



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 090041/2023

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS JUDGES: NO

(3) REVISED

18/06/2024 [Redacted Signature]

In the matter between:

MKULULI MTHETHELELI MBALI

APPLICANT

and

UNIVERSITY OF SOUTH AFRICA

FIRST RESPONDENT

**PRINCIPAL AND VICE-CHANCELLOR
OF THE UNIVERSITY OF SOUTH AFRICA**

SECOND RESPONDENT

JUDGMENT

MOTHA, J:

Introduction

[1] “Everyone is a genius. But if you judge a fish by its ability to climb a tree it will live its whole life believing that it is stupid.”¹ Summa Cum Laude, Magna Cum Laude and Cum Laude are honors awarded to those who are judged correctly by their special academic aptitude, unlike a fish in the allegory. Believing that he possesses the requisite pedagogical prowess, the applicant set his sight on graduating his LLB degree with distinction. Nothing was going to distract him from this goal, until the occurrence of a personal tragedy. In this application, he seeks an order reviewing and setting aside the University of South Africa's decision not to award his LLB degree with distinction (cum laude).

The parties

[2] The applicant is Mkululi Mthetheleli Mbali an adult male, who is currently a shadow pupil at the Pretoria Society of Advocates.

[3] The first respondent is the University of South Africa (Unisa), a Public University as envisaged in terms of sections 2 (1) of the Higher Education Act 101 of 1997, and which offers correspondence education.

[4] The second respondent is not named, save for stating that he is the principal and Vice-Chancellor of the first respondent. He is cited in his capacity as the administrative head of the first respondent.

Facts in brief.

[5] As a point of departure, one must have due regard to Unisa Rules for Students' words and phrases, which are indispensable to a proper understanding of this matter. These are:

- (a) Formative assessment: This is an assignment.
- (b) Summative assessment: This is an exam.

¹ A quotation sometimes attributed to Albert Einstein.

(c) Year Mark: This is a mark that a student gets from formative assessments (assignments) that gets weighed and added to the weighed exam mark to determine the final mark.

(d) Exam Mark: This is a mark that a student obtains in their summative assessment (exam) that gets weighed and added to the weighed year mark to determine the final mark.

(e) Final Mark: This is a mark that a student obtains after the weighing and adding together of the year and exam marks that determines whether the student has passed or failed the module out of 100%.

(f) Weighing: This is the allocation of a ratio/percentage between the year and exam marks (e.g. 20:80 or 20%: 80% respectively) that is used to weigh each mark in determining the final mark.

[6] With that background, in 2019, the applicant registered for a four (4) year LLB degree with the first respondent and completed it in 2022. From the day of registration, he submits that he intentionally wanted to attain his degree with distinction. Accordingly, he acquainted himself with Rule 26.3 of Unisa Rules for Students. Rule 26.3 sets out the requirements for a student to pass with distinction (cum laude), viz:

26.3.1 passed all modules for the qualification at Unisa; and

26.3.2 passed all final-level modules at the first attempt; and

26.3.3 attained an overall average of 75% in the qualification.

[7] The first respondent contends that the applicant did not comply with Rule 26.3.2 because he failed the module RRLLB81, by obtaining a final mark of 36%. The said final mark was computed as follows:

	Mark	Weighing	Total
Year Mark:	9.75%	40%	4%
Exam Mark:	54%	60%	32%
Total (Final Mark)			36%

[8] The applicant contests that he failed the module RRLB8 and submits that the first respondent should not have considered his Year Mark in calculating his Final Mark. In support of his protestation, he submits the following reasons:

Extension of time to submit

[9] On 20 January 2022, he registered for the module RRLB81. He submits that he could not study this module from the beginning, as, at the time, he was preparing and writing the following supplementary exams:

- (a) PVL 3702 - Law of Contract, on 18 February 2022.
- (b) CPR 3701 - Criminal Procedure, on 28 February 2022.
- (c) PV L3704 - Undue Enrichment Liability and Estoppel, on 4 March 2022.

[10] Without taking this court into his confidence about what happened to assignment 1, he submits that the first respondent failed to afford him an extension to submit his assignment 2, which caused his Year Mark to be low. He failed to submit assignment 2 of the module RRLB81, which was due on 7 April 2022. Following the passing away of his mother on 30 March 2022, he submits that he was not able to focus on his studies.

[11] Due to the bereavement, he also did not attend to his emails until 19 April 2022 at 23h30. Only then did he learn of two extensions given to all students for the submission of assignment 2. The first extension of the deadline was to the 14th of April 2022 and the second to the 19th of April 2022 at 16h00.

[12] On 20 April 2022 at 00h02, he penned an email to the Senior Lecturer of the module, Mr. LC Coetzee, requesting an extension to submit his assignment 2. In

response, Mr. Coetzee granted a final extension, for the submission of RRLLB81, to 24 April 2022, for all students. He finally submitted his assignment 2 and achieved 9.27%.

Legitimate Expectation

[13] Secondly, and this is the nub of this matter, he took the exam and obtained 54%, on 2 June 2022. As already stated, the first respondent concluded that he had amassed a total of 36%, when considering both Year and Exam Marks. He challenges this decision as being procedurally unfair. Based on the first respondent's practice of not considering the Year Mark if lower than the Exam Mark, he submits that, when he obtained 9.75%, he had taken comfort in that he would pass his Exam Mark. This, the argument goes, was a violation of his right to be heard, and he had a legitimate expectation that the first respondent would continue with the practice.

The issues

[14] The substratum of the applicant's case is legitimate expectation. In proving that the first respondent had established a practice of not considering a lower Year Mark if the Exam Mark was higher, he refers the court to three examples between May 2020 and November 2021, viz:

1. May/June 2020

A) Module: CRW 2602 - Criminal Law General Principles:

	Mark	Weighing	Total
Year mark:	75%	0%	0%
Exam mark:	90%	100%	90%
Total:			90%

B) Module: PVL 2601 - Family Law:

Year mark:	90%	20%	18%
------------	-----	-----	-----

Exam mark:	84%	80%	67%
Total:			85%

2. October/November 2020

A) Module: FUR 2601 - Fundamental Rights:

Year mark:	75%	0%	0%
Exam Mark:	80%	100%	80%
Total:			80%

B) Module: IND2601 - African Customary Law:

Year Mark:	96.5%	20%	19%
Exam Mark:	72%	80%	58%
Total:			77%

3. October/November 2021

A) Module: Civ 3701 - Civil Procedure:

Year Mark:	76%	0%	0%
Exam Mark:	95%	100%	95%
Total:			95%

B) Module: PVL 3701 - Law of Property:

Year Mark:	80%	20%	16%
Exam Mark:	76%	80%	61%
Total:			77%

[16] Having conceded that in 2019 this was not the practice, he submits that the first respondent established a pattern which he relied on to his detriment. Even though it was within the powers of the first respondent to discontinue the practice, he maintains that any change had to be communicated to him. Therefore, in considering the applicant's low Year Mark, the first respondent decided to change its established practice without adequate notice, he concludes.

[18] Consequently, he was disadvantaged by this decision which materially and adversely affected his right. He submits that he had a legitimate expectation that the practice would continue until he was informed of a change. Accordingly, he brings an application for the review of the decision in terms of the Promotion of Administrative Justice Act No.3 of 2000 (PAJA), on the following grounds:

1. Section 6 (2) (c) procedural and fairness;
2. Section 6 (2) (e) (iii) Relevant considerations were not considered;
3. Section 6 (2) (g) failure to take a decision
4. Section 6(2)(h) The actions by the 1st respondent are so unreasonable that no reasonable person could have so acted

[19] The respondents submit that the applicant was bound by the Unisa Rule for Students. Furthermore, they refer to the Tutorial letter 103/3/2022, which is given to all the students at the commencement of the module RRLB81.

[20] At this stage it is apt to refer to Unisa Rules for Students. It is common cause that the applicant is bound by the contents thereof, hence he refers to 26.3 therein.

Furthermore, this is a document relied upon by the applicant. In relevant parts, it states:

"The content of this section is defined by the legislation and regulations set out in the Higher Education Act, 1997 (as amended). Where provision is made for institutional discretion, the Unisa rules are subject to approval by Council and / or Senate (as appropriate), except where expressly recorded to the contrary. These rules represent the general rules of the university and apply to all Unisa students. These rules must be read together with the applicable Unisa policies, which have the same force and effect as these rules. The relevant policies are available on the Unisa website...

When a student registers with Unisa, the student

- a) acknowledges an awareness of the prevalent rules of the university; And
- b) undertakes to be bound and abide by the rules of the institution.

The student bears the onus of ensuring that he or she is familiar with the rules pertaining to his or her registration with Unisa. Ignorance of these rules and related institutional policies will not be accepted as an excuse for any transgression.

Official communication from the university is sent via e-mail to student's myLife e-mail account. The rules for the use of the myLife e-mail account are as follows...

17 Formative Assessments...

17.1 Every student is required to complete the formative assessment requirements as set out in the tutorial letters for the registered module.

17.2 The formative assessment will be used to calculate the year mark is set out in the tutorial letters and on myUnisa for the module. The year mark will contribute towards the final examination mark, (the contribution of the year mark towards the final summative assessment mark will be set out in the tutorial letter [s] for the module.)

17.3 The year mark will only be considered for purposes of calculating the final examination summative assessment mark if a student attains a minimum mark of 40% in the summative assessment set for the module (this sub-minimum rule)..."

[21] From the perusal of Unisa Rules for Students, it is abundantly clear that it must be read with Tutorial letters for the registered module. Focusing on the matter at hand, clauses 17.1 and 17.2 of Unisa Rules for Students refer to the Tutorial letter 103/3/2022 for the module RRLLB81 (Department of Criminal and Procedural Law) and sheds light on this case. Again, in relevant parts, it reads:

"Tutorial Letter 103/3/2022

Research Report

RRLLB81

Semesters 1 & 2

Department of Criminal and Procedural Law

IMPORTANT INFORMATION:

This tutorial letter contains important information about
your module.

Dear student

You must submit two formative assignments for this module (Assignment 1 and Assignment 2), and one summative assignment (Assignment 3).

- **Assignment 1** is a multiple-choice assignment, consisting of fifteen (15) questions. You must study Tutorial letter 102/3/2022 and Tutorial letter LLBALLF/302/4/2022 (School of Law Referencing Style Guide) in order to be able to do this assignment.

Assignment 1 contributes 25% towards your year mark. Your year mark contributes 40% towards your final mark.

- **Assignment 2** is a **draft** research report. A draft, in this sense, is a preliminary version of a piece of writing. The work you submit on Assignment 2 will therefore be a preliminary version of the research report that forms the outcome of this module. The idea behind this assignment is for us to monitor your progress with the writing of the final research report. From Tutorial Letter 103/3/2022 (this tutorial letter) you are required to select ONE (1) topic and base your **Assignment 2 AND Assignment 3** on that topic. From the topic you have selected, you are required to formulate your own working title or the title of your research report. **You may NOT change topics once you have selected a topic.**

Assignment 2 may not exceed **12 pages**, excluding the Title Page, Table of Contents, other preliminary material (such as your list of abbreviations and acronyms) and the Bibliography. You **MUST** reference this assignment according to the School of Law reference style, which is discussed in Tutorial Letter 102/3/2022 and LLBALLF/302/4/2022.

Assignment 2 contributes 75% towards your year mark. Your year mark contributes 40% towards your final mark.

- **Assignment 3** is your **final research report** and is a revision of your draft research report.

The final research report (or Portfolio) constitutes the examination. You will submit it as Assignment 3, and you must submit it using the normal method of submission, even though it is the examination for this module...

Assignment 3 contributes 60% towards your final mark, while the year mark contributes the remaining 40%. You must achieve 40% as the subminimum in the examination (Portfolio/ Assignment 3) before your year mark will be taken into account. In other words, if you do not obtain at least 40% in the examination (Portfolio/Assignment 3), your year mark will NOT be taken into account when your final mark for the module is calculated. Your examination mark will then be your final mark.

TO SUMMARISE: There are two formative assessments for this module. Both are compulsory. The marks for the two assignments constitute your year mark (Assignment 1 contributes 25% towards your year mark, and Assignment 2 contributes to 75% towards your year mark). Assignment 1 is a multiple-choice assignment. For Assignment 2 you will submit a draft research paper. You will continue to work on improving the draft even after submission thereof. Research is a sustained endeavour of writing, revising, and rewriting. Once you have received feedback on your draft research paper, you will further improve your research report by heeding and responding to the comments and suggestions. The final product will be submitted as Assignment 3, which constitutes your summative assessment. You will not write **an examination in this module.**"

The law

[22] When dealing with legitimate expectation, the court can do no better than to refer to the matter of *National Director of Public Prosecutions v P Phillips and Others*,² which was mentioned with approval in the SCA matter of *South African Veterinary Council and Another v Szymanski* 2003 (4) SA 42 (SCA). The court said:

² 2002 (4) SA 60 (WLD).

"A legitimate expectation

'arises where a person responsible for taking a decision has induced in someone who may be affected by the decision, a reasonable expectation that he will receive or attain a benefit or that he will be granted a hearing before the decision is taken.'

De Smith, Woolf and Jowell *Judicial Review of Administrative Action* 5th ed at 417, para 8-037.

Such an expectation may arise,

'either from an express promise given on or before of a public authority or from the existence of a regular practice which the claimants can reasonably expect to continue'...

The law does not protect every expectation but only those which are 'legitimate'. The requirements for legitimacy of the expectation, include the following:

- (i) The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification': De Smith, Woolf and Jowell (op cit [Judicial Review of Administrative Action 5th ed] at 425 para 8-055). The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.
- (ii) The expectation must be reasonable: *Administrator, Transvaal v Traub* (supra [1989 (4) SA 731 (A)] at 756I - 757B); De Smith, Woolf and Jowell (supra at 417 para 8-037).
- (iii) The representation must have been induced by the decisionmaker: De Smith, Woolf and Jowell (op cit at 422 para 8-050); *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346 (PC) at 350h - j.
- (iv) The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate: *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C) at 59E - G."³

³ Id at para 27-28C1.

[23] This exposition of the law has been adopted and supported by Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*,⁴ where the court said:

“In *Administrator, Transvaal and Others v Traub and Others*, Corbett CJ considered the concept of “legitimate expectation” and its development in English law. In considering what conduct would give rise to a legitimate expectation, he cited the speech of Lord Fraser of Tullybelton in *Council of Civil Service Unions and Others v Minister for the Civil Service*:

“Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from *the existence of a regular practice which the claimant can reasonably expect to continue.*” (emphasis supplied by Corbett CJ)⁵

[24] In applying these legal precepts to the case, the applicant falters at the first principle. The documents (Unisa Rules for Students and Tutorial Letter 102/3/2022) presented to him by the first respondent are clear that the Year Mark is taken into consideration when calculating the Final Mark. Before relying on the practice, the least he could have done would have been to seek clarity and assurance from the first respondent. Given his concession that this was not the practice in 2019, he had to be certain of the existence of this new practice.

[25] in view of the contents of the Tutorial letter, his expectation cannot be said to be 'clear, unambiguous and devoid of relevant qualification.' Furthermore, upon a proper reading of the Tutorial letter 103/2/2022, Assignment 3 was a continuation of assignment 2. It was stated that:

“For assignment 2 you will submit a draft research paper. You will continue to work on improving the draft even after submission thereof...Once you have received feedback on your draft research paper you will further improve your research report by heeding and responding to the comments and suggestions. The final product will be submitted

⁴ 2000 (1) SA 1 (CC).

⁵Id at para 212.

as Assignment 3, which constitutes your summative assessment. You will not write **an examination in this module.**"

[26] It would neither be reasonable nor sensible to separate the marks of essentially the same scholarly work. This was a continuum; therefore, he fails at the second hurdle of reasonableness as well. With such lofty goals, the applicant let himself down by not beginning with his studies as soon as possible. He does not state whether he submitted Assignment 1, which contributed 25% towards the 40% Year Mark. From the sequence of events, it is easy to conclude that he did not submit the assignment 1. He, therefore, squandered 25% of the 40% Year Mark. This is inconsonant with a student whose goal is to graduate with distinction. To attain such distinctions, one must be prepared for a life of sacrifice, hard work, dedication and self-discipline.

Conclusion

[27] In my book, a cum laude student and a student who obtains 9.27% do not belong in the same kraal. Had he taken his work seriously long before the sad chapter in his life, he would have not been in this position. I do not think he wanted to obtain cum laude on technicality. It would be most unscholarly to award a pass with distinction (cum laude) to someone who failed a module so dismally, 9.27%. I must agree with the first respondent that the applicant did not comply with Rule 26.3.2. of Unisa Rules for Students.

[28] The respondents' handling of the matter left much to be desired for an institution with such a glowing history. In their answering affidavit, the respondents submit that the applicant relies on measures which were taken due to Covid 19 and were not the standard University practice. They refer to Unisa Assessment Procedure Manual Revised November 202. This document is neither attached to the documents for the court to see nor seen by their counsel. The applicant, too, does not know this document. Furthermore, it is submitted that the system of not considering Year Mark if lower than the Exam Mark was applied to supplementary exams.

[29] The insouciant handling of this matter mimics how the applicant's emails were dealt with. Several emails of the applicant went unanswered. For example, he submits that his emails to the Dean of Law, dated 11 August 2022 and 25 August, received no feedback. Deciding to escalate the matter, he emailed the Registrar on 14 September 2022 and 13 November 2022. Again, no response was forthcoming. Having failed to receive any feedback from the Dean and Registrar, he dispatched an email to the Vice-Chancellor, on 11 October 2022. Still, he received no response. This behavior must be deprecated. Students are the lifeblood of universities and deserve better treatment than that.

Costs

[29] The norm is that costs follow the results. In this matter, due to respondents' failure to assist the court with document 202 and the general nonchalant way they dealt with this matter, it would be most inappropriate to make such an order. In the result, I do not make any order as to costs.

ORDER

1. The application is dismissed.
2. No order as to costs.



M.P. MOTHA

JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

For the Applicant:	Adv W. Roos
For the Respondents:	Adv T. Moneri
	S Pearl Ndaba Attorneys

Date of hearing: 30 May 2024
Date of judgment: 18 June 2024