

File

**IN THE HIGH COURT OF SOUTH AFRICA  
LIMPOPO DIVISION, POLOKWANE**

**CASE NO: 4384/2017**

- (1) REPORTABLE: YES/NO  
(2) OF INTEREST TO THE JUDGES: YES/NO  
(3) REVISED.

06/02/2018  
DATE

M. S. Phiso  
SIGNATURE

In the matter between:

**MOKIDI LEBOGANG MAKWELA**

**APPLICANT**

and

**UNIVERSITY OF LIMPOPO**

**FIRST RESPONDENT**

**MINISTER FOR HIGHER EDUCATION & TRAINING**

**SECOND RESPONDENT**

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## JUDGMENT

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### PHATUDI M.G :

- [1] This is a review application. The Applicant in this matter seeks relief *inter alia* as follows:-
- a) That, the First Respondent's decisions not to recognize the First Applicant's course or modules completed at University of South Africa be declared unlawful and unconstitutional and therefore liable to be reviewed and set aside.
  - b) That, the First Respondent's decisions in refusing to confer a degree of Bachelor of arts (Communication Studies) on the Applicant be declared unconstitutional and invalid;
  - c) That, the First Respondent be ordered to confer the degree Bachelor of Arts (Communication Studies) on the Applicant at the next graduation ceremony to be held by it after the granting of this order;
  - d) Further that, the Applicant be exempted from the obligation to first exhaust any internal processes applicable, and the

e) Costs of application in the event of opposition thereto.

[2] The Application is resisted by the First Respondent only. As the Second Respondent did not deliver opposing papers despite proper service, it is assumed that it abides the decision of the court.

[3] **A BRIEF FACTUAL BACKGROUND:**

- 3.1. The Applicant, a former *bona fide* registered student with the First Respondent, registered her studies towards a degree Baccalareus Artium ("Communications Studies"). ("the degree") in January 2011. Her allocated student number is 2011 14881.
- 3.2. General rule 10 of the First Respondent ("the University") regulates the maximum duration of prescribed academic curricular set for each registered student at the university. In an instance where a 3 year degree duration is prescribed, the maximum period permissible is 5 years, while a 4 year qualification, the maximum duration is 6 years to complete the course.
- 3.3. It is alleged that the Applicant in 2014 exhausted the 4 years of the 5 years maximum duration for her degree. In that grace period, she then in January 2015 sought an indulgence or call it permission to enroll for the 2 outstanding namely,

modules media Studies 301(MDST 301) and Media Studies 302 (MDST 302) at the University of South Africa (" Unisa"). The purpose of the indulgence was that on completion she would present to the First Respondent the 2 modules due in order to satisfy the academic requirements for the degree.

- 3.4. Pursuant to the request mentioned, the First Respondent's Registrar granted the request in a letter issued to the Applicant, attached to her founding affidavit.<sup>1</sup>("FA"). In granting the approval, Unisa was the institution nominated, and a prescribed fee for recognition of such modules was levied. I propose to deal with the implications thereof later in this Judgment.
- 3.5. Acting on the permission granted, the Applicant proceeded to register the afore mentioned modules/courses at Unisa during 2015/16 academic year. The 2 modules/courses were achieved by December 2016<sup>2</sup>, even though it seems that the 2 modules/course were in fact achieved in the course of May and October 2016, respectively.
- 3.6. In early March 2017, the Applicant in anticipation to square up her outstanding courses approached the university to present, as permitted, the achieved modules/courses in order to fulfill the requirements for the degree so as to have it conferred upon her during the 2017 Autumn graduations. She was, however, orally informed by one of the officials of the University that she could not

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<sup>1</sup> Annexure "MLM<sup>2</sup> P42 Paginated Index

<sup>2</sup> Annexure :MLM<sup>3</sup>, P43, "FA



graduate in 2017 due to recent changes in the curriculum over the past year or so which were then introduced as HST 011/012, HCOB 021/022. The Applicant subsequently sought legal counsel to intervene on her behalf.

- 3.7 In response to the Applicant's attorneys' letter dated 29 March 2017,<sup>3</sup> the registrar on behalf of the First Respondent advanced as reasons for her exclusion following:

"In case of a 3 year qualification, the maximum duration is 5 years and a 4 – year qualification has to be completed within a maximum of six years. Seeing that she had already exhausted 4 years of a 5 year duration for the qualification she was enrolled for, the student requested permission to register for the two outstanding modules (MDST301 AND MDS 302) at Unisa **with the understanding that she would present them to complete the qualification. Permission was granted to this effect.** The student was away from the university in 2015 and 2016 academic years, for modules that she was supposed to have completed in 2015. Only in 2017, did the student bring forth the two modules completed at Unisa.

Parallel to all these developments, the University as required by the Higher Education Act 101 of 1997 and the recently **approved Higher Qualification Sub - Framework imperatives changed the**

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<sup>3</sup> Annexure "MLM<sup>5</sup>, P47, "FA

curriculum of B.A (Communication Studies) programme, which means the old qualification for which the student was enrolled had been phased out and is no longer on offer .....”(owned emphasis)

- [4] Aggrieved by the response received and the reasons proffered by the First Respondent's Registrar as grounds for her exclusion from ensuing graduations ceremony, the Applicant launched the present application.
- [5] The crisp issues are whether the decision sought to be reviewed is rational, and whether did not materially violate the Applicant's rights, not only to fair administrative action, but also to her right to freedom of education as guaranteed by the Constitution and the Bill of Rights, and whether that the changed curricular could operate retrospectively to the student's prejudice.
- [6] I consider it apposite to approach these issues against the relevant facts canvassed in this matter. The following factors are, however, found to be common cause:

6.1. The Applicant is an erstwhile registered student at the First Respondent's campus from 2011 to 2014. She was registered for courses in a curricula approved for B.A (Communication Studies). This is a prescribed 3 year course.

6.2. Written permission was granted to her pursue the outstanding modules/courses at Unisa, which she finalized by December 2016.

6.3. The permission obtained was at a time when the University already “recently approved Higher Education sub-framework imperatives that changed the curriculum of the degree in question”. These changes effectively made the previous curricular followed by the Applicant obsolete as it was, “no longer on offer”.

6.4. The Applicant did in fact achieve the 2 outstanding modules/courses for which permission was given to complete at Unisa in October 2016. The results awaited in order to fulfill the Applicant’s old curriculum towards the degree, were only released by Unisa on 08 March 2017. A closer scrutiny of Annexure “MLM<sup>3</sup>” reveals that the 2 modules/courses were achieved during May and October 2016, respectively.

[7]. The reasoning by the university’s Registrar that “ only in March 2017, did the student bring forth the 2 modules completed at Unisa” is therefore with respect, , spurious, to say the least.

[8]. Furthermore, the reasoning postulated that “the degree will be conferred when all required number of appropriate credits has been accumulated for a specific

qualification" (Rule G35.2) could not have been intended to operate retrospectively so as to render the Applicant's achievement under the previous dispensation redundant and therefore obsolete. To hold otherwise would lead to manifest absurdity.

[9]. The permission granted could possibly be criticized on one or more of the following considerations:

- 9.1. It is a wide blanket covering document with no specific limitations<sup>on</sup> the time truncated within which the Applicant would be obliged to complete the 2 modules/ courses offered by Unisa in respect of which permission was granted;
- 9.2. The said permission failed to implore upon the Applicant about the existence of or the imminent existence of the so-called "approved Higher Education Qualification Sub-Framework" imperatives that changed or were to change the old BA (Communication Studies) curricular and to achieve the modules/courses within specified time lines.
- 9.3. Similarly, the permission did not call upon the Applicant precisely when to "submit the original copy of your (her) academic record on completion." Needless to mention, the document is for that matter to computed to compute its effective date. This document in the main created a culpable impression on the Applicant's part that the approval granted was in line with existing University rules and therefore genuine and good on its face.



[10]. The relevant document, contextually, created in my view, a legitimate expectation to her that the degree shall upon fulfillment of the outstanding modules/courses under the old curricular be conferred.

[11] The decision by the university to refuse to issue a degree certificate to the Applicant after successfully achieving the 2 modules/courses, clearly, materially and adversely affected her rights to her legitimate expectation.

[12] Assuming for a moment that the university knew or reasonably ought to have known of the new changes or imminent changes that would materially and adversely impede the Applicant from acquiring the degree sought when introduced, it remains obscure as to why it failed to call on the Applicant and perhaps other mutually affected students involved in the changes, to make representations as required by law.

(See Section 3(i) (ii) of PAJA) <sup>4</sup>

The First Respondent did not avail itself of the recourse in Section 3(i) (ii) of PAJA as it had information at its disposal about the effected changes in the Curricular before it ordained the permission for Applicant to complete her studies at Unisa.

[13] Against the contents of Annexure "MLM<sup>2</sup>", (the letter of permission) the university is furthermore by operation of the doctrine of estoppel precluded from relying on the true facts which, in any event, were not drawn to the applicant's attention when permission

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<sup>4</sup> Promotion of Administrative Justice Act 3 of 2000 ("PAJA")

was granted. The letter of permission already indicated in Paragraphs 10( 10.1 – 10.3) *supra* is wanting in details and precision.

In any event, the First Respondent did not deny the existence of the permission in its answering affidavit.<sup>5</sup> (“AA”)

[14] The averment by the university that while away in 2015 Applicant failed to renew her registration defeats all logic. This is particularly so that she was already released and permitted to pursue her further studies at Unisa. She could not have reasonably been expected to labour for the two universities simultaneously, academically, in the same year, The results which show that she obtained the 2 courses in 2016 are not dispute either.

[15] The averment by the First Respondent that Applicant by not enrolling at its institution in 2015 amounted to “interruption” of her further studies is untenable. There could not have been an “interruption” in her continued studies regard being had to the written permission given to her by the same institution to accomplish her studies under the old rules.

[16] The rule governing enrolment under new rules provide that:-

**Rule 4.2.1:**

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<sup>5</sup> Page 62, Para 9.2 and Para 10 paginates index – AA

"Where a Rule relating to the composition of a module/course or programme is amended, a student who began his/her studies under an old rule and did not interrupt his/her studies, may complete his/her programme under the old rule, except where Faculty Rules determine otherwise, subject to the stipulations under Rule G4.2.2.2 and G4-2.2.3"

[17] But, when does "interruption" of studies occur?

**Rule G.4.2.2** provides that:-

"A student interrupts his/her studies when he/she:

(a) .....

(b) fails to attain the requisite credits at a specific year level and in all events, to the stipulations under Rule G25.1 and G26?

[18] The real issue in this instance is whether or not the Applicant, following the type of permission granted to her to complete her studies at Unisa during the subsistence of the Old curricular or rules, "interrupted" her studies within the purview of the university rules, in particular Rule G4.2.2.2

In my view, it cannot be said that she did "interrupt" her studies for the reasons outlined in Paragraphs 10 to 16, above.



- [19] To that extent, I find the provisions of Rule G4.3.1 which provides that **"where the composition of a programme changes substantially, the student shall be required to register under the new programme, whether or not such student has interrupted his or her studies"** to have materially and adversely affected the Applicant's right to fair administrative action. The rule and what it seeks to achieve is also found not only irrational but also grossly unreasonable.
- [20] The First Respondent should have in, my own opinion, still have made recommendations through the relevant faculty and Senate, and formulated provisional measures to enable the Applicant and likewise affected students who commenced their studies under the old programme, to complete their studies according to the new curricular, subject to certain terms and conditions attached. Rule G4.3.2 of the General Rules is clear in this regard. Failure to have had recourse to this rule, read with Rule G4.2.2.3, which authorizes the Senate at the recommendation of the Faculty concerned in "exceptional circumstances", permit a student who allegedly "interrupted" his/her studies under such conditions as it may determine, to continue his/her studies under the old rule, renders the decision affecting the applicant not to confer her degree unconstitutional and invalid. The First Applicant failed to apply its mind properly if it did regarding these remedial measures.
- [21] The new rule, whether or not correctly applied, cannot be said to have had retrospective effect in operation. If applied retrospectively, it could lead to a manifest absurdity piercing the veil of fair administrative justice the Applicant is entitled to. The decision to



deny the Applicant not to obtain the degree is not only unlawful and irrational, but also violates the applicant's fundamental right to freedom of education as provided for in the Bill of rights. Such conduct is, in short, clearly unconstitutional and invalid.

[22] In the premise, the court is satisfied that the Applicant has made out a case on the merits, regard being had to the balance of probabilities which weigh in favour of the Applicant in the circumstances. The Respondents, conversely, did not demonstrate on paper what potential or actual prejudice would it suffer if in "exceptional circumstances" referred to in Rule G4.2.2.3, the degree aspired for, is conferred on the Applicant. Accordingly, the application ought to succeed, as I make the following Order:

- (a) The First Respondent's decision in refusing to confer the degree Bachelor of Arts (Communication Studies) on the Applicant is reviewed and set aside;
- (b) The First Respondent's decision not to recognize and accept the Applicant's courses (MDST 301 and MDST 302) obtained at Unisa is declared unlawful, unconstitutional and invalid.
- (c) . The First Respondent is ordered to confer upon the Applicant a degree in Bachelor of Arts (Communication Studies) at the next graduation ceremony (2018) after the granting of this order;

- (d). Further that, the Applicant be and is granted exemption from having to first exhausted the First Respondent's internal procedures and remedies applicable.
- (e). Further that, the First Respondent is ordered to pay the costs of application.

M.G. Phatudi.

**M.G PHATUDI**

**JUDGE OF THE HIGH COURT ,**

**LIMPOPO DIVISION POLOKWANE**

**REPRESENTATIONS:**

- |   |          |                              |
|---|----------|------------------------------|
| <b>1. Counsel for Applicant</b>                 | <b>:</b> | <b>Adv S Tebeila</b>         |
| <b>Instructed by</b>                            | <b>:</b> | <b>M.P Makwela Attorneys</b> |
|   |          | <b>POLOKWANE</b>             |
| <br>  |          |                              |
| <b>2. Counsel for 1<sup>st</sup> Respondent</b> | <b>:</b> | <b>Adv M.S Monene</b>        |
| <b>Instructed by</b>                            | <b>:</b> | <b>J.S Talane Attorneys</b>  |
|   |          | <b>POLOKWANE</b>             |
| <br>  |          |                              |
| <b>3. Date of Hearing</b>                       | <b>:</b> | <b>23 NOVEMBER 2017</b>      |
| <b>4. Date Delivered</b>                        | <b>:</b> | <b>06 FEBRUARY 2018</b>      |