IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 3518/2008

In the matter between:-

PRANEEL MISTHRY Applicant

and

UNIVERSITY OF KWAZULU-NATAL Respondent

JUDGMENT

Delivered on 11 November 2014

Vahed J:

[1] The applicant was a student at the respondent university ("the university") reading for his Bachelor of Science in Electronic Engineering ("BSc Eng") degree. In the final year of academic study he needed to complete and pass a module described as the Electronic Design Project course ("the module"). The module is usually undertaken during the second semester of the academic year. During his final year in 2006 he took the module but failed. In 2007 he repeated the module but failed again.

[2] During February 2008 the applicant commenced review proceedings against the university seeking an Order that:

> "the respondent's decision to fail the applicant in a semester course in which he was tested on a project titled: 'A Dynamically Reconfigurable

> Adaptive Viterbi Decoder' in the School of Electrical, Electronic and Computer Engineering in or about December 2007, is hereby reviewed and set aside and the matter is referred to the respondent for reconsideration of such result alternatively an order substituting such result with the result that the applicant passed the said course."

[3] In simple language the applicant, in an area of study chosen by him, had to design a *hardware* component to resolve a particular issue and demonstrate that it actually worked. During the semester the course content required him to submit two interim reports on his progress towards completion and a final report (referred to as a dissertation) which is marked. That is then followed by an examination. The final assessment of a student's competence is assessed in three components: an assessment of the student's writing skills, an assessment of his or her oral skills and an assessment of the degree of accomplishment of the project as a whole.

[4] The reason for the applicant's failure is crisply captured in a letter addressed to Professor F Takawira, the head of the School of Electrical, Electronic and Computer Engineering by one of the examiners, Mr R Sewsunker. The contents of that letter provide a useful introduction to the applicant's complaints. It said:

> "The abovementioned student was examined by a panel of two examiners on 21 November 2007, Professor H Xu and the undersigned. The examination consisted of two parts; a poster presentation of the project effort followed by a demonstration of the actual project. The student performed satisfactorily in the poster presentation aspect but did not meet the criteria to pass the demonstration aspect. The project topic was '*A Dynamically Reconfigurable Adaptive Viterbi Decoder*'. A key project requirement was '*This project focuses on implementation of the*

Adaptive Viterbi Algorithm (on an FPGA) using VHDL. The decoder is to be implemented on an Altera UP2 or UP3 board, and the decoded results will be displayed on VGA'. The reason the student did not pass the demonstration was that he was unable to demonstrate that the project hardware was in fact working. He showed a simulation result which appeared to work correctly. The student was granted extra time of one week in order to get the hardware working. The details of this were clearly spelled out to the student shortly after the final examination When the student expressed his inability to demonstrate his results using a VGA screen, the undersigned suggested that short streams of input, intermediate and output data be shown on a logic analyser instead. The student half-heartedly agreed to look into this.

The extra-time examination took place on 29 November 2007 and the examiners were Professor D. Dawoud and the undersigned. This examination was simply a demonstration where the student would show the hardware functionality that was absent in the final examination. The student showed closely what he had shown in the final examination with no evidence of additional work done. He showed the simulation work, and when asked to demonstrate that the hardware was working, he said he understood implementation on an FPGA to mean '*to download his code to the FPGA and not to mean that he had to show that the FPGA was in fact working as a Viterbi decoder*'. He thus failed the extra-time examination."

[5] The applicant's complaint initially was that the requirement that he had to demonstrate on a VGA screen that his project worked was not part of the original requirements. This he said was added to the examination requirements very late in the day and was one impossible to comply with.

[6] After the "record" was made available to the applicant in terms of Rule 53 and the mark sheets were disclosed to him, an additional complaint

was added to the effect that if his individual scores were averaged, he would nevertheless have passed. Other criticisms of the marking criteria employed by the examiners were also made.

[7] In essence, the university's case was that:-

a. The conduct and/or decisions implicated do not constitute administrative action under the Promotion of Administrative Justice Act, 2000 ("PAJA") and are thus not reviewable;

b. In any event, on the respondent's version (owing to the fundamental disputes of fact on the papers) no irregularity occurred.

[8] Those disputes of fact were fundamental to a proper understanding of the case and arose because the deponents to the respondent's answering affidavits, who were all the examiners and the head of the school, were unequivocal in asserting:

a. that the requirement for the demonstration of the working result on a VGA screen was always, to everyone's knowledge, an integral part of the examination, and one that was easily achieved within the time allocated;

b. that each of the separate components of the final examination had to be passed and that a pass could not be achieved by averaging the separate results.

[9] Those factual assertions, amongst others, were clearly and logically made in the papers and were such that I could not, taking a robust approach, summarily reject them.

[10] Before argument commenced it was common cause that the following disputes of fact existed:

a. Whether the requirement for the applicant to display his project using a VGA controller, constituted a part of the project from inception, or was added as a requirement at the "eleventh hour".

b. Whether, in order to facilitate such display, the applicant was expected a design a VGA controller which constituted a different and separate project.

c. If the VGA display was indeed added in as an "eleventh hour" requirement, whether such could be complied with in the time available.

d. Whether the applicant was required to demonstrate that his project actually worked.

e. Whether the marking requirement was that the three separate components of the final examination had to be individually passed or whether a pass was achievable on averaging the final scores.

[11] When argument in matter commenced Mr *Janse van Rensburg*, who appeared for the applicant, insisted that the matter be disposed of by argument on the papers as they stood, and expressly disavowed any suggestion that the disputes of fact be resolved by a reference to oral evidence. He said that he adopted that course of action because of the long delay between when the application was initially commenced (February 2008) and the date of hearing (August 2014) and that any further delay was not in the parties' interests. I was not appraised of the reasons for the long delay.

[12] Given that stance I put to Mr *Janse van Rensburg* that it followed that the application fell to be decided on the respondent's version and that on that version no reviewable irregularity existed. He conceded that the difficulty was insurmountable.

[13] In *Plascon Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) the following was said at 634E – 635C:

> 'Secondly, the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by VAN WYK J (with whom DE VILLIERS JP and ROSENOW J concurred) in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E - G, to be:
>
> "... where there is a dispute as to the facts a final interdict should only be

> granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

This rule has been referred to several times by this Court (see *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* 1976 (2) SA 930 (A) at 938A - B; *Tamarillo (Pty) Ltd v B N Aitkin (Pty) Ltd* 1982 (1) SA 398 (A) at 430 - 1; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) at 923G - 924D). It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 - 5; *Da Mata v Otto NO* 1972 (3) SA 858 (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) *(g)* of the Uniform Rules of Court (*cf Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case *supra* at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another* 1983 (4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the *Associated South African Bakeries* case, *supra* at 924A).'

[14] That statement is now well known in our law as the *Plascon-Evans* rule. In National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at paragraph 26 the court said:

> '[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

[15] In Rail Commuters Action Group & Ors v Transnet Ltd t/a Metrorail & Ors 2005 (2) SA 359 (CC) at paragraph 53 the Constitutional Court described the *Plascon-Evans* rule thus:

> '[53] In assessing a dispute of fact on motion proceedings, the rules developed by our courts to address such disputes will be applied by this Court in constitutional matters. Ordinarily, the Court will consider those facts alleged by the applicant and admitted by the respondent together with the facts as stated by the respondent to consider whether relief should be granted. Where however a denial by a respondent is not real, genuine or in good faith, the respondent has not sought that the dispute be referred to evidence, and the Court is persuaded of the inherent credibility of the facts asserted by an applicant, the Court may adjudicate the matter on the basis of the facts asserted by the applicant. Given that it is the applicant who institutes proceedings, and who can therefore choose whether to proceed on motion or by way of summons, this rule

restated and refined as it was in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* is a fair and equitable one.'

[16] Mr *Janse van Rensburg's* concession was properly made.

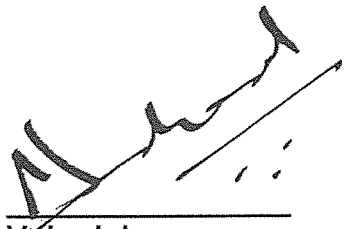
[17] On that analysis alone the application fell to be dismissed.

[18] However, it is my view that properly contextualised, the relationship between the applicant and the university is a contractual one. Courts typically do not interfere in that relationship unless fraud or malice or bad faith on the part of the institution is proved. There is accordingly a reluctance on the part of the courts to intervene in decisions of an educational institution relating to academic evaluation, save where the applicant has shown treatment that was manifestly unfair or where there has been a flagrant violation of the rules of natural justice. See *Rittenhouse-Carlson v Portage College* 2009 ABQB 342, a decision of the Court of Queen's Bench of Alberta, Canada. See also generally the discussion in *Potwana v The University of KwaZulu-Natal* [2014] ZAKZHC (1) (24 January 2014).

[19] On that basis, and in the absence of the applicant being able to demonstrate fraud, malice or bad faith or manifestly unfair conduct, the decision is not reviewable in any event.

[20] It seems also that the applicant has failed to demonstrate any reviewable activity on the part of the respondent university that is justiciable under PAJA.

[21] The application is dismissed with costs.



Vahed J

Case Information:

Date of Hearing:	15 August 2014
Date of Judgment:	11 November 2014
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