

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

Case Number: 75657/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO. ☒ YES ☐ NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO. ☒ YES ☐ NO

(3) REVISED. ☒

12/10/16

DATE

[Signature]

SIGNATURE

12/10/2016

In the matter between:

MOGODI MATSHIDISO

1ST APPLICANT

MOKWENA JEANETTE

2ND APPLICANT

SETSIBA MAMPOTSE CONSTANCE

3RD APPLICANT

MBATHA THULISILE GLENDAR

4TH APPLICANT

MATLOU MAMOJA TSOALEDI

5TH APPLICANT

MONEOANG SIPHO MPHO

6TH APPLICANT

MACHETE MEMORY

7TH APPLICANT

MAVHUNGU MATODZI

8TH APPLICANT

ADV ZONDEKA MAKONDO

AFRICAN LAW PROJECT

9TH APPLICANT

And

THE PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA

1ST RESPONDENT

MINISTER OF HIGHER EDUCATION

2ND RESPONDENT

CHAIRPERSON COUNCIL FOR HIGHER
EDUCATION

3RD RESPONDENT

CHAIRPERSON OF UNIVERSITIES OF
SOUTH AFRICA

4TH RESPONDENT

VICE CHANCELLOR OF THE UNIVERSITY
OF LIMPOPO NO

5TH RESPONDENT

JUDGMENT

Fabricius J,

1.

This is an urgent application set down for hearing on 4 October 2016. It was heard on 6 October 2016. The issues involved, whether express or implied, are of such

importance that I deem it important to deal with the proper context in some detail.

2.

The relief initially sought was the following: "Pending the outcome of the relief sought in PART B.

PART A:

1. Declaring the decision of the Second Respondent of the 20th September 2016 of recommending increase of universities fees taken therein to be unlawful administrative action and unconstitutional.
2. Reversing and/or setting aside the decision of the Second Respondent recommending that universities fees be increased between 2% to 8% before the Commission of Inquiry into Higher Education and Training ("the Fees Commission") has finalised its report and presented it to the First Respondent.
3. Directing that the decision made by the First Respondent of 0% increase on student fees stand until such time that the First Respondent has received a

final report from the Commission of Inquiry into Higher Education and Training ("the Fees Commission").

4. Declaring that the Respondents' action(s) are inconsistent with the provisions of *Section 7 (1) and (2) of the Constitution*.
5. Declaring that the Respondents' action(s) are inconsistent with the provisions of *Section 28 (1) (f) (ii) of the Constitution*.
6. Declaring that the Respondents' action(s) are inconsistent with the provisions of *Section 29 (1) and (2) of the Constitution*.
7. Declaring First and Second Respondents' decision or failure to take such decision to declare any fees increase before the final Report of Commission of Inquiry into Higher Education and Training ("the Fees Commission") to be procedurally unfair, and materially influenced by an error of law.
8. Declaring First and Second Respondents' decision or failure to take such decision to patiently await the final report and recommendations of the Commission of Inquiry into Higher Education and Training ("the Fees Commission") to be procedurally unfair, and materially influenced by an error

of law.

9. Alternatively, directing the First, Second and Third Respondents to urgently

sit and consider the 0% fee increment pending the finalisation of the final

report: Report of the Commission of Inquiry into Higher Education and

Training ("the Fees Commission").

10. Directing that the cost of relief sought in Part A to be of public interest and

as a result the cost of relief sought in Part A be borne by the First and

Second Respondents."

PART B:

This part was formulated on the basis of a review application relating to the alleged

decision of the Second Respondent referred to in par. 2 of the prayers.

3.

The deponent to the Founding Affidavit avers that she is acting in her own interest,

in the interest of fellow students and also in the public interest in terms of the

provisions of *Section 38 (a), (c) and (d) of the Constitution*. Confirmatory affidavits

were only filed by the Fifth, Sixth and Eighth Applicants.

4.

The purpose of this application was said to be the following:

1. "The purpose of this application, first is to seek an order declaring the recommendations of fees increment, made by the Minister of Higher Education on 19 September 2016 to be an unfair administrative action that adversely affect poor students and the public at large.
2. Secondly, seeking an order declaring that the Applicants have not been given the opportunity to make any representation to the Commission thus the Minister of Higher Education has failed to comply with the provisions of *Section 4 of Promotion of Administrative Justice Act 3 of 2000* and further failed to apply the principles of the *audi alterem partem* rule.
3. Thirdly, seeking an order directing that the 2015 decision of the First Respondent of 0% increase continues until such time the First Respondent has been handed the final commission report and the opportunity to apply his

mind on the said final report.

4. Fourthly, seeking an order declaring the recommendations of the Minister of Higher Education to be in conflict with *Section 28 (1) (f) (ii) of the Constitution*.
5. Fifthly, seeking an order declaring that the First and Second Respondents are in contravention of the provisions of *Section 29 (1) (b) and (2) (c) of the Constitution*.
6. Sixthly, seeking an order declaring that education is a fundamental right enshrined in *Section 29 of the Constitution of the Republic of South Africa*, that in terms of section 7 (2) the State must respect, protect, promote and fulfil these rights as there is no limitation that exists in terms of *Section 36 of the Constitution*.
7. Alternatively, seeking an order compelling the Second Respondent to comply with the decision issued by the First Respondent on 23 October 2015 of 0% fee increment until such time as the Commission has concluded its business and gave its final report to the First Respondent and the First Respondent

applied his mind on the recommendations contained in the report.

8. Furthermore, is to seek an interim order compelling the Second Respondent to withdraw his recommendation for fee increase for year 2017 until such time the Commission has concluded its business and/or the finalisation of the review application **PART B** of this application."

5.

It is clear from those allegations that the Applicants rely on certain provisions of the *Administrative Justice Act 3 of 2000 ("PAJA")*, certain sections of the *Constitution of South Africa* and also on the requirements for an interim mandatory interdict. Under the heading "Law" they repeat that they rely on Sections 7, 9, 28 (1) (f) (ii), 29 (1) (b) and (2) (c) read with Section 33 (1), (2) and Section 84 (2) (f) of the *Constitution of the Republic of South Africa Act 108 of 1996*. The Applicants also repeat that they rely on Section 3 read with Section 4 (1) to (3) of *PAJA*, namely the Second Respondent's recommendation to increase university fees from 2% to 8%, without giving the Commission adequate time to finalise its report, and hand its

recommendation over to the First Respondent. It is also said that the Second Respondent's decision to recommend university fees increase of 2% to 8% constitutes administrative action which materially and adversely affects the Applicants' rights, and that the decision of recommending a fees increase had been taken without observing the prescript of "*audi alterem partem*-rule". They also rely on "the ruling party's basic document - The Freedom Charter, that states that higher education and technical training shall be opened to all by means of State allowances and scholarships awarded on the basis of merit and that Adult illiteracy shall be ended by a mass State Education Plan". I may just add at this stage, that this Charter was drawn during 1955 and has no legal effect inasmuch as *Section 2 of the Constitution* states that the *Constitution* itself is the supreme law of the Republic. In the context of the applicable "Law", Applicants say that this Court has the power to declare that any law or conduct that is inconsistent with the *Constitution* is invalid to the extent of its inconsistency, and in that context make reference to *Section 172 of the Constitution*. Lastly, they submitted under this particular heading that I have the power to review administrative actions which flow

directly from *PAJA*, common law, legality and the *Constitution*.

6.

As far as urgency is concerned, the following was said:

1. "The announcement of the recommendations of the Minister of Higher Education placed me and other students in the universities' education, well-being, physical, mental health and moral at high risk.
2. The announcement has created a volatile situation in all universities, resulting in some universities' properties being damaged thus putting the life of minors like myself in serious danger.
3. The examination is supposed to start as from 20 October 2016, and this makes it impossible for students to prepare for such examinations as classes will be constantly disrupted by protesting students.
4. Crimes of robbery and house-breaking in the vicinity of the University have suddenly increased to unacceptable standards thus putting my life and other students' at high risk.

5. The First and Second Respondents have failed to protect my Section 28 (1)

(f) (ii) constitutional rights.

6. Respondents have failed to take into consideration that the Commission has

not submitted its final report and that universities fees increase is of great

national interest and needs to be handled with care;

7. Education is a human rights issue, education is life, the Respondents'

actions are life-threatening;

8. The Applicants' urgent application is of great public interest to the citizens of

South Africa and Africa at large as it may bring a possibility of civil

disobedience by students and the public at large;

9. Education is a right enshrined in Section 28 (1) (f) (ii) and Section 29 of

the *Constitution of the Republic of South Africa Act of 1996* as amended,

and can only be limited in terms of law of general application to the extent

that the limitation is reasonable and justifiable in an open and democratic

society based on human dignity, equality and freedom."

At the hearing on 6 October I accepted that the application was urgent in the

context of the issues raised. There are obviously other potent formal defects in the application, but fortunately all parties before me were *ad idem* that I should address the crux of Applicants' case and not discuss it or strike it off the Roll for reasons relating to urgency, *locus standi* and the obvious absence of a cause of action in the context of most constitutional provisions relied upon.

7.

To give the above-mentioned the proper contextual meaning, it is convenient to mention at this stage that on 22 January 2016, by way of *Proclamation 1 of 2016*, the President established a "Commission of Inquiry into Higher Education and Training" (the "Fees Commission"). This Commission was tasked to enquire into, report on, and make recommendations on the following:

1. "The feasibility of making higher education and training (higher education)

fee-free in South Africa, having regard to:

- 1.1 the Constitution of the Republic of South Africa, all relevant higher and basic

education legislation, all findings and recommendations of the various

Presidential and Ministerial Task Teams, as well as all relevant educational policies, reports and guidelines;

1.2 the multiple facets of financial sustainability, analysing and assessing the role of government together with its agencies, students, institutions, business sector and employers in funding higher education and training; and

1.3 the Institutional independence and autonomy which should occur *vis a vis* the financial funding model".

On 20 May 2016, by way of *Government Notice No. 556*, a call was made for submissions to the Commission of Inquiry by 31 May 2016. I agree with the Applicants' criticism of the short period of time. On 8 August 2016, by way of Proclamation, which would come into effect on 23 September 2016, the terms of reference of this Commission were amended, and it was stipulated that it would be required to submit interim reports and recommendations to the President whenever it was necessary, and issue a preliminary report by 15 November 2016. The Commission would also have to complete its work within a period of eight months from the date of the Proclamation i.e. by no later than 30 June 2017, and would

have to submit its final report to the President within a period of two months after the date on which the Commission completed its work.

8.

As far as the background facts were concerned, it was said that the history of the problems of education for African children was as old as colonisation of South Africa by both the Dutch and the British. During the British rule, the education of African children was left in the hands of the churches and the Government refused to take responsibility for the education of the African children or the African people. After the National Party took over the Government, it created policies that adversely effected the education of the African child. Free education of these children was removed from the control of the churches and the burden of paying was put on the oppressed African people to finance their children's education. Thus, so it was averred in the Founding Affidavit, the majority of African children were denied education. Further background facts were that on 14 October 2015, the Mail and Guardian Newspaper reported that management of Wits University raised the fees by 10.5% and an up-

front registration fee by 6%, a decision that "enraged Wits students resulting in the biggest protest the University had ever seen after post-apartheid". This protest spread to other universities in the country. On 23 October 2015, the President announced a 0% increment after deliberation with certain vice-chancellors of universities and student representatives, and also taking into account considerations of national interest. In this context the deponent to the Founding Affidavit submitted that the President's announcement of a 0% increase created a legitimate expectation that there would be no fee increase until such time that the Commission to be appointed by the President had concluded its business and submitted its final report.

9.

It is clear from the Founding Affidavit read as a whole that what gave rise to this urgent application was a statement by the Minister of Higher Education, the Second Respondent, published on 19 September 2016. I deem it important, for purposes of this application, to quote this statement by the Second Respondent in full:

"Good morning ladies and gentlemen of the media, and thank you very much for making time to be here for this important announcement.

Our public universities are a significant national asset. They empower the next generation with skills and knowledge, and contribute significantly to the ability of our economy to compete globally through innovative and appropriate research.

Our universities currently face serious challenges in terms of funding. At the same time, large numbers of South Africans are currently finding it difficult to access post-school education because of the financial challenges they as individuals or as families face.

Government is aware of these challenges and takes them very seriously. Indeed, government remains firmly committed to progressively realise free post-school education for the poor and working class, as called for by our Constitution, and to assist middle class families who are unable to pay.

This is demonstrated by the creation of the Presidential Commission of Inquiry into Higher Education and Training funding, which includes universities, and Technical and Vocational Education and Training (TVET) colleges, as well as the substantial

increases in funding to the National Student Financial Aid Scheme since 2010.

The task of the Presidential Commission is to advise on systemic and long-term measures to achieve a far-reaching reconstitution of the entire post-school education and training funding system, thereby enabling South Africans to access higher education even if they come from poor and working class families.

The Heher Commission recommendations will hopefully also contribute significantly to building and strengthening our universities and TVET colleges – and the Commission should be allowed to complete its vitally important task.

In the interim, while we all wait for the recommendations of this Commission, our university system has to continue functioning, producing skills for the economy, and empowering young South Africans and students from countries around the world, in particular the South African Development Community (SADC).

Currently, our universities face an extremely difficult financial situation. The effects of last year's moratorium on fee adjustments and the extra costs associated with insourcing have both added to these challenges.

Our immediate and pressing task is to ensure that as we continue to improve access

to post-school education and strengthen the quality of learning and teaching, we do not erode the financial sustainability of the sector.

Our economy is currently weak and our fiscal position parlous. The tax burden has been rising in recent years, and we must preserve the fiscal space to fund government's policy agenda in future years. This means that any funding government mobilises to support the pressing challenges in higher education, it would need to reprioritise from other government programmes.

We understand the legitimate student concerns about the affordability of university education. At the same time, we need to ensure that those who can afford to pay must pay.

Equally importantly, the post-school budget has to cover students in technical and vocational education and training, while we also face the challenge of building a community college sector to provide educational alternatives for 18 million South Africans who are unable to study at university.

In other words, our job as government requires a number of very delicate balancing acts.

To achieve our objectives, we must continue arguing for as significant a budget allocation as possible for post-school education. Indeed, a look at this year's budget shows that this sector received the largest increase in funding of any government department.

Higher Education and Training this year received an additional 18% for 2016/17, with an average annual increase of 9.8% across the Medium Term Expenditure Framework period up until 2018/19.

From R 42 billion in the 2015/16 financial year, the Department's budget is set to rise to R 55,3 billion in 2018/19.

Government has this year provided R 1,9 billion of the R 2,3 billion shortfall resulting from the subsidization of the 2016 university fee increase. More than R 4,5 billion in the 2016/17 financial year has been reprioritised to the National Student Financial Aid Scheme (NSFAS).

Expanded funding is targeted to support 205 000 students entering universities for the first time or continuing this year, and a further 200 000 students at TVET colleges. This means that a total of 405 000 students would receive government

support to access universities and colleges in 2016.

The National Skills Fund (NSF) has allocated R 1,393 billion in 2016 towards funding undergraduate and postgraduate bursaries in scarce and critical skills. This funding is directed at meeting the full cost of study for over 13 500 undergraduate and 1 200 postgraduate students enrolled in programmes at our 26 public universities.

In addition, and perhaps most importantly, we must also ensure that we strengthen and empower those sectors, which are charged with training, and skilling people either who choose not to go to university or who do not have the opportunity, but nevertheless must be assisted to become useful contributors to the economy.

To support this aim, the NSF has allocated R 626, 795 million in 2016 towards supporting TVET college students in occupational programmes with a specific emphasis on occupations in high demand and R 1,237 billion towards funding students in workplace-based learning.

Artisan development is also key on our agenda to address the National Development Plan target of 30 000 artisans per annum by 2030. Dependent on the artisan

trade, it costs between R 350 000 – R 400 000 over a period of three years to train an artisan.

This year the target is to register 30 750 new artisan learners, which will amount to approximately R 4,6 billion in artisan learner grant funding through the Sector Education and Training Authorities (SETA's).

It is indeed a fine balancing act and we must all participate, whether at the national level, in university administrations, or as student leaders – because it is the nature of balancing acts that if one falls, all fall.

Last month I received recommendations from the Council on Higher Education (CHE) on university fees for 2017. I have studied these recommendations, consulted with university vice-chancellors and council chairs, various student organisations, organised labour, faith communities, political organisations and government.

Ladies and gentlemen, the issues at stake are complex, and there are differing opinions and arguments across the system.

The CHE argued for a consumer price index (CPI) based fee adjustment for 2017,

while many university leaders have made a strong case that an 8% agreement (CPI + 2%) is essential.

On the other hand, some students have called for a moratorium on all fee adjustments until the outcome of the Presidential Commission is announced, whilst others are supporting government's measures to assist students from poor, working and middle class families, which include the "missing middle".

Currently, the authority for determining fee adjustments resides with University Councils (I underline). The CHE has suggested to their leadership that the system will be best served by a national approach. However, at the same time we do recognise the differentiated nature of the system and that a one-size fits all approach may not lead to sustainability in the system over the long run.

Government is alive to the legitimate cries of students regarding fees and to those of the universities who must continue to pay for specialist books and equipment in foreign currency and ensure that academic, support and service staff are adequately paid for their work.

As we wrestle with how to respond comprehensively, the equally critical building and

transforming of our post-apartheid universities has to be supported. Starving our universities of funding is not the way to go, which is effectively what another across-the-board fee rise moratorium against the current fiscal backdrop would mean at this point.

While the Presidential Commission does its important work in developing proposals for a long-term funding model, universities will not be able to operate with less funds than what they already have. Everything is more expensive today than it was this time last year.

That is the reality of inflation.

We have looked at the challenges at hand from all sides and have concluded that the best approach would be to allow universities individually to determine the level of increase that their institutions will require to ensure that they continue to operate effectively (I underline) and at least maintain existing quality – with the caution that this has to also take into account affordability to students, and therefore has to be transparent, reasonable and related to inflation-linked adjustments. Our recommendation is that fee adjustments should not go above 8% (I underline).

To ensure that such inflation-linked fee adjustments on the 2015 fee baseline are affordable to financially needy students, government is committed to finding the resources to support children of all poor, working and middle class families – those with a household income of up to R 600 000 per annum – with subsidy funding to cover the gap between the 2015 fee and the adjusted 2017 fee at their institution.

This will be done for fee increments up to 8%.

This will in effect mean that all NSFAS qualifying students, as well as the so-called “missing middle” – that is, students whose families earn above the NSFAS threshold but who are unable to support their children to access higher education, will experience no fee increase in 2017. Government will pay for the fee adjustment (underline). This will bring huge relief to nurses, teachers, police, social workers, and other parents who work in occupations that do not earn huge salaries, and who have children at university. This will apply to students at universities and TVET colleges.

Administrative mechanisms will be developed and students informed on how to apply for the gap-funding grant before the end of this academic year.

There are many students from upper middle class and well-off families, as well as

students on full company bursaries in our institutions who can afford to pay the adjusted 2017 fees, and we expect them to do so.

It is very unclear to government why families who can afford private schools should, under the current circumstances, be receiving further state subsidies for their children at universities.

To subsidise these students would require taking funding from the poor to support cheaper higher education for the wealthy, which is not justifiable in a context of inequality in our country. We cannot subsidise the child of a cleaner or unemployed person in the same way as we subsidise the child of an advocate, doctor or investment banker.

While NSFAS will continue to provide loans and bursaries to poor and "missing middle" students, which is developing a model that will be tested in 2017 to provide affordable support to these students. We will continue to look for other ways of supporting financially needy students not covered by NSFAS, whilst a long-term solution is being developed to raise sufficient funding from the public sector, private sector and other sources to fund "missing middle" students at universities and TVET

colleges.

Universities must urgently, effectively and comprehensively advance our shared transformation as articulated in the 2015 Durban Statement on Transformation, and provide annual reports on their progress. Moreover, universities are expected to pay all of their staff, both permanent and contracted, a fair living wage.

I thank you."

Having regard to this statement, it was said in the Founding Affidavit that as a matter of fact the Minister of Higher Education had advised "the fee increment not exceeding 8%". It was alleged that because the authority determining any adjustment resided with the University Council, and the fact that the President had appointed the Commission under the chairmanship of retired Judge of Appeal J. Heher, the Minister had "jumped the gun in issuing the recommendation". The submission was that the Minister had no authority to determine any fee increment, that his recommendation was therefore unlawful, and constituted unfair administrative action that adversely affected the deponent's rights and those of other students. The Minister's statement had allegedly the following three "key

implications" for students of the University of Limpopo:

- 1.1 "The first key point is that, the Government is committed to finding the resources of children of all poor working and middle class families whose household income is up to R 600 000 per annum. We submit that this does not resolve the issue of free education, but a simple transfer of the education's financial burden from parent to child or student, and we submit that NSFAS is a loan that must be paid back by Applicants and the community of students with exorbitant interest, after obtaining their qualification.
- 1.2 We submit that the above-mentioned solution does not address the question of free education. It still perpetuates the policies that were started by the National Party to deny an African child free education.
2. The second key point is that, the burden is of financing the education and an increase thereof has been placed on the African child, as the increase would affect the loan that NSFAS gives to students.
3. The third key point is that NSFAS may increase by 8% which will have

devastating effects to a poor African child who has to pay back as soon as she completes her studies."

10.

It was also alleged that on 26 September 2016, the University of Limpopo issued a notice that classes were suspended until 28 September 2016, based on the press statement issued by the Minister that resulted in the situation at the University becoming highly volatile which adversely "affected minors like myself". It was said that other students were similarly adversely affected and on 27 September 2016, a student residence was also burnt down.

11.

Having dealt with the above mentioned background, the Applicants in the Founding Affidavit then deal with the requisites for an interim interdict. They do so under the heading of a *prima facie* right, irreparable harm and no alternative remedy as well as the balance of convenience. Under the heading of "Prima Facie Right", the First

Applicant says that in the light of the fact that a lawful Commission was established, the Minister's recommendation on a fee increment not exceeding 8% was unlawful and unconstitutional, and against the spirit reached between the First Respondent and other interested parties. In view of the above, so it was put, the recommendation of the fee increment constituted unfair administrative action that adversely affected the Applicants and the student community at large, and was therefore unconstitutional. It was also said that the said recommendation undermined work of the Fee Commission and created an atmosphere of mistrust. It also undermined the 2015 presidential announcement of a 0% fee increment. Under the heading of "Irreparable harm and no alternative remedy", it was said that if interim relief was not granted, the Applicants and the membership of the Ninth Applicant would suffer irreparable harm in that "the Applicants' irreparable harm lies in the fact that if a interdict is not granted but they are ultimately successful in showing that in the review application the impugned decision is invalid and unlawful". Under the heading of "Balance of convenience", it was said that "Applicants and the entire student community at large will suffer in the event that an interdict is not granted and

the Applicants are ultimately successful in the review application".

12.

By way of conclusion it was submitted that there were exceptional circumstances that existed that warranted this matter to be heard on an urgent basis, that a case has been made out for an interim interdict and that the prospects of success in the review application were overwhelming.

13.

It is to be expected that in a democratic society that has not yet overcome the inequities of the past, disagreement will be rife about what is right and wrong. A reasoned and informed argument can contribute to positive debate about what is in the best interests of the broader society.

It is not appropriate for me to comment on Government policy, nor will it serve any useful purpose herein if I deal with the history of this country that the Applicants have eluded to, except to say the following which is contextually justified: It is indeed

a shameful and tragic truth that millions of South Africans were deprived of an adequate education in the past. That this fact or the Government's present position has led, as alleged, to continued violence in the streets and at the Universities, is something that I abhor. It is not justified on the basis of any rational argument. The sad irony is that it will ultimately be the students that will suffer the most if facilities meant for them are destroyed, if lectures are prevented and Universities are closed at critical examination times. What example does that set for the youth that must look upon the present events with deep anxiety and insecurity? It also appears that Police and security personnel often react with inappropriate brutality. Our system of constitutional values suffers as a result and the whole of society is scarred.

14.

At the hearing of this application, Mr J. Hattingh appeared for all the Applicants. I was informed that he appeared pro bono. I thank him for accepting this instruction and for representing the interests of the Applicants as best as he could, having regard to the facts and the applicable legal principles. I was informed that the

Applicants' Affidavits have been drafted by themselves, but that he had studied them and associated himself with them. In Court, I complimented the Applicants for their courage and confidence for approaching this Court for an order, albeit incompetent in law, as I will hereafter show, rather than taking the law into their own hands and inflicting violence on others or on property. In order to avoid unnecessary argument on orders that were not competent, having regard to the provisions of *PAJA* and the *Constitution*, Mr Hattingh handed up a new Draft Order which now read as follows:

1. "The Second Respondent is ordered to retract the pronouncement made on 19 September 2016 that University fees for the 2017 academic year be adjusted to a maximum of 8%.
2. The Second Respondent is ordered to refrain from making further pronouncements in respect of the increases of University fees pending the finalization of the report of the Commission of Inquiry into Higher Education and Training commissioned by First Respondent in terms of Proclamation No. 1 of 2016 published in the Government Gazette of 22 January 2016.

A cost order was also sought. Mr Hattingh informed me that to the best of his knowledge, it was the first time that students had decided to approach a Court for relief rather than resorting to the streets and being part of the chaotic circumstances that one can view daily at a number of Universities. I was assured that the Applicants were not participating in any violence, but that as reflected in the Draft Order presented to me, the violence and chaos at the Universities had been caused by the statement of the Second Respondent that I have quoted in full. He submitted that the University of Limpopo had been closed as a direct result of the Minister's announcement. He posed the question to me whether these students, whether at the University of Limpopo or at other Universities, had not possibly misunderstood the Minister's statement. I mentioned to Mr Hattingh that it was not for a Court to tell a Minister of the Cabinet what policy statements to make, when to make them, and how to make them. The principle of the separation of powers is one that underlies our constitutional dispensation and that it was not for a Court to say what a Minister may say or do, having regard to Government policies or other consideration that concerned the Executive. See: *Mazibuko v The City of Johannesburg 2010 (4) SA*

1 at 20 par. 61, by way of example. I posed the question to Mr Hattingh whether or not the detailed statement of the Second Respondent was unlawful or not. He conceded that it was not unlawful in the context of any Statute that he could rely upon, or in terms of any constitutional provision, but that it was inappropriate because of the establishment of the Fee Commission that I have referred to. He also conceded that it was the University Council in each particular case who had to make a decision regarding their fee structure and that no such decision has yet been made. The said Commission was lawfully instituted and it had been inappropriate to have made an interim statement regarding a fee structure as the Second Respondent had done.

15.

On behalf of the First Respondent, Ms A. Platt SC simply pointed out that there was no issue against the First Respondent. She submitted that the business of Courts was generally retrospective in that they dealt with situations or problems that had already crystalized and not with prospective or hypothetical ones, and therefore the

necessary factual predicate was required.

See: *Ferreira v Levin NO 1996 (1) SA 984 (CC) at par. 199.*

She submitted that the Applicants were applying for relief in the abstract, and without due regard to the rights of people or juristic entities other than the Applicants, and permutations beyond the facts of the present case, and without proper consideration for its effect, *inter alia* on the national fiscus and on the economy as a whole. The result was that having regard to the Applicants' Affidavits, no factual material had been presented to justify the challenge that the First Respondent's conduct was unconstitutional. I agree with that submission and hold that no case has been made out against the First Respondent. It is of course correct that the President stated on 23 October 2015, by way of a statement issued by the Presidency that he had held a meeting with Vice-Chancellors, Chairpersons of University Councils, Presidents of Student Representative Councils and representatives of student organisations nationally. The statement continued as follows: "The meeting agreed that Government needs to lead a process that goes wider than fees, looking at the higher education sector. On the matter at hand, we

agreed that there will be a zero increase of university fees in 2016". The statement is unambiguous and clear. No increase of university fees was envisaged for 2016. It went no further than that and in my view there is no basis for submitting that it could have formed any reasonable expectation that the fee structure for 2017 would not need to be addressed, having regard to normal economic realities. With reference to the Second Respondent's detailed statement of 19 September 2016, Mr S. Maritz SC pointed out that if this statement was read carefully and rationally, it was clear that no decision had been taken by the Government relating to an increase of fees, and that it was abundantly clear as well that the Universities had as yet not taken any decision relating to an increase of fees for 2017. The press statement of the Minister was a well-reasoned document and it comprehensively demonstrated the Governments present limited ability to subsidise needy and the so-called "missing middle" students, up to an increase of 8% in student fees for the 2017 academic year. The press statement was in fact in the nature of an appeal to Universities to limit all increases in fees to 8% which the Government would fund. The Minister's announcement was not a decision and did not amount to any form of executive or

administrative action. Accordingly, there was simply nothing capable of review, either in these proceedings or by way of the prayers sought as per PART B of the Notice of Motion. Neither the President, nor the Minister, had the authority to decree a 0% increase in fees for the 2017 academic year. Similarly, I did not have the power to order a 0% increase for next year. The Minister's Answering Affidavit was deposed to by the Director-General of the Department of Higher Education of the Republic. He was entitled to make this affidavit and was duly authorized by the Minister to do so. The following was said in this affidavit which I deem to be important and decisive of the present issue before me: "The Second Respondent has no authority or capacity to increase or decrease university fees or to maintain such fees at the current rate. Maintaining fees at the current rate or any increase or decrease falls solely within the competence of each individual University. As yet no University announced an increase of fees for the 2017 academic year". I agree with this contention and it is clear from the very detailed statement of the Minister that I have quoted in full. The 0% increase of the university fees in 2016 announced by the First Respondent in 2015 was a result of an agreement reached between

Government and all the Universities of South Africa. The nub of this agreement was that there would be an increase of 6% in fees in 2016, which was funded by an additional subsidy by the Government and by the University from their reserves. It was therefore a misconception to argue that 0% increase for 2016 had been announced in 2015. The Director-General continued to say that the reserves of the respective Universities had now been depleted. Their running costs were very high and their very existence were threatened if they did not keep up with the inflation of such costs in the ensuing years. The Government was subsidizing an average of 40% of the running costs of Universities, but the actual subsidies provided to individual Universities varied. In the case of the University of Limpopo, the actual subsidy was 67% of its running costs. The Council on Higher Education presented a very detailed advice to the Minister on 11 August 2016. This advice made it abundantly clear that all Universities were financially stressed and that the entire tertiary education system would face collapse if urgent remedial action were not taken. The press release by the Second Respondent, upon a proper reading thereof, was an information document. It was pointed out that needy students could be

subsidised with fee increases up to 8% in 2017. This was the upper limit of the Government's financial ability, and forms the basis of the well-reasoned recommendation that fee increases be limited to 8%. In actual fact, the press release was no more than a plea to Universities to limit an increase accordingly, and it was in the form of a recommendation by which no University was bound. Accordingly, and in the context of the applicable legal principles, the press statement by the Second Respondent was neither of an administrative, nor executive nature. Accordingly, the press statement, and what was contained therein, was not subject to review by a Court, and the relief sought by the Applicants in the Draft Order handed to me during the hearing was not competent.

16.

I agree with those submissions. They are made on the basis of objective facts. Furthermore, the 0% increase in fees referred to in 2015 occurred by agreement, and by its very nature could not have given rise to any reasonable expectation that a 0% increase would be perpetuated in future. The definition of "administrative action"

in *PAJA* made it abundantly clear that this plea to Universities based on solid economic considerations, was not an administrative action that could be reviewed by a Court. It was not in the nature of a decision be it of administrative or even executive nature.

I agree.

It is of the utmost importance that the statement of the Second Respondent be properly read, properly analysed and properly understood. If this is done, the violence and anarchy that have allegedly resulted from this statement should cease.

He submitted that violence is not contemplated as a solution to problems facing our society, be it of an economic nature or otherwise. It was an anathema to any civilized society. He submitted that students should contribute to solutions and not resort to violence to force either the Government, or the Universities, to take decisions which are not based on sound economic considerations. If they do, the whole system will ultimately collapse and there will be nothing to study for, and the Applicants' dream of one day appearing before me, as either Attorneys or Advocates, will simply dissipate into thin air. In that context, it was submitted that it

was appropriate for me to look at the application before me beyond the legal issues that arose, and to point out to every single interested party and all students, that neither the Minister of Higher Education, nor the individual Universities, have as yet made any decision that would adversely affect any student.

17.

Ms M. Engelbrecht on behalf of the Fourth and Fifth Respondents associated herself with the argument presented on behalf of the President and of the Minister. The Limpopo University was due to set its fees for the 2017 academic year in early November, after consultation with relevant stakeholders, and in accordance with proper procedure. Its Council, in making the decision on fee increases, would bring into account the recommendation as well as all other relevant factors. If the recommendation was followed, only a tiny minority of the students of the University would experience any fee increase since about 70% of the students were NSFAS students and the remaining 30% largely came from the so-called "missing middle". Furthermore, the University had already indicated that it would consider the

circumstances of students not benefitting from the recommendation on a case-by-case basis, to alleviate their burden also. She also submitted that, as was pointed out by her colleagues, that the recommendation had in any event no force of law.

18.

In the light of the provisions of the Constitution, the provisions of *PAJA* and the autonomy of the Universities to determine their own fees, which has not yet been done, there was no decision by any of the Respondents that could be reviewed by me or could be set aside. She also submitted that the history of education in South Africa was not a matter that required debate in the present proceedings. The Fees Commission would only complete their work by mid-2017 and all reasonable persons should await the conclusion of the work of the Committee. I must point out that it is clear from the Applicants' own admissions in their affidavits that the Minister does indeed not have the power to set fees. Accordingly, the recommendation has no force of law and is not enforceable as against the University or against anyone else. The remedy for the Applicants and for all other students in the country is to

engage the Universities and all other interested parties on a calm and rational basis having regard to objective economic factors. I agree. Normally, this would have been the end of the argument and I would be entitled to make an order dismissing the application without much further ado. I was however invited, in the interests of society as a whole to go one step further than a Court would normally do in proceedings before it, and especially in proceedings in the Urgent Court. I was asked by all Counsel to call upon each and every student in South Africa to calmly and rationally consider the statement by the Second Respondent again, if this was done it would be realized that it was in the nature of a well-reasoned plea to Universities to limit any increases up to 8%, which would then be funded by the Government. There was no reason for any anarchy, violence and destruction of property. I asked Counsel whether it would be proper for me, sitting as a Court to give guidance in this context by way of explaining the meaning of the Minister's statement and its status in law. This I have done. I asked all Counsel whether it would be proper of me to moralize in this judgment, if I can use that phrase, but all Counsel were in agreement that I should point out what was right according to law

and what was wrong. This I have done. The Minister's statement is clear. It is not legally binding on anyone. The Universities have as yet made no decision. The Fees Commission is doing its work. The President has made no binding decision. It is abundantly clear that no action of the Respondents in this matter justify the present violence that one can observe at Universities.

19.

Our *Constitution* is based on the Rule of Law. Without it our society will not survive, be it in its present form or any other form. Violence can never be the solution to economic problems or the plight of the poor, which I recognise. If I could remedy the inequities of the past, I would. In the present instance, there is no legal basis for the relief sought by the Applicants. I commend them for their courage, their efforts in these proceedings and the fact that they have sought relief from this Court rather than resorting to acts of anarchy. I sincerely hope that they will one day appear before this Court, either as Attorneys or Advocates, and that the Rule of Law will guide them in their efforts. I similarly appeal to all other students to follow the same

lawful course.

20.

The following order is therefore made:

1. The application is dismissed;
2. There is no order as to costs.



JUDGE H.J. FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Case number: 99212/15

Counsel for the Applicants: Adv J. Hattingh

Instructed by: Sekati Monyane Attorneys Inc

Counsel for the 1st Respondent: Adv A. Platt SC

Instructed by: The State Attorney

Counsel for the 2nd Respondent: Adv S. Maritz SC

Instructed by: The State Attorney

Counsel for the 4th & 5th Respondents: Adv M. Engelbrecht

Instructed by: Anton Bakker Attorneys

Date of Hearing: 6 October 2016

Date of Judgment: 12 October 2016 at 10:00