IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, MTHATHA)

CASE NO: 580/19

In the matter between

OLWETHU NYUME & ANOTHER **Applicants**

and

WALTER SISULU UNIVERSITY & 16 OTHERS **Respondents**

***EX-TEMPORE* JUDGMENT**

MBENENGE JP

[1] The applicants are two of about 74 students registered with the Walter Sisulu University Faculty of Health Science, studying towards the attainment of a Bachelor of Health Science in Medical Orthotist and Prosthetist. Their registration with the University and choice of the degree towards which they are studying followed upon their *bona fide* belief that the degree was duly accredited, but alas, that has not come to pass. They claim that they learnt way back in 2018 that the degree was not accredited.

[2] The applicants and other students concerned have been entertaining the hope that at some point in time the University would rectify the situation and ensure that there were no adverse consequences for the students. Anyone finding oneself in the applicants' situation would be concerned. The consequences of non-accreditation are too ghastly to contemplate. Despite the uncertainty, the university has continued registering the students it enrolled during 2016 and 2017 towards a non-accredited degree.

[3] The applicants now seek, by way of urgency, a rule *nisi* returnable on 12 March 2019 calling upon the respondents to show cause, if any, why the following order should not be made final:

> "2.1 The decision of the 1st, 4th and 5th respondents in admitting and enrolling the applicants as students registered in the faculty of health, studying Bachelor of Health Science in Medical Orthotist and Prosthetist is reviewed, corrected and set aside.
>
> 2.2 That the decision of the 1st, 4th and 5th respondents in admitting and enrolling the applicants as students without accreditation by the 7th and 8th respondents, is reviewed, corrected and is declared unlawful and unconstitutional and is accordingly set aside.
>
> 2.3 The 1st respondent who is without accreditation is interdicted, and/or prohibited, and/or restrained from advertising and/or offering the Bachelor of Health Sciences in Medical Orthotist and Prosthetist".

[4] They have cited, as respondents, quite a number of functionaries who may have an interest in the outcome of these proceedings. These include the Minister of Higher Education and Training, the Council for Higher Education and the South African Qualifications Authority. For now, the applicants seek an order that, pending the return day, the University be restrained from offering the Bachelor of Health Sciences in Medical Orthotist and Prosthetist.

[5] The application does not purport to be a class action. Certain decisions are being challenged, yet it is not clear from a reading of the papers as to precisely what the basis for challenging those decisions is. This is especially so if one has regard to the contractual relationship that exists between the University and the students concerned.

[6] The requisites for the grant of an interlocutory interdict are:

(a) a *prima facie* right;

(b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

(c) balance of convenience in favor of the granting of the interim relief; and

(d) the absence of any other satisfactory remedy.

[7] Mindful of this, in their quest for interlocutory interdictory relief, the applicants have alleged that there is no alternative remedy, save the one they are seeking before this court. They go on to say they harbor an apprehension that any accreditation that may eventuate would not have retrospective effect. How they arrive at this conclusion is not altogether certain from a reading of the papers.

[8] They furthermore say the balance of convenience favors the grant of the relief they are seeking. As far as I could have ascertained, nothing from a reading of the papers resembles an allegation that they have a *prima facie* right.

[9] The University is not oblivious to the challenges besetting it in relation to the degree in question. It has, in so many words, confessed that registering students towards the degree in question in circumstances where the first respondent is not accredited, is regrettable and should never have taken place, hence there was no intake of further students during 2018 and 2019. The university has set in motion steps to remedy the parlous situation in which the students, including the applicants, find themselves.

[10] In the affidavit deposed to by Mr Khaya Maphinda, Registrar in the employ of the University, filed in opposition to these proceedings, it is stated, in paragraph 10:

> "The 1st respondent, has adopted a view that those students have paid fees and have been given tuition and have a lawful expectation to graduate. It was a consequence of the aforementioned that the Department of Education and Training and the Council for Higher Education and the Health Professions Council of South Africa and the Durban University of Technology and the 1st respondent, brokered an agreement that is acceptable to all of those parties. That agreement is that the Durban University of Technology will assess the program or degree presented by the 1st respondent. They have an accredited program themselves. If they are satisfied that the degree presented

> by the 1st respondent is compatible with their accrediting, with their accredited degree, then in those circumstances students graduating from the 1st respondent will graduate with a Durban University of Technology accredited degree. An agreement has been reduced to writing to deal with the practicalities of this arrangement. All of the students who are enrolled in their third and fourth years of study are aware of the aforementioned. Once the agreement is signed, the university the Durban University of Technology will complete their inspection and as I have already stated the 1st respondent is not admitting any new students to that degree at present. As a parallel process the 1st respondent has applied to the council for higher education for accreditation of the degree".

[11] Besides making contentions on the merits of the application, the University has raised non-joinder of all the other students enrolled for the pre-final and final years of study of the degree, who are not parties before me. Were the relief sought in paragraph 2.3 of the Notice of Motion to be granted, says the University, the other students who seem content with the situation would be materially affected by the relief, the upshot of which is to interdict the 1st respondent from offering the course of study. There has indeed been a non-joinder of the majority of students who are not parties to this application.

[12] I am, as a matter of law, precluded from even considering whether a case has been made out for the grant of the interlocutory interdict being sought. I have no discretion to exercise, until all the necessary parties are before this Court. In *Khumalo v Wilkins* (1972 (4) SA 407 (N) 457A – B), Milne J said the following:

> "Once it is shown that a party is a necessary party in the sense that he is directly and substantially interested in the issues raised in the proceedings before the court and that his rights may be affected by the judgment of the court, the court will not deal with those issues without such a joinder being effected and no question of discretion nor of convenience arises. In my view that is what was decided in *Amalgamated Engineering Union v Minister of Labor* 1949 (3) SALR 637 (A) 659"

[13] It follows from what I have mentioned that I am not able to deal with any of the issues raised, no matter how attractive they look, until there has been a joinder of the other students concerned.

[14] The only outstanding issue is that of costs. As I have said, the application does not purport to be founded on section 38 of the Constitution, namely, a class

action. It is also not founded on any of the other provisions of the Constitution, thus far. The only thing that one can make out is that it is based on contract. Had the application been founded on the provisions of the Constitution, one would have been tempted to say, by reason thereof that they are championing a constitutional cause of action even if they have not been successful, costs should not follow the result. In the instant matter there is no reason why costs should not follow the result, at least insofar as these proceedings relate to what happened yesterday.

[15] The order that I make therefore is the following.

(1) *There has been a non-joinder of other students registered for the degree, Bachelor of Health Science in Medical Orthotist and Prosthetist in the faculty of Health Science, Walter Sisulu University, Nelson Mandela Drive Campus Mthatha, during the current year.*

(2) *In the event that the applicants are still bent on pursuing this application they are directed to cause a set of the papers generated in this application to date, to be served upon the students who have not been joined thus far, within ten days from today.*

(3) *The application is, pending the joinder of the outstanding parties, postponed sine die.*

(4) *The applicant shall pay costs occasioned by yesterday's hearing on the opposed scale, jointly and severally, the one paying the other to be absolved.*

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MBENENGE JP
JUDGE PRESIDENT OF THE HIGH COURT

For the applicants	:	Mr Hinana
For the respondents	:	Mr Hobbs
Date heard	:	19 February 2019
Date Delivered	:	20 February 2019