to conduct another strain of Covid-19 or the emergence of a new pandemic, because those regulations would be fact-specific to circumstances present during that relevant time. As a result, this Court's decision in respect of the impugned regulations based on the current facts would have no effect, as there are no regulations in place at the present moment."[11]

[48] In the matter of **Minister of Justice and Correctional Services and Others v Estate Late Stransham-Ford**[12], the Supreme Court of Appeal said:

"The Appeal Court's jurisdiction was exercised because a discreet legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required. The High Court is not vested with similar powers. Its function is to determine cases that present live issues for determination."[13]

[49] It is the contention of Mr *Budlender* that on the authority of the decisions of the SCA in **Solidariteit Helpendehande** and **Stransham-Ford**, the High Court does not have jurisdiction to decide a matter which is moot on the grounds that it raises issues of public importance which might arise in the future. That, according to the Respondents, is not a matter which a High Court may determine in an application for a declaratory order.

[11] p. 9, par. [20].
[12] 2017 (3) SA 152 (SCA).
[13] Par. [25].

[50] It is Mr *Budlender*'s further contention that on the basis of the decisions of the Constitutional Court in **JT Publishing**, **Hugo** and **Afriforum**, and the Supreme Court of Appeal in **Solidariteit Helpendehande**, the challenge to lawfulness of a policy which ceased to exist and in respect of which complete rescission has been tendered, raises purely historical issues which are abstract, academic or hypothetical. The challenge is then moot.

[51] In this respect, it was pointed out that the University had offered in totality to rescind the policy, subject to confirmation of this by the University Council, which is a body that has the power to rescind a policy which it has made. In this respect, there is therefore no basis for a declaration that the policy was unlawful or invalid.

[52] I do however not agree with Mr *Budlender*'s contention to the effect that the tender to rescind would affect the mootness of a matter, nor the basis for a declaration of such policy. If a High Court has the jurisdiction to make a declaratory order in regards to a subject matter which has not become moot, the tender by the institution issuing such policy, will not have any effect.

[53] In the **Solidariteit Helpendehande**-matter, the Supreme Court of Appeal has held that when a Court of first instance has ceased to exist before judgment, it has no jurisdiction to entertain the merits of the matter. Only an Appeal Court has a discretion to hear an appeal notwithstanding the mootness.

[54] In the matter of **Minister of Justice v Estate Late Stransham-Ford** (*supra*), it was further said:

> *"The common feature of the cases, where the Constitutional Court has heard matters notwithstanding the fact that the case no longer*

presented a live issue, was that the order had a practical impact on the future conduct on one or both of the parties to the litigation. In IEC v Langeberg Municipality, while the relevant election had been held, the judgment would effect the manner in which the IEC conducted elections in the future. In Pillay, the Court granted another declaratory order that significantly reduced the impact on the school of the order made in a court below. In Pheko, while the interdictory relief that have been sought has become academic, a decision on the merits would affect its claim for restitutionary relief."[14]

[55] Wallis JA in the **Stransham-Ford** matter, further said as follows:

"… I do not accept that it is open to courts of first instance to make orders on causes of action that have been extinguished, merely because they think that the decision will have broader societal implications. There must be many areas of the law of public interest where a judge may think that it would be helpful to have clarification but, unless the occasion arises in litigation that is properly before the court, it is not open to a judge to undertake that task. The courts have no plenary power to raise legal issues and make and shape the common law."[15]

[56] In the matter of **President of the Republic of South Africa v Hugo**, Goldstone J said as follows:

"But the circumstances of the JT Publishing case differ toto caelo from those now before us. That was a case where the relief asked for on appeal was to declare legislation invalid and to place parliament on

[14] p. 164, par. [23].
[15] p. 165, par. [24].

terms to amend it. By the time judgment was delivered in this Court, the act was about to be repealed and replaced. The question before the court therefore had absolutely no relevance to the future and in the face of it imminent repeal the applicants could not have been granted any effective relief not even a declaratory order."[16]

[57] In the **JT Publishing (Pty) Ltd**, matter Didcott J said the following:

"The only question remaining in dispute on those features of it was whether their consequent invalidation should ensue immediately or be suspended for a limited period in order to afford Parliament the opportunity of repairing the defects in them. The occasion for that opportunity which was thought to have arisen has disappeared, however, since we reserved our judgment in the case. For Parliament has now achieved the purpose that the suspension was meant to serve by passing in the meantime the Forms and Publications Act 65 of 1996, which repeals entirely both the Publications Act and the Indecent or Obscene Photographic Matter Act, replacing the pair with a substantially different scheme. The new statute was enacted recently and it has not yet been brought into operation. But that will no doubt happen soon, in all probability, sooner than the time when the suggested suspension would have expired. The old statutes, which are already obsolete, were both then terminated. Neither of the applicants, nor for that matter anyone else, stands to gain the slightest advantage to gain from an order dealing with the moribund and futureless provisions. No wrong which we can still right was done to either applicant on the strength of them. Nor is anything that should be stopped likely to occur under the rapidly waning authority.

[16] p. 27, par. [51].

In all those circumstances there can hardly be a clearer instance of issues that are wholly academic of issues exciting no interest but a historical one, than those on which our reading is wanted have now become. The repeal of the Publications Act has disposed altogether of the question pertaining to that."[17]

[58] This means, that in order for a litigant and in particular the Applicant in the present matter, to pass the test of mootness, it must be shown that the policy of the UFS does not "lack vitality or vigour"[18] and that the Applicant, in particular its members, or anyone else, stands to gain some advantage from an order dealing with the policy of the UFS.

[59] Mr *Heunis*, appearing for the Applicant, contends that the Respondents' reference to "suspension", "uplifting" of the policy of the UFS, means in effect that the matter is still live.

[60] The definition of suspension according to the Oxford Dictionary, is *"the act, stopping something happening, operation for a period of time"*.

[61] At this point I will refer to a letter written by the attorney acting on behalf of the Respondents, dated 27 January 2023, therefore subsequent to the launch of the application during 2022, addressed to the attorney acting on behalf of the Applicant. This letter recorded *inter alia*:

[17] p. 526, par. [16] and [17].
[18] Oxford Dictionary, 6th Edition, p. 568.

"2. We are instructed to advise you that having considered your client's review application, our client is of the view that the application does not raise any live dispute which can or should be determined by the court.

3. We point out the following in this regard:

- *On or about 13 July 2022, the executive committee of the University Council (the ECC) requested approval from the University Council for the upliftment of the UFS Covid-19 Regulations and Required Vaccination Policy (the policy) with immediate effect.*
- *The ECC advised the Rectorate that the policy should only in the event of changes in the National Regulatory environment with respect to Covid-19, to such an extent that the policy requires re-implementation, make a recommendation to Council for the re-implementation of the policy.*
- *On or about 14 July 2022, the Council resolved by round robin to uplift the policy with immediate effect;*
- *….*
- *….*

4. It follows that the policy was no longer in force at the time where your clients launched its review application in November 2022.

5. Our client undertakes that if the National Regulatory and health environment with respect to Covid-19 changes to such an extent that it is necessary to consider reimplementation of the policy, it will only consider reimplementation of the policy after proper consideration of the then available medical and scientific evidence and the views of experts in this regard.

6. Our client further undertakes that if the National Regulatory and Health Environment with respect to Covid-19 changes to such an extent that it

is necessary to consider the introduction of the new policy with regard to a vaccine mandate, it will only consider the introduction of such a policy after a proper consideration of the then available medical and scientific evidence and the views of experts in this regard.

7. *The validity or otherwise of the policy does not determine any existing, future or contingent right or obligation. The relief which is sought in this regard bears only on the matter which is now history.*
8. *The relief sought in paragraphs 2 to 5 of the Notice of Motion is entirely hypothetical, because the justifiability of any future vaccine mandate will depend on the future nature of SARS-CoV-2 and Covid-19 and the then existing scientific and medical knowledge in that regard. Further, these are matters which a court cannot determine at this time."*

[62] In response to this letter, the attorney acting on behalf of the Applicant, who is also a founding member of the Applicant and one of its three directors, addressed a letter to Respondents' attorneys dated 3 February 2023 in which *inter alia* the following is stated:

"2. My client rejects your claim on behalf of the University of the Free State (your client) that its review application to have your client's 'Covid-19 Regulations and Required Vaccination Policy' (the policy) set aside and declared unlawful does not raise any live matter to be determined by the Court.

3. ….

4. ….

5. ….

6. This application's outcome has significance in terms of justice for past and current transgressions against your client's stakeholders, and further as a matter of broader public interest.

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7. *The legality of the policy (and mandates in general) remains untested at High Court level. A precedent is needed to determine the handling of similar policies in future scenarios and beyond the confines of the university."*

[63] The majority of authorities relied upon by the Respondents in support of their contention that the matter is moot, are both in circumstances and facts in which the relevant legislation considered had already been repealed. In the present matter however, the policy had not yet been rescinded but merely suspended or uplifted.

[64] On the version of the Respondents themselves, and in particular the UFS itself, as we found in the letter referred to, it does appear that the UFS envisage that the policy may be reimplemented *"only in the event of changes in the national regulatory environment with respect to Covid-19"*.

[65] The question arises why has the UFS and its Council elected not to rescind the policy already but has chosen to merely suspend / uplift it. Isn't the inference inevitable that it wishes to keep the policy as an eventuality and if so, how does it affect the mootness of the policy and the matter at hand?

[66] On the other hand, the wording in the letter by Applicant's attorney referred to already, where reference is made to "*the broader public interest*" creates the impression that the Applicant anticipated the mootness of the policy and the subject matter.

[67] In the same letter, reference is made to *"current transgressions"*, but it is clear that due to the suspension of the policy, there were no current transgressions

at the date when the application was launched, at the date when the letter was written, at the date of the hearing of the matter, as well as the date of the judgment whereas currently, the policy is suspended.

[68] The Respondents, went further and stated:

> *"A precedent is needed to determine the handling of similar policies in future scenarios and beyond the confines of the University."*

However, in the **Estate Stransham-Ford** matter, it was said that it is not open to Courts of first instance to make orders on causes of action that have been extinguished merely because they think that their decision will have broader societal implications.

> *"There must be many areas of law of public interest where a judge may think that it would be helpful to have clarification but, unless the occasion arises in litigation that is properly before the court, it is not open to a judge to undertake that task."*[19]

[69] According to the Respondents, the policy had a limited duration. It speaks for itself that this duration was by implication whilst the circumstances demanded the implementation of the policy, and more in particular whilst the state of disaster was still in place.

[70] As in the **Afriforum**-matter referred to, the defence by the Respondent relates to the state of the disaster at that stage. In that sense, the duration of the policy was indeed limited till the termination of the state of disaster which has already taken place.

[19] p. 165, par. [24].

[71] The reason for Applicant for approaching Court for the review of the policy of the UFS, is in all likelyhood because it foresees that the policy might be re-implemented by the Respondents.

[72] The Respondents themselves have also indicated that the policy will be implemented in the event of changes in the National Regulatory Environment with respect to Covid-19 which could only relate to the reinstatement of the national state of disaster.

[73] There is no indication produced through evidence by the Applicant that the regulations pertaining to Covid-19 will in future change and that the national state of disaster will be reinstated.

[74] The Court can take cognisance of the fact that the virus and its variants causing the pandemic of the Corona Virus is still *in esse* in parts of the world and more in particular in South Africa. But all indications are that the spread thereof is under control not only in our country but also across the world. There is no evidence before us to the effect that the state of disaster might be reinstated which will then also lead to the reinstatement of the policy by the UFS.

[75] The policy, although in its suspended form, was not designed to continue operating indefinitely but indeed for a limited period / time / purpose, namely to contain the Corona Virus. Whilst presently, there are no indications in the world nor from the South African government that such a state of disaster might be re-implemented in respect of the Covid-19 pandemic, the re-implementation thereof, remains pure speculative. The Constitutional Court in

the matter of **Minister of Tourism and Others v Afriforum** commented that it may indeed take a long time before South Africa is faced with another state of disaster. However, for purposes of the present application, the Applicant must show through evidence (scientific and/or medical) that there exists a reasonable apprehension of such a state of disaster being implemented and effectively the policy of the University being re-implemented. In that sense, the basis to be decided upon in regards to the lawfulness of the policy is *"indeed imagined or suggested but not necessary real or true"*[20] (hypothetical) and academic which results in the mootness of the matter.

[76] In view of my finding in regards to mootness, I do not consider it necessary to adjudicate on the redundancy of the matter save to say that I agree with the submissions on behalf of the Respondents that the main purpose, namely to gain access to the records pertaining to the decisions taken by the Respondents to implement the policy, has now been achieved and that the Applicant has all the relevant records. *"It has not used PAJA for the rules of court to seek further records"*. The fact that the main purpose has indeed been achieved underlines the fact that the relief which the Applicant seeks is moot (the review relief), or impermissible (the declaratory relief), and it is therefore redundant.

[77] As referred to in the **Mokhele** - matter the Constitutional Court has held that it is axiomatic that mootness is not an absolute bar to the justiciability of an issue, and there are certain factors, already stated, which ought to be considered whether a matter should be heard and adjudicated upon inspite of mootness. Such factors will now be considered in the context of the present matter.

[20] Oxford Dictionary, p. 720.

[78] I have already dealt with any practical effect that an order by this court will/might have. The policy is currently suspended and cannot have any adverse effect on any party, in particular members of the Applicants, students or employers at the UFS or any other university in South Africa. This is currently the situation whereas it has not been shown that the policy be implemented in future policies, also the practical effect in respect of the future is absent.

[79] Undoubtedly this matter would have been a matter of great importance had the policy not been suspended. No evidence has been placed before us that the policy will, on probabilities be implemented in future

[80] Coupled with this, the policy is a document which has been and will continuously be reappraised and revised as circumstances change and as scientific advances take place. This is recognised in the policy in its preamble already referred to.

[81] The UFS has already undertaken that if the National Regulatory and Health environment in respect to Covid-19 changes to such an extent that it will be necessary to consider re-implementation of the Policy, it will only re-implement after a proper consideration of the then (not current, nor past) medical and scientific evidence and the views of experts in this regards. There is no reason to doubt that undertaking. If that is the case it is not of importance of how the policy reads now but how it reads in future and the evidence upon which re-instatement takes place. The present Policy might be outdated. In short the current policy, being suspended is of no importance, due to the fact that it may be adjusted / amended in future

[82] Indeed full arguments had been advanced by all parties in the matter and indeed the issue before court is complex. But the reality remains that the Applicant has failed to show, based on medical and scientific evidence, that there exists a real possibility that a National State of Disaster may be reinstated and the policy subsequently be implemented.

[83] It follows that the application should fail.

[84] Mr *Heunis* argued that should the Court find against the Applicant, regard must be had to the **Biowatch** principle which was established in the matter of **Biowatch Trust v Register, Genetic Resources and Others**[21] in view of the Applicant's pursuit of constitutional rights, both on behalf of stakeholders of the Third Respondent and in terms of the public interest. He argued that it is not appropriate that a cost order be granted against the Applicant particularly since litigation is neither frivolous nor vexatious.

[85] The Respondents on the other hand, argued that the protection afforded in the **Biowatch**-matter is not unqualified. Such protection is specifically excluded where the litigation in question *"is frivolous or vexatious, or in any other way manifestly inappropriate for any of the reasons and relied upon by the Respondents in this regard"*.

[86] The papers filed in this application consisted of approximately 3000 pages, the majority of which having been filed by the Applicant consisting to a great extent of expert reports, opinions and correspondence. From a perusal of such documentation, it is evident that the institution of the application and the

[21] 2009 (6) SA 232 (CC).

continuation thereof is everything but frivolous and vexatious. It was supported by very well substantiating evidence.

[87] Taken into account all the factors with reference to the **Biowatch** matter, I deem it just and equitable that each party is to pay its own costs.

Order:

[88] Therefore, the following order is made:

1. The application is dismissed with no order as to costs.

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J J F HEFER, AJ

I concur.

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P J LOUBSER, J

Appearances:

On behalf of the Applicant:	Adv JC Heunis SC
	Instructed by: EG Cooper Majiedt Incorporated
	Bloemfontein
On behalf of the Respondents:	Adv GM Budlender SC
	Assisted by: Adv FJ Gordon- Turner

Instructed by: Phatshoane Henney Attorneys

Bloemfontein