REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **38337/2016**

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED ✓

3.11.16

Date:

WHG VAN DER LINDE

In the matter between

Seadimo Tlale	First Applicant
The Students Listed in Annexure "A"	Second and further Applicants
and	
The University of Witwatersrand, Johannesburg	First Respondent
The Minister of Higher Education	Second Respondent

Judgment

Van der Linde, J:

Introduction and background

[1] This application is brought as a matter of urgency for an order directing the first respondent to defer its 2016 November year-end examinations until January 2017, alternatively until 17 November 2016. The first respondent, the university, opposes the relief claimed, but counsel for the second respondent, the Minister, advised that her client abides.

[2] The application was launched on Friday, 28 October, 2016, and the answering affidavit of the university was filed late on Monday night, 31 October, 2016. The matter was called at 10h00 on Tuesday, 1 November 2016, and then stood down until 14h30 to enable the applicants' replying affidavit to be filed. It was argued on the afternoon of 1 November 2016, until after 18h00, and this judgment was prepared as soon as possible thereafter.

[3] The case arises from the recent student protest action at the university, related mainly to fees but also to teaching content. The university's response to the sometimes violent conduct by some students was to deploy a police and private security presence on campus, and to introduce a curfew. This made for an atmosphere that was generally not conducive to learning, but particularly not to examination.

[4] The case for the applicants is that examinations generate sufficient anxiety and stress of their own accord; the tense atmosphere on campus added exponentially to the challenges of sitting for the examinations. In these circumstances their preparation for the examinations was materially compromised by the sub-optimal conditions, hence the application.

[5] Some perspective about protest action is needed. Barely two weeks ago the Supreme Court of Appeal[1] said about protest action:

"[62] Protest action is not itself unlawful. As pointed out by Skweyiya J in the passage already quoted from Pilane the right to protest against injustice is one that is protected under our Constitution, not only specifically in section 17, by way of the right to assemble, demonstrate and present petitions, but also by other constitutionally protected rights, such as the right of freedom of opinion (s 15(1)); the right of freedom of expression (s 16(1)); the right of

[1] Hotz v UCT (730/2016) 2016 ZASCA 159 (20 October 2016), per Wallis, JA.

freedom of association (s 18) and the right to make political choices and campaign for a political cause (s 19(1)). But the mode of exercise of those rights is also the subject of constitutional regulation. Thus the right of freedom of speech does not extend to the advocacy of hatred that is based on race or ethnicity and that constitutes incitement to cause harm (s 16(2)(c)). The right of demonstration is to be exercised peacefully and unarmed (s 17). And all rights are to be exercised in a manner that respects and protects the foundational value of human dignity of other people (s 10) and the rights other people enjoy under the Constitution. In a democracy the recognition of rights vested in one person or group necessitates the recognition of the rights of other people and groups and people must recognise this when exercising their own constitutional rights. As Mogoeng CJ said in SATAWU v Garvis, ***[17]*** *'every right must be exercised with due regard to the rights of others'. Finally the fact that South Africa is a society founded on the rule of law demands that the right is exercised in a manner that respects the law."*

[6] The background to this application is thus one in which students exercised their constitutional right of demonstration, but it is also one in which, in some instances, some students failed to do so peacefully and in a manner that respected and protected the constitutional rights of others. That elicited the response from the first respondent in the form, amongst others, of the heightened security measures and presence, and the curfew.

[7] Counsel for the applicants did not argue that the first respondent's response in this regard was not proportionate to the protest action itself, and in fact eschewed any such suggestion.[2] What counsel for the applicants did argue, was that the first respondent did not respond appropriately, or at all, to the stress and anxiety suffered by his clients in consequence of the totality of the prevailing circumstances caused both by the protest action and the response to it.

[8] Concerning the entitlement to relief that flowed from the first respondent's asserted failure, the applicants changed tack. In their initial notice of motion, they claimed[3] an interdict restraining the university from continuing with the year-end examinations scheduled to

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[2] This approach made it unnecessary to consider prayer 3 of the notice of motion, which in the alternative to an outright postponement of the examinations, asked for such a postponement pending an application to review and to set aside the decision of the university to implement the security measures on campus.

[3] In the main part of prayer 2.

commence on 3 November 2016, and compelling it to postpone the examinations until January 2017.[4]

[9] When the applicants' counsel moved the application, however, he did not persist in the relief claimed anywhere in the notice of motion. Instead he applied, from the Bar, for an order interdicting the first respondent from requiring that, in terms of the rules that normally apply to students who elect to sit for deferred examinations, the applicants must vacate the university residences in the interim, and return only when they sit for the deferred examinations. The relief directed at postponing the examinations not being persisted with, the implication was that the applicants would apply to sit the deferred examinations.

[10] The first respondent's response to the amended relief claimed, was that it involved an entirely new case, one to which the first respondent had not been called to respond; that this was a breach of fundamental principles of litigation and the audi alteram partem principle and so could and should, in fairness, not be countenanced; but that in any event, even the amended case was not sustainable in law, just as the original case was not.

[11] Finally, the parties all round accepted that the relief ultimately sought was in the nature of a final interdict, and so the three well-trodden requirements of a clear right, an injury actually committed or reasonably apprehended, and the absence of similar protection by ordinary remedy[5] would have to be satisfied. Against this introduction and background, the applicants' case may now be considered.

Have the applicants established a clear right?

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[4] There were alternative prayers. This included to postpone the examinations to a date when the university would be satisfied that the conditions for writing examinations were conducive towards ensuring that students were afforded the best opportunity to perform to the best of their potential, and further alternatively to 17 November 2016.

[5] Setlogelo v Setlogelo, 1914 AD 221.

[12]The applicants relied not on any contractual right[6] but on s.29(1)(b) of the Constitution, in terms of which everyone has the right to further education, which the state, through reasonable measures, must make progressively available and accessible. They submitted that this subsection encompasses tertiary education. But appreciating the application of the principle of subsidiarity, the applicants relied pertinently on the Higher Education Act 101 of 1997.

[13]The first respondent is a *"higher education institution"* for the purposes of that Act, and also an *"organ of state"* as defined in s.239 of the Constitution. In terms of s.65B, such an institution may award diplomas and certificates, and confer degrees.

[14]The applicants stressed aspects of the Preamble of the Higher Education Act, and it is best to quote it:

" WHEREAS IT IS DESIRABLE TO-
ESTABLISH a single co-ordinated higher education system which promotes co-operative governance and provides for programme-based higher education;
RESTRUCTURE AND TRANSFORM programmes and institutions to respond better to the human resource, economic and development needs of the Republic;
REDRESS past discrimination and ensure representivity and equal access;
PROVIDE optimal opportunities for learning and the creation of knowledge;
PROMOTE the values which underlie an open and democratic society based on human dignity, equality and freedom;
RESPECT freedom of religion, belief and opinion;
RESPECT and encourage democracy, academic freedom, freedom of speech and expression, creativity, scholarship and research;
PURSUE excellence, promote the full realisation of the potential of every student and employee, tolerance of ideas and appreciation of diversity;
RESPOND to the needs of the Republic and of the communities served by the institutions;
CONTRIBUTE to the advancement of all forms of knowledge and scholarship, in keeping with international standards of academic quality;..."

[15]So as to complete the statutory framework, the Statute of the University of the Witwatersrand, referred to as *"the Wits Statute"*, was passed in 2002. In terms of s.27(1) of the Higher Education Act the Council governs the public higher institution; in terms of s.28(1) of that Act, read with s.30(1) of the Wits Statute, the Senate is accountable to

[6] Although this was alluded to in the founding papers.

Council. In terms of s.30(2) of the Wits Statute, it is the Senate, acting on the strength of power delegated by the Council, that makes rules as to the manner in which students are to be examined.

[16]This statutory framework was common cause, and so too that this application was in the final analysis not a reasonableness or rationality review under s.6 of the Promotion of Administrative Justice Act 3 of 2000,[7] and so issues of deference therefore did not arise. One was concerned simply with reliance on the principle of legality.[8]

[17]Put differently, the applicants' case was that the first respondent acted outside of its powers as embodied in the statutory framework described above. It was also common cause that a rule[9] existed which required of students who sat for deferred examinations to vacate university residences by 5 November 2016 until just before the date of the deferred examinations.[10]

[18]What was not common cause, was whether the first respondent's failure to exempt the current applicants from the operation of that rule, offended the principle of legality and was thus unlawful. Here the argument came down to whether the Senate's decision of 6 October 2016 that the current deferred examination process allowed sufficient flexibility for students who could not sit for the November 2016 year-end examinations, was a sufficiently complete, and thus ultimately rational, response to the applicants' stress and anxiety.

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[7] No such review was asserted on the papers.

[8] As developed in cases such as Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council, 1999(1)SA 374 (CC) at [56], [58]; President of the Republic of South Africa v South African Rugby Football Union, 2000(1)SA1 (CC) at [148]; Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa, 2000 (2)SA 674 (CC) at [85]; and Albutt v Centre for the Study of Violence and Reconciliation, 2010(3)SA293 (CC).

[9] There was no suggestion that the first respondent did not have the power to make the rule in the first place. Both the Engineering and Built Environment and the CLM have expressly notified their students (in the case of the former) that applications for deferred examinations from those *"... who have been involved in, or affected by, activities over the last two weeks on campus will be considered"*; and in the case of the latter, *"Should the reason for your application be related to stress and anxiety caused by the protest action (which is a perfectly legitimate reason to apply for a deferred exam)..."*.

[10] In the case of the deferred examinations of 1 to 6 December 2016, the residences may be occupied by 26 November 2016; in the case of the deferred examinations of 3 to 15 January 2017, the residences may be occupied by 2 January 2017.

[19]Two avenues of inquiry are now indicated. One is whether the attack on the rationality (or lack thereof) of the Senate decision of 6 October 2016 succeeds, and the other is whether the first respondent is being prejudiced by having to meet the relief now claimed, having regard to the fact that its affidavits were not prepared with that in mind.

[20]Starting with rationality, the threshold has been laid down thus (emphasis supplied):[11]

"[90] Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision. This is such a case. Indeed, no rational basis for the decision was suggested. On the contrary, the President himself approached the Court urgently, with the support of the Minister of Health and the professional associations most directly affected by the Act, contending that a fundamental error had been made and that the entire regulatory structure relating to medicines and the control of medicines had as a result been rendered unworkable. In such circumstances, it would be strange indeed if a Court did not have the power to set aside a decision that is so clearly irrational."

[21]Does the Senate's 6 October 2016 decision, objectively viewed, offend this standard? The factual basis for the inquiry is the first respondent's version as set out in its answering

[11] Pharmaceutical, op cit, per Chaskalson, P (then). This case does not, from the applicants' perspective, involve an attack on procedural fairness in the context of rationality, as was invoked in Albutt op cit.

affidavit, given that a final interdict is sought, together with those portions of the applicants' version not disputed by the first respondent. The answering affidavit explains the substantial logistics involved in arranging an examination for some 28 000 students. It explains the violence of 19 and 20 September 2016, involving as it did damage to university property and intimidation and assault of members of the university community.

[22]On Friday 23 September 2016 the senior executive team, termed SET, announced the suspension until further notice of all university operations. The SET expressed concern that the academic year should not be lost, compromising the education of 37 000 students, and causing a damaging knock-on effect on many others.[12] On 26 September 2016 a poll was announced to determine the attitude of staff and students to the resumption on Monday 3 October 2016 of the academic programme.

[23]The poll was conducted on 29 September 2016 and the interim results reflected that the significant majority of the students wished the academic programme to resume. On 2 October 2016 the resumption of the university the next day was announced, with staff returning then and the academic programme resuming on 4 October 2016. Security presence was stepped up, subject to a commitment to reduce it proportionally to a reduction in violence and intimidation.

[24]On 3 October 2016 a group of about 500 persons harassed people on the campus. The SET issued a warning about the dire consequences of a lost academic year. On 4 October 2016 lectures were disrupted, students were arrested, one student and one staff member assaulted, and property damaged. The police were harassed, resulting in the use of tear gas, rubber bullets and stun grenades. Several clashes occurred between students and policemen; several policemen were injured. Several cars were damaged.

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[12] An interview of 29 September 2016 with the Vice Chancellor and Principal indicated that if the academic year were lost, the public health system would have 1,200 to 1,400 fewer doctors in 2017. Similar consequences would play out in the fields of other professionals. A report in the Sunday Times Business of 11 October 2016 spoke of the dire immediate economic impact of a national shutdown of universities.

[25]That evening a mediated negotiation between the protagonists was agreed upon, coupled with a suspension of the academic programme until Monday 10 October 2016. There were tentative agreements struck between management and students on the issues of access to quality, free, decolonized higher education, and a General Assembly was arranged for Friday, 7 October 2016.

[26]Still on Thursday 6 October 2016 a special meeting of the Senate took place. It considered how best to save the academic year. Various alternatives were considered. In the end it decided that two weeks of the academic programme had been lost, and that that period should be recouped by extending the programme pro tanto.

[27]The resolution was thus resumption on 10 October 2016, and extension of the academic programme from 14 October to 31 October 2016. There would be a study break on 1 and 2 November 2016, with examinations to commence on 3 November 2016 and to conclude on 30 November 2016. Deferred examinations were scheduled for early December 2016 in respect of the Faculty of Health Sciences, CLM (Commerce Law and Management), and Humanities, and for January 2017 in respect of the other faculties.

[28]The minutes of the meeting reflect that the impact of the resolution on residence students would have to be *"factored"*. The DVC (presumably, Deputy Vice Chancellor) acknowledged that residence students would be impacted, but that this issue *"would be taken into consideration and discussed."*

[29]Although this does not appear from the minute, the DVC says that the Senate considered the option that students who could not sit for the November 2016 examination, could have their examinations deferred. There was general agreement that the current deferred examination process allowed enough flexibility in this regard and should be followed.

[30]On 8 October 2016 the SET issued a statement confirming the resolution to resume on Monday, 10 October 2016. The statement is at pp 167 and 168 of the papers; it is generally

conciliatory in tone, but it stressed the need to save the 2016 academic year and advised of the approval of a revised calendar for 2016.

[31]On 10 October 2016 lectures resumed, but were disrupted by large groups of protestors in the Parktown and Braamfontein campuses. A bus was set alight in Braamfontein. Classes continued on 11 October 2016, but with low turnout. On 12 October 2016 classes continued without disruption. On the same day the SET issued a statement[13] confirming that the academic calendar would be extended by two weeks; and it advised students that the new timetable had been posted on the Wits website and student portal.

[32]The answering affidavit then goes on to explain that some examinations have already commenced; and it devotes considerable detail to the detrimental consequences were the examinations to be postponed.[14]It explained too the efforts made by academic staff properly to complete their programmes without compromising quality teaching.[15]

[33]Concerning the precursor to the present application, the answering affidavit explains that the SRC was present at the 6 October 2016 Senate meeting, and raised no issue with the extension of the examination timetable. Ten days later, on 16 October 2016, it issued academic demands, including course work that was to be excluded from examination; tests, reports, assignments and presentation in respect of the period 19 September 2016 to 14 October 2016 had to be discounted; and dedicating 18 October 2016 to 4 November 2016 to revision of work covered. The timetable was also to be extended by a further week.

[34]The structure of the SRC document allowed for the main examinations, as well as the deferred examinations, to continue. There was no suggestion in it of the holus bolus postponement of these. This fits with the first respondent's evidence that at the 6 October 2016 Senate meeting the issue of the deferred examinations was discussed, and that there

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[13] Included at page 173 of the papers.
[14] Paragraphs 62 to 79.
[15] Paragraphs 80 to 99. This discussion includes the progress made in some salient law subjects, like Social Justice and Human Rights, Insolvency, Introduction to Law, Practical Legal Studies, Insurance, and Taxation.

was general agreement that the current deferred examination process allowed enough flexibility.

[35]A meeting was held on 18 October 2016 with the SRC. The issue of deferred examinations was discussed at length. Here again, as later recorded by the DVC in paragraph 4 of his letter of 25 October 2016, there was general agreement that the current system allowed enough flexibility to cater for those students that could not sit for the November 2016 examination.

[36]The DVC responded in his letter of 25 October 2016 that the exclusion of parts of course work could not be agreed to, for reasons of credibility and quality of the course. He pointed also to the agreement that had been reached at the 6 October 2016 Senate meeting regarding the extension of the academic programme by two weeks.

[37]On Friday, 28 October 2016 the first respondent met with two of the present applicants. At this meeting too the students were advised that they could apply to defer their examinations to cater for their personal circumstances. Later that day this application was served by email. On Saturday 29 October 2016 the first respondent's attorneys wrote to explain that the examination could not be postponed.

[38]The letter also made the point that the applicants could apply for deferred examinations to meet their personal circumstances. The personal circumstances that some of the applicants had set out in the founding affidavit were identified as the type of personal circumstances to which reference was being made. It also drew attention to the rules of the Engineering and Built Environment in this regard, to which reference has already been made above.

[39]This section of the letter expressly concludes with this sentence: *"Representatives of our client confirm that the facts and circumstances set out in your clients' founding affidavit and confirmatory affidavits indicate that your clients would qualify to obtain deferred examinations."*

[40]Finally, it is necessary to record something concerning the stress and anxiety that the applicants are experiencing. Although there was an attack on the report of the Centre for the Study of Violence and Reconciliation put up by the applicants in their supplementary affidavit, the essence of what that report conveys was never in dispute. Reference may be had in this regard to paragraphs 16, 26, 27, and 28. The author discusses Acute Stress Disorder, and identifies numbing and other disabling reactions. She says that after a traumatic experience a person may have problems keeping her mind on one thing. Also, such a person may find that she has no energy, and get frightened easily.

[41]In argument counsel for the first respondent did not dispute that the applicants have suffered these type of consequences; indeed, not only does the first respondent's attorney's letter accept it, but the deferred examination rules already referred to above expressly identify these personal circumstances as bases on which deferment may be granted.

[42]Where does that leave one? The facts set out about show that the Senate responded in a particular way, on 6 October 2016, to the threat to the 2016 academic year. The response included the postponement of the academic calendar by two weeks. But since this application is no longer about the postponement of the November 2016 examinations, the rationality of the Senate's response in this regard is not on the table.

[43] What is on the table is the deferred examination rule that requires those students to vacate the residences until just before they write the deferred examinations. But that rule was extant before the current protest action, not because of it. One has to assume this, because the applicants have not suggested anywhere in their papers that the rule came into existence just now, in response to the protest action.

[44]The applicants have also not suggested that the rule affects them in a particularly detrimental way, given the stress and anxiety they experience as a result of the atmosphere created by the protest action and the university's response to it. Their case would have to be

that the first respondent acts irrationally in not now relaxing the rule for them and those similarly placed, specifically given their disadvantaged economic backgrounds.

[45]But quite apart from whether such a decision would have been irrational and thus unlawful, no such decision has been made by the first respondent, at least not on these papers. What one has are two references[16] in the minutes of the 6 October 2016 meeting.

[46]The cryptic notes there do not convey that the Senate had resolved that, despite economic challenges, students who suffered stress and anxiety as a result of the protest action, and who will therefore be applying for deferred examinations, should nonetheless vacate the residences in the interim.[17] Nor have the applicants relied on these two references as recording such a resolution. The applicants have simply not developed these issues further in their founding affidavit, and so the first respondent, not being called upon to deal with it, has not answered this issue.

[47]This is not just a technical point. There are a number of objective considerations, not subjective opinion or argument, that a court would have to be informed about before it would be able to assess the rationality of such a decision, were it taken. They include the following.

[48]First, all constitutional rights are constrained amongst others by the rights of others. That is particularly relevant in this matter where there are likely to be students in residences that are currently sitting for the examinations that are already underway. They may potentially be distracted by those who are not yet sitting, and are awaiting the deferred examination dates. One does not know whether this is a real issue, because the first respondent has not been called upon to deal with this issue.

[49]Second, one does not know how many residences are involved, nor how many students are involved; clearly it has to be a finite number. One does not know whether any of those

[16] Page 165, paragraphs 4a and 5b.
[17] If anything firm can be made of these references, it is that the matter was still open.

rooms have been earmarked for revenue-generating purposes. One does not know of the cost implications of keeping the residences open during the month that lies ahead.

[50]Third, given the contentious background against which this application was brought, one does not know whether leaders of groupings that are intent on scuppering the 2016 academic year are included among those (not the applicants) that would want to benefit from staying on in the residences for November, perhaps as a foothold to perpetuate renewed violent protest. If that were so, the October 6 Senate resolution would fall to the ground, with the far-reaching consequences that have been alluded to earlier. Since the first respondent was not called upon to deal with this, one has no facts on this score either.

[51]These considerations lead me unavoidably to conclude that the case that was advanced by the applicants from the Bar has not been established; in particular, that no clear right to a final interdict in those terms has been shown. This conclusion is driven principally by the absence of evidence not only of conduct on the part of the first respondent that could be said to constitute irrational conduct, but also by the absence of evidence by means of which to assess the rationality of any such conduct.

Conclusion and costs

[52]The application must therefore fail. The first respondent asked for costs against the applicants; the applicants in turn did not ask for costs, on the basis that they were asserting constitutional rights. No doubt the ordinary rule is that costs follow the event. But virtually as prominent is the rule that costs are in the discretion of the court. There are a number of factors that have persuaded me to make no costs order. They include the following.

[53]First, as counsel for the applicants said, they were asserting their constitutional rights and ordinarily in those instances no order is made. Second, they are financially at the opposite end of the economic scale as is the first respondent. Third, they are likely innocent ones caught in the cross-fire between students abusing their right peacefully to demonstrate, and

security forces trying to constrain them. Fourth, in all, this is not a case where there is a commercial winner and a commercial loser.

[54]In consequence I make the following order:

The application is dismissed.

WHG van der Linde
Judge, High Court
Johannesburg

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