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

CASE NO: 1409 / 2024

In the matter between :

MANDLENKOSI MANJIYA	**Applicant**
And	
WALTER SISULU UNIVERSITY	**1st Respondent**
MINISTER OF HIGHER EDUCATION, SCIENCE AND ENNOVATION	**2nd Respondent**

JUDGMENT

KUNJU AJ

A. Introduction

[1] This application is divided into two compartments. The first compartment seeks for an interim interdict. The second compartment is a review. The two compartments are referred to in the notice of motion as part “A” and part “B”.

[2] The part that is currently before me is part “A”. Part “A” is an interim interdict brought on urgent basis pending the final determination of part “B”.

[3] In his notice of motion the applicant applies for the following order :

[3.1] That the applicant's non – compliance with the rules relating to forms, service and time limits be and is hereby condoned and the applicant be and is hereby granted leave to bring this application as the matter of urgency in terms of rule 6 (12) of the Uniform Rules of Court;

[3.2] The applicant be and is hereby condoned for the non – compliance with the required 72 hour notice prescribed in terms of Section 35 of the General Law Amendment Act 62 of1955;

[3.3] Pending Part B of this application, the first respondent be and is hereby order **to open is registration system to allow** the applicant to register for his Diploma in Analytic Chemistry for the academic year of 2024, **up until the year he complete the said Diploma, forthwith**;

[3.4] Pending Part B of this application, the first respondent be and is hereby order to do everything necessary and possible to put the applicant at the same level and situation in terms of academic progress for the academic year 2024 like any other students who have registered **at the beginning of the registration for the academic year 2024 by allowing the applicant to recover in relation to everything already done academically** as follows:

> [3.4.1] To have extra learning hours for studies already done for the academic year 2024;
>
> [3.4.2] To submit of any work or assignments already done for the academic year 2024;
>
> [3.4.3] To have adequate and reasonable time **to prepare to write tests and any other assessments already done for the academic year 2024**.
>
> [3.4.4] To write supplementary exams in respect of any module he may fail during the academic year 2024, regardless of whether or not he

meets the percentage for supplementary exams.

[3.5] Pending Part B of this application, Part A of this application is of immediate effect as an interim relief/ order.

[3.6] Part B of this application is postponed to the 9th of April 2024.

[4] The application is opposed by the respondent.

[5] Part A was argued before me on 21 May 2024. Given the nature of the relief sought, the applicant is required to satisfy the interim interdicts requirements before an order is issued in his favour.

(B) **The parties**

[6] The applicant is a major male person previously registered with the Walter Sisulu University. He resides at Lepota Village in Sterkspruit.

[7] The first respondent is Walter Sisulu University, a University established through its statute published in the Government Gazzette Notice No. 37325 dated 17 January 2014 as envisaged in Section 33 of the Higher Education Act No. 101 of 1997. This respondent has its offices situated at Nelson Mandela Drive, Mthatha.

[8] The Second respondent is the Minister of Higher Education, Science and Ennovation. He is the Political head and is accountable to parliament for activities and functions of his department. The first respondent falls under his auspices and control. The principal offices of the second respondent are in Pretoria.

C. **The background facts**

[9] The applicant registered as a student with first respondent during year 2020. He registered for a diploma in Analytical Chemistry under the faculty of Natural Sciences.

[10] During year 2022 the applicant did not do well academically with the result that he was excluded. The exclusion was subsequently uplifted consequent upon the decision of the senate. Due to covid related considerations – it was decided by the senate of the first respondent that all students who were excluded on academic grounds during Covid 19 period their exclusion was uplifted. It is why he registered for the academic year 2023.

[11] During December 2023 he was advised by Secretary within his faculty that he had been excluded on academic grounds. The Secretary Ms Sipokazi Pikinini also furnished the applicant with appeal documents in case she wanted to appeal the decision.

[12] In or around 8 January 2024 he submitted his appeal against his exclusion from registering for the diploma during the academic year 2024. He stated the reason for his poor performance as stemming from the ill – health and ultimate death of his father on 01 August 2022.

[13] Between the period 29 February 2024 and 1 March 2024 the applicant received the outcome of his appeal which was in the negative. He then decided to approach his attorneys. The attorneys had sent a letter of demand on 12 March 2024 and 19 March 2024 respectively. The letter appears as annexure **FA – 8**. On 12 March 2024 it was sent electronically whereas on 19 March 2024 it was delivered by hand.

[14] The letter demanded that the exclusion be reversed so that the applicant's registration for academic year 2024 is processed and activated. The letter further demanded for a response not later than 22 March 2024 at 11h00, failing which the applicant threatened that a Court of law was to be approached on urgent basis.

[15] It does not appear that there was any response to the above letter of demand. As a result, the applicant approached this Court on 28 March 2024 on urgent basis and not on 22 March 2024 as threatened.

[16] It being an urgent application, I need to first deal with the issue of urgency

that is contentious between the parties.

(D) **Urgency**

[17] There are disturbing delays in the manner in which the applicant handled the application after it was issued on 28 March 2024. In fitting cases my attitude is always that if a fundamental right enshrined in the constitution is either disturbed or threatened, I am prepared to relax the rules and in turn allow a matter to be ventilated. I observe that a right to education in this matter is at the centre of this litigation. However, this is not a case where I am disposed to apply my discretion in favour of the applicant. I have taken into account the entire set of circumstances of this matter. In particular, the wide ranging relief sought.

[18] Prayers 3 and 4 of the notice of motion give a hint that at the stage when the application was brought substantial progress in the academic syllabus for year 2024 had taken place.

[19] That point taken into consideration, it would appear that by the time the matter was heard i.e 21 May 2024, a substantial redress in the future was a strong possibility and a practical way of dealing with the situation of this matter. I expand below.

[20] If at that late stage of the year the applicant had not registered, I do not see any inhibiting factor why the applicant did not proceed with review proceedings with a view to secure an order directing the respondent to register him during 2025 academic year. The notice of motion signals a lot of progress after registration in respect for 2024 academic year was closed.

[21] The failure by the applicant to give consideration to the above in my view does not help him satisfy the Court that if the order is not granted there will be absence of substantial redress at a hearing in due course. The applicant has missed the boat, in the sense that the period of registration for academic year 2024 was completed in February and it is why the applicant demands that this Court prescribes a University timetable specifically for the applicant in respect of academic year 2024.

That cannot be an easy decision in the absence of fundamental transgression of applicant's fundamental rights.

[22] Given the stage at which the application was heard, the nature of the relief sought and the failure by the applicant to satisfy the Court why he cannot obtain substantive redress at a hearing in due course, I do not see the applicant passing the jurisdictional requirements set – out under rule 6(12) of the uniform rules of Court. In deciding whether an applicant will be able to obtain redress at a hearing in due course, the delay between the hearing before an urgent Court and a Court in the ordinary court is a weighty consideration.

[23] I am not satisfied that both the requirement of absence of substantial redress in due course and the reasonableness of the abridgment of time periods have been properly traversed and motivated by the applicant.

[24] Whether an applicant will not be able to obtain substantial redress in an application in due course is fact bound. It is why I find that as at 21 May 2024 applicant had lost a lot already during the academic year 2024. What was available at that stage was to challenge his exclusion so that if he succeeds he could be then be readmitted during year 2025 academic year. Such outcome would have been achieved if the review was to be heard later this year. All this can be observed by looking at the applicants notice of motion.

[25] Apart from the hint reflected in the notice of motion, it is not clear from the founding affidavit:

(a) if at the time the application was heard the registration had not closed;

(b) the extent to which the syllabus had progressed either at the time of the drafting of the papers or hearing of the matter.

[26] One is able to glean from paragraph 41.4 of the founding affidavit that this course is semesterised. This would mean therefore that this course was left with one month for the first semester to end at the time the application was argued before me.

In that paragraph applicant contends that the matter is urgent and he does not want to find himself in a situation where :

"[*41.4] Exams for the first semester have already been written*".

[27] Despite my conviction stated in paragraph 17 above, I am totally not persuaded that this is a matter that warrants relaxation of the provisions of rule 6 (12).

[28] Even if I were to consider relaxing the rule, there are other obstacles in the way of the applicant. Such obstacles are located in the province of the law of interdict.

E. **Requirements for an interim interdict**

[29] The applicant seeks for an interim interdict. For him to secure such a relief he must satisfy the following test :

(a) prime facie right even if it is open some doubt;

(b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted;

(c) the balance of convenience must favour the grant of the interdict; and

(d) The applicant must have no other remedy (**National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 – PARA 41**).

[30] I am careful in how I deal with an interdict pending a review because in the OUTA judgment above, **Moseneke DCJ** reminds us that a Court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been finally impugned on review. As said part B (is a pending review).

[31] It would appear on the authority of OUTA also that temporary restrain against the exercise of statutory power well ahead of the final adjudication of applicant's case may be granted only in **the clearest of cases** and after a careful consideration of separation of powers.

[32] I do not believe that I can characterise this case as the clearest of cases.

[33] Given the attitude I take of the matter, I intend to deal only with one requirement out the four requirements set out above. It is to that now I turn.

(i) The balance of convenience

[34] The Court must be satisfied that balance of convenience favours the granting of an interim relief. This appears to be a balancing act between the prejudiced to be suffered by the applicant if relief is not granted and the prejudice to be suffered by the respondent if the relief is granted.

[35] The prejudice to be suffered by the respondent if the relief sought in paragraph four (4) of the notice of motion were to be granted is evident. One cannot imagine the administrative changes that a University such as respondent would endure if it were to be directed by way of a Court to formulate a program designed for one student. I cannot ignore that the course is semesterised. This means in each semester different courses are registered. The full effect of this application is that the University shall have to design a special program only for the applicant until he completes his degree. It also suggest that all the laws and regulations of the University must be relaxed in order to allow the applicant to complete his degree. In short, the administrative effects are ghastly to contemplate.

[36] The interim relief will definitely bring about immense inconvenience to the respondent. The semester had reached an end or was nearing an end at the time the application was heard. If the order is granted, it would mean a first semester is created during the second semester for one student. I do not believe that situation favours the balance of convenience.

[37] As said above, the applicant delayed the hearing of the application to his prejudice because at the time the applicant was heard it was already late in the academic year for year 2024.

[38] By way of illustration and a matter that I also considered under urgency above, the Court had issued a directive on 28 March 2024 for the service of the papers and hearing of the matter on 2 April 2024. It would appear from the returns filed that the application papers in respect of both respondents were only served on 02 April 2024 at 16h27 and 16h57 respectively – very late in the afternoon of the date on which the matter was directed to be heard by a Judge. Such conduct does not exhibit any sense that the matter was considered urgent by the applicant. The applicant failed to manage his application so that it does not lose urgency. The urgency got lost in the process.

[39] In a directive dated 2 April 2024, **Justice Rusi** noted in paragraph 3 that despite the existence of a directive issued on 28 March 2024 for the enrolment and hearing of this application :

(a) It was not enrolled on 2 April 2024, and

(b) that the papers were only served on 2 April 2024 at 16h27 and 16h57 respectively.

[40] On 02 April 2024 the matter was postponed to 9th April 2024.

[41] What compounds the problems for the applicant is that it is not clear what happened to the matter on 9 April 2024. The application was enrolled for 10 April 2024 and on this date parties had put each other on terms for the filing of further affidavits. Worse, the application was postponed to a date to be arranged with the Registrar. The postponement of an urgent application like this one in that manner compromised any urgency that could have existed at some point.

[42] For all the above reasons, I do not believe that the applicant is entitled to an

interim relief (part A).

[43] I have considered the question of costs in relation to the hearing of the interim relief. I have taken into account that the applicant is a student or an unemployed individual and is genuinely fighting for access to education. He wants to go back to class. I feel pitty for him. What he seeks though is too much for the respondents to bear.

[44] I have observed that for the delays which resulted in the application not being heard on 10 April 2024, the first respondent had contributed. The first respondent also brought a condonation application. It sought condonation for late delivery of their heads of argument. All circumstances considered, I do not believe that I should issue a cost order against a student.

[45] The following order shall issue :

[45.1] The interim order sought in part "**A**" of the notice of motion is dismissed.

[45.2] each party shall pay its own costs.

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V. KUNJU

ACTING JUDGE OF THE HIGH COURT

For the Applicant:	Mr C. Nonkolela
Instructed by:	Mandla Attorneys Attorneys for the Applicant No. 26 St Georges Street East London
C/o:	Falithenjwa Attorneys 11 Nelson Mandela Road

Mthatha

For the Respondent: Mr J. Hobbs

Instructed by: Drake Flemmer & Orsmond (EL) Inc.
TH Madala Chambers
14 Durham Street
Mthatha

Heard **:** 21 May 2024
Delivered **:** 3 September 2024