

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

CASE NO. 136/2023

NOT REPORTABLE

In the matter between:

MBALI SILIMELA

Applicant

and

UNIVERSITY OF FORT HARE

First Respondent

SENATE

Second Respondent

NJABULO ZUMA

Third Respondent

VUSUMZI MNCUBE

Fourth Respondent

JUDGMENT

HARTLE J

[1] The applicant was a student registered in his final year at the University of Fort Hare in 2022 in the faculty of teaching and learning (Education).

[2] He approached this court acting in person on the basis of urgency to judicially review a “decision” of the Senate of “disallowing to capture (his) actual marks for EDW 401 module” and for further orders directing the respondents (who I shall collectively refer to as the University) to finalize the correction of his marks and to issue a “confirmation letter” to him, and further compelling it to furnish him with the minutes of Senate that concern the so-called decision. (Although he asked exhaustively for the minutes to be provided to him, they were only furnished to him after the issue of the present application under the guise that a formal adoption process had to ensue, which took almost seven weeks to unfold.)

[3] In the founding affidavit, he avers that the application is for the review and setting aside of a decision taken by the Senate of the University on 2 February 2023 “to withdraw/revoke (his) EDW 401 marks of 57%, which had been conferred on him by (the) Faculty of Education and Faculty board of the first respondent on 12th January 2023” and, in the alternative, he “contends” that the senate’s decision on 2 February 2023, in terms of which his marks for EDW 401 “was withdrawn or revoked,” be declared of no force and effect. Further, in the concluding paragraphs of his founding affidavit he requests an order directing the University “to finalise the correction of (his) marks” and to review and set aside the decision of the Senate for rejecting the correction of (his) marks (for the) EDW401 module”.

[4] Whichever way one looks at the “problem” that he believes falls to this court to be resolved since he claims he has exhausted every avenue open to him, it is clear that his concern resides in the fact that notwithstanding his own Faculty supporting the pass mark of 57% in respect of course work that was admittedly submitted late after a successful “appeal”, he has not been cleared to pass his course.

[5] It is not in contention that the absence of a confirmation letter stands in the way of him graduating from the course and harms his career prospects. (This goes to urgency which I accept has been established on the applicant’s papers.)

[6] The university pleads that the relief sought by the applicant is incompetent and that he has failed to make out a case for review. It also challenged the supposed exigency of the matter on the basis that urgency was self-created and complains of prejudice relating to the truncated time periods that were imposed upon it within which to reply. It filed a preliminary answering affidavit and although I afforded it an opportunity to amplify its papers (since it indicated that should it be afforded more time, it “would be able to place a “record” before the (court)”, it accepted by the date of the hearing that it had said what it needed to. Beyond the extract of minutes of a special meeting of the Senate that was held on 2 February 2023, ostensibly *via* Microsoft Teams, and the applicant’s Academic Record, it has offered no other official historical record to show how it has internally dealt with the applicant’s predicament (especially between “appeal” and referral to Senex/Senate for “approval”) since his supposed infraction of the University’s rules. It has also not made available any institutional rules or processes that illuminate what the parties were required to do in such an instance, what formal steps had to be taken, or who would have had authority at any level to decide what. Ironically the University puts that shortcoming at the door of the applicant for not having placed a record before this court or even having requested one, whereas his aspiration to understand the position from the University’s perspective, even if not stated in a formal request per the court’s Rules, is plain from his various emails to it and from the tenor of his very plaintive affidavit and email correspondence with the University leading up to the issue of this application.

[7] The university’s stance is that there is no decision final in nature taken by the Senate that is susceptible to judicial review. Further, it claims that there is no final mark of 57% for the module but that such a mark (which has clearly been recommended by the Faculty for acceptance) is still to be approved for *late* correction. Without Senate approval, so it says, there is no such mark on the applicant’s academic record. Indeed, the official academic record reflects the applicant to have failed the module with a mark of 23%.

[8] The University explains that this is because the marks system for 2022 was closed, but it has not taken the court into its confidence regarding when that happened (or what exactly its processes are in this respect), or why a trajectory that was being followed up until the Senate's impugned decision of 2 February 2023 (not final on the University's version which suggests by necessary implication that it is therefore still open to the applicant to pursue as an option) is no longer possible. Evidently the applicant has been querying the outcome of his assessments for the course in question since January this year with a maddening ferocity leading up to the issue of the present application.

[9] The course in question, the module EDW 401, although in the process of being phased out according to the University, was a compulsory module for a school experience portfolio forming part of the applicant's curriculum comprising of seven components. In order to pass it the applicant was required, *inter alia*, to submit history method videos and his admin portfolio for the practical training. The submission date for the videos was 2 September 2022, and for the admin portfolio, 13 October 2022. He submitted both only on 11 November 2022, nine and four weeks late respectively. The applicant has not in the papers before this court dealt with his reasons for the delays or shared why he believes there was merit in his late submissions being condoned, evidently focussing more on the fact that, according to him, he was already condoned by his Faculty that saw fit to assess his practical work after the fact notwithstanding the late submissions, and to give him an overall mark of 57% for the course.

[10] Quite evidently the Senex and the Senate are dissatisfied with whatever excuse was made by or on behalf of the applicant for the late submission but it is not clear what the committees were told or why they hold such a view particularly in relation to the applicant and the reasons which he must have provided to his own faculty leaders to have persuaded them to ultimately give him a mark despite the late submissions. None of this detail has been revealed by the University to the court.

[11] The University's unyielding attitude however appears to be that since the applicant failed to meet the deadlines for his respective course work to be filed on time he automatically forfeited his right to have them assessed and to receive an outcome in respect thereof *even if an internal process in this instance in fact resulted in him being condoned by his own faculty*. The University wants the court to ignore this important feature of the applicant's case. It was important for me to understand why I should ignore it, but the University's answering affidavit has not provided much insight in this respect. The applicant pleaded, for example, that "there is no rule which permits Senate to revoke (his) marks". Whilst the tenor of the applicant's papers suggests that his real concern resides in the fact that the Senate ignored the positive recommendation of his own faculty (rather than an imagined revocation of the 57% mark), or failed to put its stamp of approval on it to permit the corrected mark to prevail, the answer made by the University to this allegation skirts around the true issue. It pleaded instead that: "(i)t is incorrect that Senate revoked any mark, accordingly the statement that any power to do so is absent, is irrelevant."

[12] Given its prevarication in this regard, the court remains in the dark regarding who's power it is to do what in this peculiar fact-scenario or to understand why the applicant finds himself in the checkmate situation in which he is, leading this court to infer, on the premise suggested by section 5 (3) of the Promotion of Administrative Justice Act, No 3 of 2000 ("PAJA"), that the Senate's failure to have endorsed the Applicant's corrected mark was taken without good reason.

[13] In order to demonstrate the curious stance adopted by the University, it cannot refute that the applicant's assessments were ultimately marked at the higher rate, but it now also insists that that mark (the revised one of 57% in which all the applicant's hopes reside) came too late for submission before the closure date for final marks to be uploaded on the University's system. This appears to be its reason why it is "game over" for the applicant who must in its view instead either re-enrol for the module (which it has said in no uncertain terms is being phased out) or that he must seek a re-assessment according to GR 8 of the University's *General Prospectus 2021*.

[14] Without this court having been taken into its confidence regarding the University's marking system it is difficult to understand why the closure of the marks system is now supposedly final especially against the background of the fact that there was a motivation and submission to the three stage committees concerning the applicant's scenario *inter alia*, culminating with the Senate's impugned decision which, by the university's own confusing suggestion, is still not a final culmination of the whole debacle. The University, so it appears to me, is blowing hot and cold in this regard. Why was lip service being paid to a process that in its view was not going to be able to ameliorate the situation for the applicant and the other affected students if the door had firmly closed on their endeavours to seek condonation for their respective failures to have met their deadlines timeously?

[15] I believe that there is merit in the fact that the applicant's lecturer for the module at least allowed the applicant's course work to be marked and that the Faculty thereafter earnestly motivated for his corrected mark to be accepted despite his breach of the University rules. The University agrees that the correction had to be officially approved according to the rules and practices of the University, and thus it ended with the Senate so the Senate must therefore give proper consideration to his unique request based on the essential features of his case that was placed before it.

[16] It is quite unfortunate that this court is none the wiser what the rules of engagement were (or are) for such a process so as to adjudge whether the University acquitted itself of its obligations in this respect but the strange outcome that was reached is to my mind a sufficient indication that it has not properly considered the Faculty's request to accept the applicant's late corrected mark.

[17] On 13 February 2023 the applicant obtained from Professor Mncube (the 4th respondent) an extract of the Faculty's positive submission to Senate on the issue. This reads as follows:

“The school experience portfolio comprises 7 components. Student **Mbali S (201903297)** submitted only four on time, which resulted in a final mark of 23. The student reported that he had a challenge uploading the video. By the time he submitted the video, the system was closed, so the marks could not be captured. The Faculty requests that 23% which was initially captured, be changed to 57%. The Faculty supports the correction of marks for the student because he is a final year student in the old BEd qualification that he’s being phased out. According to the records the student has completed all the requirements for BEd programme except for the Teaching Practice (EDW 401), which is a compulsory module. (See the attached academic records). The faculty of education, in the past three years, followed Continuous Assessment, which does not provide for supplementary or special examinations for the last outstanding module. We plead for the correction of mark by capturing the marks that were outstanding. If the correction of marks is sanctioned, the students will graduate and their chances of employment will be enhanced”.

[18] It is hard to fathom from the limited information placed before the court by the University why these representations in respect of the applicant did not succeed. Indeed, Professor Mncube’s submission and motivation provide weighty considerations for the three committees to have condoned the applicant’s infraction of the rules and to have approved the late corrected mark. In the Senate’s minute it is also co-incidentally noted that the applicant “reported difficulty in uploading videos.” One searches in vain for any negative reason that served before the Senex/Senate that would have operated against condoning the applicant’s breach and accepting his late corrected mark.

[19] The Senate’s impugned resolution is that it does not support the correction of marks for the three affected students. In the minute provided it records its view that the students involved had not followed the rules but that surely was the reason in the first place for the referral to the committees to ascertain whether the complained of infractions could be condoned. It asserted that it was not satisfied that the information presented to it was sufficient and urged upon the Faculty to discuss the matter with the

Deputy Vice Chancellor on how to proceed. This to my mind appears to be a criticism of how the faculty handled the process at its level rather than in respect of the applicant's personal request (amongst the other students) to be condoned. The minute itself, evidently grudgingly provided to the applicant after numerous requests for it even after its sign-off on 16 March only on 21 March 2023, does not provide any detail why the *applicant's* corrected mark could not be approved. The discussion is broad and does not speak to his unique situation so the comment in it that the Faculty needed to present sufficient information with which the Senate could make an informed decision does not provide confirmation that the applicant fell short of the target (or the Faculty motivating on his behalf). The further observation, for example, that "these cases" should not have been brought to Senex and Senate for adjudication, it being the responsibility of the faculty, is most puzzling especially since it is common cause that the Faculty did "adjudicate" the applicant's request to be condoned, assessed his course work, and made pertinent recommendations that his late corrected mark be approved.

[20] It is no wonder that the applicant has not accepted that the Minutes are "complete" and persists in asking for the "raw" recordings to demonstrate how the Senate got to its resolution concerning him. The court's concern is that the University has not disclosed all the matter that was placed before it in relation to the applicant's unique scenario. If the Faculty has fallen short in relation to the applicant's request to be condoned in respect of process or in any other way, a court reviewing the University's conduct in ignoring the positive recommendation of the Faculty must especially show how and why.

[21] It is ironic and opportunistic in my view that the University contends that its "decision" is not capable of judicial review because it is not final. It was contended on its behalf that should the full information be presented (whatever that might be), with a solution discussed and tabled by the Faculty in consultation with the Deputy Vice Chancellor (a process that seems in the applicant's situation to have already pertained), the Senate would *then* be able to take a decision which would not be in conflict to the resolution. That is what it says on the one hand but with the same breath it maintains

that because the official marking system has closed in the interim, the putative yet to be condoned mark can in effect never be approved and that the applicant must instead follow the re-enrolment or reassessment routes. (Neither coincidentally make any sense. On its own admission the practical training module will no longer be offered, and the GR8 option proposed does not exactly fit the situation that pertains here).

[22] The minute and resolution of the Senate does not suggest that the applicant is condemned to the current predicament he finds himself in because the marking system has already closed. This is a view that the University has adopted in its answering papers as opposed to something the Senate concerned itself with. To the contrary it is implied in the University's argument that the decision "is not yet final" that it sees the referral back to the Faculty as a possible way of generally resolving the conundrum. It appears to me however that in the applicant's case there is sufficient information before it to consider the Faculty's recommendation (which assumes that the relevant information has already been provided to the Faculty and that it considered the reasons furnished to it by him to have persuaded it in the first place to mark the late submissions and to have pleaded a case to the Senate on his behalf for his lateness to be condoned and the late mark approved) and that the relevant committees must therefore simply get on with it and properly decide that narrow question whether it can support the Faculty's recommendation regarding the applicant, or not. If not it must of course stand ready to provide cogent reasons for such a decision.

[23] In all the circumstances I am satisfied that the applicant has made out a case for judicial review (section 8 (3) of PAJA applies) in the sense that the Senate has failed to take a critical decision which it was obliged to following the faculty's recommendation put before it that the applicant's late mark of 57% should be approved. The enormous prejudice to the applicant thereby which he has for a long time coming sought to address informally with the University (very volubly I might add) requires that the decision be taken with great alacrity.

[24] I issue the following order:

1. The applicant's failure to have complied with the rules of court with regard to the necessary forms and service is condoned and the matter is confirmed to have been justified as one of urgency.
2. The University, through its responsible structures, is directed within 5 days of this order to properly consider the recommendation of the 4th respondent, read together with all the information already furnished in support of the applicant's request to have been condoned for his late submissions of the practical training components of the EDW401 module, that his late corrected mark of 57% in respect of the module be accepted and captured on the marks system, and to make a decision to approve it or not.
3. If the decision arising is not one of approval of the Faculty's recommendation, the decisionmaker is to provide adequate written reasons to the applicant for his/her/its decision adverse to his interests at the same time it publishes its decision.
4. The respondents shall pay the applicant's costs such as the Registrar will allow to an unrepresented litigant.

B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING : 24 March 2023
DATE OF JUDGMENT : 28 March 2023

Appearances:

For the Applicant : In person

*For the Respondents : Mr. D Kotze instructed by Conradie Halton Cheadle Attorneys
c/o Smith Tabata Attorneys, East London (Ms Kara-Lee Swartz)*