

REPUBLIC OF SOUTH AFRICA



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

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE..... SIGNATURE:.....	

CASE No 4754/2019

In the matter between:

DINKWANYANE KGALEMA MOHUBA

PLAINTIFF

And

THE UNIVERSITY OF LIMPOPO

DEFENDANT

JUDGMENT

LEDWABA AJ

Introduction

[1] Mr Dinkwanyane Kgalema Mohuba(the plaintiff) applied for enrolment

as a student for the degree of Doctor of Commerce(the degree) with the University of Limpopo(the defendant or the University) . By way of the letter dated the 11th August 2016, the defendant advised the plaintiff that his application was successful. In the plaintiff's version, his application constituted an offer which was accepted by the defendant and this resulted in the agreement between himself and the defendant. He contends that he has since complied with all requirements to be conferred with the degree. The defendant does not deny that the plaintiff was registered as its student. It denies that he has complied with the requirements to be conferred with the degree.

[2] For the reasons that are not relevant to decide this matter, the defendant not only refused to confer the degree on the plaintiff, it also terminated his registration as its student and has rejected his re-application. Following the defendant's Executive Committee meeting of the 3rd October 2018, the plaintiff's registration was termination on the 5th October 2018.

[3] Aggrieved at the refusal to confer the degree and the termination of his registration, the plaintiff has instituted action proceedings and prays for an order directing the defendant to confer the degree on him. The defendant has raised a special plea. The plaintiff's particulars of claim and the defendant's special plea read as follows:

Particulars of claim

1. The plaintiff is DINKWANYANE KGALEMA MOHUBA a university administrator and at all relevant times hereto, the Executive Director for Marketing and Communications of the defendant of 11 Apollo Street, Sterpark, Polokwane, Limpopo Province.
2. The defendant is the UNIVERSITY OF LIMPOPO being a university as defined in section 1 of the Higher Education Act 101 of 1997, situated at University Road, Zone A, Mankweng, Limpopo Province, Republic of South Africa.
3. During August 2016 the plaintiff applied for enrolment as a student for the degree Doctor of Commerce with the defendant, which application the defendant accepted.
4. In the circumstances the plaintiff and the defendant entered into a tacit contract of which the material terms were that the defendant would award the said degree upon the plaintiff once the plaintiff had been registered as a student of the defendant for the period prescribed by the defendant's Senate and completed the work and attained the standard of proficiency determined through assessment as required by the Senate.
5. The plaintiff duly registered as a student of the defendant for the period prescribed by the Senate and completed the work and attained the standard of proficiency determined through assessment as required by the Senate and in all respects entitled to the conferment of the said degree.
6. The defendant, in breach of the said contract, refuses to confer the degreeand then repudiated the agreement(and) summarily terminated the plaintiff's enrolment as student and refused that the plaintiff be re-registered as such.

7. The plaintiff rejects the defendant's said breach and repudiation and elects to hold the defendant to the contract between the parties.
8. In the circumstances the plaintiff is entitled to an order directing the defendant to confer the said degree upon the plaintiff.

WHEREFORE the plaintiff claims:

1. An order directing the defendant to confer the degree of Doctor of Commerce upon the plaintiff;
2. An order that the defendant pays the plaintiff's costs of suit;
3. An order granting further or alternative relief to the plaintiff.

Defendant's special plea

1. The defendant is an organ of state as defined in terms of the Promotion of Administrative Justice Act 3 of 2000 {"PAJA"}.
2. The plaintiff alleges in paragraph 4 of his particulars of claim that the defendant was obliged to award him a doctorate degree after the defendant *"completed the work and attained the standard of proficiency determined through assessment as required by the Senate"*.
3. On the plaintiff's version, the defendant's refusal to award the plaintiff the doctorate degree in issue ("the defendant's decision") constitutes administrative action in terms of PAJA and the plaintiff was accordingly bound to review the defendant's decision in accordance with PAJA after the plaintiff exhausted all internal remedies.

- 3.1 The plaintiff applied and was registered for the Doctorate Degree in terms of the defendant's rules in 2016.
- 3.2 Pursuant to an investigation the defendant's Executive Committee of Senate took a decision to terminate the plaintiff's registration for the Doctorate Degree on 5 October 2018.
- 3.3 The decision to terminate the plaintiff's registration is valid and extant and has not been set aside.
- 3.4 The defendant is prohibited from awarding the Doctorate Degree until the decision to terminate his registration taken on 5 October 2021 has been set aside.
- 3.5 The defendant's refusal to award the plaintiff the Doctorate Degree in issue constitutes an administrative action which remains valid until set aside by a competent authority.
4. It is a peremptory requirement that review proceedings in terms of PAJA must be instituted in accordance with Rule 53 of the Uniform Rules of Court.
5. The plaintiff did not institute review proceedings in terms of Rule 53 within the prescribed time period in accordance with section 7(1) of PAJA.
6. In the circumstances, the plaintiff was not entitled to institute the present action for relief that is subject to and regulated in terms of PAJA.

WHEREFORE the defendant prays that the plaintiff's action be dismissed with costs alternatively that the plaintiff's action be stayed pending the final resolution of review proceedings in terms of PAJA instituted by the plaintiff in accordance with Rule 53.

[4] By agreement between the parties, the special plea has been separated to be decided on papers before the merits.

[5] The plaintiff's case is that his registration by the defendant constituted an acceptance of an offer and has resulted in the tacit contractual relationship in terms of which the defendant is obliged to confer the degree on him once he has complied with set out requirements. He contends that having complied with his obligations in terms of the contract, he is holding the defendant to specific performance of conferring the degree on him.

He avers that his claim being contractual in nature, he has decided to vindicate it by way of action proceedings. He further contends that even if his claims contains elements of legality, the Rule 53 review application is not the only platform available to him.

He says if the defendant took the view that the facts do not prove contract, the defendant should have served an exception, the result of which would have been that his claim would not be dismissed but he would be given an opportunity to remedy the defendant's cause of complaint.

- [6] The defendant denies that the plaintiff is entitled to the conferral of the degree. In terms of its special plea, its decisions to terminate the plaintiff's registration and not to confer the degree on him constitute the exercise of public power and are administrative decisions which remain valid and extant until reviewed and set aside by the competent court. It contends that until the plaintiff's deregistration is set aside, it is prohibited from conferring the degree on him and that the plaintiff's failure to institute review proceedings to set these decisions aside is fatal to his case. The defendant pleaded over that the relief sought by the plaintiff is incompetent.

I understand the essence of the defendant's special plea to be that in the face of the plaintiff's registration termination and until it is set aside, the defendant is prohibited from awarding the degree to the plaintiff.

Analysis

- [7] The parties differ on the characterisation of the defendant's decisions of terminating the plaintiff's registration, the refusal to re-register the plaintiff and the refusal to confer the degree on the plaintiff. At the centre of their differences is whether their relationship is contractual or administrative in nature.
- [8] The plaintiff says the defendant acted as an ordinary contracting party and regards the defendant's conduct as the breach of the terms of their agreement. The plaintiff has decided to enforce the terms of their

agreement and is praying for specific performance¹ that the defendant be directed to confer the degree on him.

The defendant says its conduct of terminating the plaintiff's registration and the refusal to confer the degree is the exercise of public power derived from the Higher Education Act 101 of 1997 (the HEA), the Institutional Statute: University of Limpopo (Institutional Statute) and the General Rules. It says its decisions are administrative actions as intended in section 33 of the Constitution to be reviewed in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). It implies that the available remedy is not enforcement of the terms of the agreement but those remedies found in section 8 of the PAJA.

The remedy selected by a litigant to vindicate its claim is informed by the characterisation of the conduct a litigant is complaining about. Having characterised the conduct as contractual, the plaintiff has invoked private law remedy of enforcement of the terms of the agreement. The defendant contends that its conducts being administrative in nature, the plaintiff should have employed administrative justice remedy of reviewing and setting aside the conduct. The defendant prays for the dismissal of the plaintiff's action, alternatively that the plaintiff's action be stayed pending the final resolution of the review proceedings to be instituted by the plaintiff in terms of the provisions of PAJA read with

¹ or interdict to enforce or as a form of specific performance- Chritie's The Law of Contract in South Africa- 6th Edition- page 555

Rule 53 of the Uniform Rules

[9] The plaintiff has decided to approach this court by way of action proceedings with no indication that he intends instituting the review proceedings and this cannot be imposed on him. His claim is contractual in nature and he does not claim an administrative law remedy. There is no basis for the alternative prayer contended for by the defendant. The pleadings contain the legal basis of the claim under which the plaintiff has chosen to invoke this court's competence to deal with his claim.²

[10] In terms of Section 37 of the HEA and after consultation with a senate, a council of a public higher education institution determines the admission policy of a public higher education institution.³ In terms of Rules 2.2 read with 55.2 of the General Rules of the University⁴, a doctoral degree student is required, on admission, to register by signing the official registration form and must annually renew his or her registration as long as he or she continues to be student of the University⁵, provided that a student may be refused permission to renew registration for any year of study if he or she fails to satisfy the prescribed minimum requirements.⁶ This means that until such student has complied with all the requirements of a degree such student is

² Gcaba v Minister of Safety and Security & Others (2009) ZACC 26; 2010 (1) SA 238(CC)-par 75

³ Paragraph 20(2) of the University of Limpopo Institutional Statute (Institutional Statute) gives effect to this provision.

⁴ These Rules are framed in terms of section 32 of the HEA

⁵ In terms of Rule 23.1.1, no person shall receive a qualification, except an honorary degree, unless he or she has fulfilled all the requirements prescribed by the Rules for the qualification. Rule 60 prescribes the minimum two academic years before presentation of thesis.

⁶ In terms of paragraph 58 of the Institutional Statute admission and registration of students are determined by the Institutional Rules. In terms of paragraph 31(2)(g) of the Institutional Statute, the Senate is empowered to cancel the registration of a student.

enrolled for , the registration of a student in the position of the plaintiff must be renewed on annual basis. In terms of section 65B (2) the HEA, no degree may be conferred by a public higher education institution upon any person who has not been registered as a student of such public higher education institution for the period prescribed by the senate of such institution.⁷

[11] The relationship between a student and a university is a contractual one renewable in respect of each academic year.⁸ It is entered into by acceptance of a student's application for admission , be it a first or subsequent admission. In the absence of implied term binding a university to acceptance in the years subsequent to the first year, the university is free to accept or refuse an offer contained in the student's application for readmission.⁹ The decision not to accept an offer to enter into a contract is ordinarily not a reviewable decision and not one which has to be arrived at after application of the rules of natural justice.¹⁰

[12] Admission as a student of higher education institution entails a contractual submission to its rules.¹¹ The renewal of registration as the student implies that the previous registration has come to an end and with it, as a corollary the previous admission has also lapsed. The

⁷ In terms of paragraph 60 of the Institutional Statute, the award of degrees, diplomas and certificates are determined by the Institutional Rules.

⁸ *Yatya v University of Bophuthatswana* 1994(2) SA 375(BG) (*Yatya case*)- page 383, *Mkhize.v Rector, University of Zululand and Another* 1986(1) SA 904(D)(*Mkhize case*) - page at 904, *Sibanyoni & Others v University of Fort Hare* 1985(1) SA 19(CkS) at 30D-31B(*Sibanyoni case*) , *Lunt v University of Cape Town & Another* 1989(2) SA 438(C) at 444 (*Lunt case*)

⁹ *Mkhize case*

¹⁰ *Mkhize case*– at 904 and *Sibanyoni case* at 301.

¹¹ *Hamata & Another v Chairperson , Peninsula Technikon Internal Disciplinary Committee & Others* (2002) ZASCA 44 – par 6

plaintiff's re-admission application was rejected in 2018. This is not administrative law impacting or trumping on the contractual relationship between the parties. It is the lapsing of the contract on the basis of its term.

[13] In the *Yatya* case the applicant student approached the court in 1992 for the declaratory order that he had satisfied the requirement for the degree for which he had enrolled in 1985 and for an order directing the respondent to confer a degree upon the applicant. This despite the fact that in 1991, an additional compulsory course was added and the notice was issued specially advising students that the added compulsory course was a requirement for conferment of that degree. The court asked the question whether the requirements for the award of a degree are fixed and determined at the date of first registration, or may subsequently be altered by the university in its discretion during the course of study?¹² The court said that for rationale reasons and for the assistance of both the student and the university benefit, a renewal of registration is to be considered a renewal of admission as a student. It said neither a student, when he or she first register, nor the university, in accepting that first registration, operate from fixed and immaculate positions. The court ruled that the 1985 requirements could not be used to confer the degree having regard to the 1991 registration requirements. It decided that irrespective of the fact that the applicant was registered in 1985, the 1991 registration requirements determined the terms under which the requirements of his degree was regulated. Having decided

¹² *Yatya* case - page 378 and 382 *Mkhize* case- at 904.

that the applicant was bound to comply with the requirements as laid down by the university in 1991 the court dismissed the application for conferral of the degree.

[14] In *Mkhize* case ¹³ it was submitted on behalf of the university respondent that the parties' relationship was a pure contractual one in respect of each academic year. In the alternative, it was submitted that the decision not to readmit the student was purely administrative as opposed to a quasi-judicial act and that the principles of natural justice of the right to be heard did not apply.¹⁴ The court decided that the relationship was contractual in nature.

[15] The *Hamata*¹⁵ case was about the disciplinary hearing of the student for having published a newspaper article. The parties accepted as their point of departure that the functioning of educational institution such as universities, technikons and schools is governed by the administrative law principles. This was the position adopted at the subsequent Supreme Court hearing. ¹⁶

[16] In the *Cape Metropolitan* case¹⁷, the municipality having granted the tender to collect arrear levies subsequently entered into the service agreement with the service provider. On the basis of the alleged material

¹³ *Mkhize v Rector, University of Zululand & Another* 1986(1) SA 901(D)

¹⁴ Page 903

¹⁵ *Hamata & Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & Others* 2000(4) SA 621(C) – par 24

¹⁶ *Hamata v Chairperson , Peninsula Technikon Internal Disciplinary Committee* 2002 5 SA 446 (SCA),

¹⁷ *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & Others* 2001(3) SA 1013(SCA)(*Cape Metropolitan case*)

breach of the contract, the municipality cancelled the contract. On the ground that its constitutional right to administrative justice of stating its case and be given reasons had been violated, the party aggrieved by the cancellation applied for the setting aside of the cancellation. The municipality contended that because the cancellation did not amount to administrative action, it was entitled to summarily cancel the agreement on the basis of material breach without affording the aggrieved party the procedural fairness right to be heard and to be provided with the reasons for the cancellation of the contract. The Supreme Court concluded that although the cancellation of the contract did not constitute administrative action, the aggrieved party had the right of access to information in term of section 32 of the Constitution.

- [17] In Logbro case¹⁸ , the question was whether the Provincial government, relying on tender terms and conditions, could withdrew a tender without regard to administrative justice of giving the affected parties the opportunity to make representation if the reconsideration (because the value of the property had since increased) could lead to adverse decision. The court found that the tender process constitutes administrative action (the government acting from a position of superiority or authority by virtue of its being a public authority in specifying the tender terms) with the accompanying right to the affected parties to lawful administrative action.

The court said even if the condition or the terms of the parties'

¹⁸ Logbro Properties CC v Bedderson NO & Others 2003(2) SA 460(SCA) (Logbro case)

relationship constitutes a contract, its provisions does not exhaust the duty towards the affected parties and that the principles of administrative justice continue to govern that relationship. In exercising contractual rights in the tender processes, there is an obligation to act lawfully, procedurally and fairly with the result that some of the contractual right would give way, without their existence being rendered irrelevant, to public duties under the Constitution and any applicable legislation. The principles of administrative justice frame the parties' contractual relationship and continue to govern the exercise of the rights derived from the contract. This means that even if the relationship between the parties is contractual in nature, the principles of administrative justice apply and continue to govern the exercise of contractual rights.

The court further said there is no general proposition that a public authority empowered by a statute to contract may exercise its contractual right without regard to public duties of fairness. On the contrary the established (general) proposition is that a public authority's invocation of a power of cancellation in a contract concluded on equal terms with a major commercial undertaking, without any element of superiority or authority deriving from its public position, does not amount to an exercise of public power.¹⁹

Where the parties contract on the terms dictated by one party acting from the position of superiority or authority by virtue of its being a public authority in specifying those terms, such a party is burdened with a

¹⁹ Logbro case – par 10

public duty of fairness in exercising the powers derived from those terms of contract.²⁰

[18] The similarity between the plaintiff's case and that of Lunt²¹ case is that in both cases, the complaint related to the refusal by the higher education institutions to re-register students. Accepting that the relationship between the university and the student is contractual, the student applicant successfully approached the court to review the university's decision not to give the student applicant the hearing. Having accepted that the university's conduct is an administrative action which materially and adversely affect the legitimate expectation of the applicant, the court decided that the applicant had legitimate expectation to be heard. The difference between these cases is that while the plaintiff is relying on the law of contract for specific performance, in Lunt case the applicant approached the court on the basis of administrative law. In Lunt case the decision to refuse to re-register the applicant was reviewed and set aside. This is an indication that students aggrieved by the refusal to be re-registered with institutions of higher learning and depending on the remedy sought, they have a choice of approaching the court on the basis of the law of contract or administrative law.

[19] The plaintiff's case is based on the law of contract and not on the administrative law. The tacit term of the contract is stated as being an obligation imposed on the defendant to confer the degree on the plaintiff

²⁰ Logbro case- par 11

²¹ Lunt v University of Cape Town & Another 1989(2)SA 438(C)(Lunt case)

on compliance with the conditions the plaintiff claims to have fulfilled. The particulars of claim are silent about the termination of the plaintiff's registration as the defendant's student. Whether an applicant student qualifies to be awarded a degree is determined by the requirements as at the date such applicant claims to qualify to be conferred with the degree and not as at the date of first registration. Like in *Yatya* case, what happened between the date of first registration and the date when an applicant claims to have complied with the requirements stated at the date of first registration has consequences. In this case, the plaintiff is no longer the defendant's student to be conferred with any degree by the defendant. Irrespective of whether the applicant can approach this court for specific performance in terms of contract or the review of administrative action, the plaintiff's registration status with the defendant is an important factor that cannot be ignored in the consideration of whether the defendant can be ordered to confer the degree on the plaintiff. The plaintiff's registration was not only terminated, the defendant has also refused to re-register him as its student and until that has been dealt with, the defendant cannot be ordered to confer the degree on him. Section 65B (2) the HEA prohibits the conferral of a degree by a public higher education institution upon any person who has not been registered as a student of such public higher education institution for the period prescribed by the senate of such institution

[20] The relationship between the plaintiff and the defendant started in 2016 and was terminated in 2018 and his application to renew the registration

was rejected. An assessment of whether he qualifies to be conferred with the degree can only be made on the basis of his registration status with the defendant at the date he claims to be qualified to be conferred with the degree in 2018. The plaintiff applied for his re-registration because he is aware that his registration has terminated and needs to be renewed by re-registration. When the application to renew his registration was rejected, the plaintiff abandoned his re-registration efforts and decided to approach this court to nevertheless order the defendant to confer the degree on him. While being aware that his relationship with the defendant as a student has terminated, the plaintiff is approaching this court to nevertheless confer the degree on him. Even accepting that the plaintiff does not necessarily have to follow the process set out in Rule 53 of the Uniform Rules to vindicate his claim, conferring the degree on the plaintiff in these circumstances will not only be illegal, but will be a contradiction to the defendant's decision to deregister the plaintiff.

[21] I agree with the submission made on behalf of the plaintiff that review proceedings by way of Rule 53 read with PAJA is not the only available remedy to vindicate his claim. In terms of cases such as the Jockey Club and SAFA²², an applicant which has decided to review administrative conduct does not necessarily have to follow the provisions of Rule 53 and failure to follow this rule or its provisions in reviewing a decision of an administrative nature is not necessarily irregular. This is because the

²² Jockey Club of South Africa v Forbes 1993(1) SA 649(A) and South African Football Association v Standton Woodrush (2003) 1 All SA 274(SCA)

provisions of Rule 53 exist principally for the benefit of an applicant who is not the decision maker in possession of the records on which an impugned decision is based. An applicant can waive the provision of the information which it does not need or is already in possession of such as the records and reasons for an administrative conduct. Organs of State may not use PAJA to review their decisions.²³ Action proceedings can be used to review decisions but that does not relieve such plaintiff to deal with facts which have implications on its intended remedy, such as the fact that the plaintiff's registration as the student of the defendant has been terminated.

I also agree that the fact that there may be a contractual relationship between the parties does not mean that there may not also be issues of administrative law arising. On behalf of the plaintiff a number of cases cited in footnote 11 of the heads of arguments support the position that the relationship between a student and a university is contractual in nature. This does not accord with the submission on behalf of the defendant that the defendant's power to terminate student's registration has always been accepted as the exercise of public power. The distinguishing feature between the plaintiff's case and other cases he is relying on is that unlike in the other cases where the prayers are about refusal for registration and readmissions, the plaintiff prays that the degree be conferred on him, despite the fact that his registration has been terminated and his application for re-

²³ State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd 2018(2) 23(CC).

registration was rejected.

[22] The statement that the particulars of claim classify the defendant's conduct as administrative is not correct. The particulars of claim are to the effect that the defendant has breached the terms of the agreement between the parties and is praying for specific performance. The claim is based on the law of contract and not on administrative law. The special plea states that the defendant has as a matter of fact terminated the plaintiff's registration as student and cannot confer the degree on him. Dismissing the special plea on the basis that it interprets the particulars of claim as being based on contract would be ignoring its message that the plaintiff's registration has been terminated as a matter of fact with consequences which cannot be ignored. This point has been raised as part of special and needs to be dealt with. It cannot be deferred to be dealt with the main case.

[23] The plaintiff has decided to vindicate his claim by praying for specific performance. The defendant takes the position that its decisions are administrative in nature and require judicial review proceedings in the event any party in the position of the plaintiff is aggrieved by the decisions. Pleadings are decided as framed and the defendant's decision to raise special plea instead of an exception suggests that although it does not agree with the remedy sought by the plaintiff, it accepts the particulars of claim as framed. This matter is decided not on the choice between approaching this court by way of action or review proceedings. It is not about whether the relationship between

the parties is contractual or administrative in nature. This case is about directing the defendant to confer the degree on the person who is not its registered student. This is not only an attempt at self-help but an attempt to direct the defendant to commit an illegality of conferring the degree on the person who is not its student, irrespective of whether the remedy employed by the plaintiff is contractual or administrative in nature.

The defendant's special plea is not to be decided on the plaintiff's election to approach this court by way of action or by way of review proceedings. It is decided on the prayer the plaintiff is seeking. The plaintiff is seeking for an order for specific performance that the defendant be directed to confer upon him the degree despite the fact that his registration as the student has been terminated and the defendant has rejected his re-application. The defendant's cancellation of the plaintiff's registration has factual and legal effect which cannot be ignored in the decision whether to order the defendant to confer the degree on the plaintiff.

[23] I do not think that the plaintiff is ignorant of the fact that the defendant's termination of his registration has implications. He may or may not have thought about the route associated with the prayer to the effect that the defendant be directed to rescind its decision to deregister him.

[24] A litigant in the position of the plaintiff who has both contractual and administrative remedies cannot ignore the fact that he is no longer a

registered student and pray that he or she be conferred with a degree irrespective of that legal position. The plaintiff has decided to pray for specific performance that the defendant be directed to confer the degree upon him. Apart from making the point that the plaintiff's deregistration as the defendant's student remains in force and on the basis that its decision was administrative in nature, the defendant prays that the plaintiff's action be dismissed, alternatively be delayed pending the outcome of the review proceedings to be instituted by the plaintiff. The alternative prayer loses sight of the fact that the plaintiff has deliberately elected his remedy as the enforcement of the terms of the contract and has no intention of reviewing the defendant's decisions. He cannot be forced to review the defendant's decisions. This matter is decided on the pleadings as framed by the plaintiff.

- [25] There is no law or principle that says a party which has options of employing the law of contract to vindicate its claim is not bound by or cannot apply the principle of administrative law. In the cases where the courts have accepted the relationship between the parties as contractual in nature, the courts have also accepted that to the extent that the aggrieved parties have fair procedural rights, such relationships have administrative elements as well. Notwithstanding a contractual right of an organ of state to withdraw a tender, the relationship between such public authority and the tendering private individual may still be governed by the principles of administrative law

when it comes to the right to procedural fairness.²⁴ There is no bright line test for determining whether administrative principles intrude in the contractual relationship involving an organ of state and a private party.²⁵ In that sense private and public law are not exclusive.

[26] The defendant correctly points out that until the decision is set aside, whether by judicial review proceedings, the plaintiff's registration termination exist in fact and it has legal consequences that he is no longer its registered student. The consequence of administrative decision, whether validly taken or not cannot be ignored. The legal position is that until set aside using the legal process, even an invalid administrative decision exists in fact and it has legal consequences that cannot simply be ignored. Ignoring such an administrative decision is licence to self-help.²⁶

[27] In the same way the court cannot order a defendant to honour a prescribed claim, irrespective of its merits, this court cannot order the defendant to confer the degree on the plaintiff who has been deregistered as its student.

Conclusion

[28] The plaintiff has decided to vindicate his claim by way of action

²⁴ South African National Parks v MTO Forestry & Another 2018(5) SA 177(SCA)(SANPARK) – par 35

²⁵ Pharmaceutical Manufacturers Association of South Africa & Another : In re Ex Parte President of the Republic of South & Others (2000)ZACC 1; 2000(2) SA 674- par 45 and SANPARK- par 37

²⁶ Oudekraal Estates (Pty) Ltd v City of Cape Town & Others 2004(6) SA 222(SCA) -par 26, MEC for Health, Eastern Cape v Kirland Investment (Pty) Ltd t/a Eye & Laser Institute 2014(3) SA 481(CC) –par 87-106, Merafong City Local Municipality v AngloGold Ashanti (2016) ZACC 35- par 36,37, and 41

proceedings. He is praying for specific performance and his case is decided on his particulars. While the litigant in the position of the plaintiff has a choice to vindicate his or her right in terms of the law of contract, the terms of contract he or she is seeking as well as the prayers sought to be enforced must be legally enforceable.

[29] The effect of the plaintiff's deregistration as the defendant's student is that he is no longer its student. I do not understand the plaintiff's position to be in dispute with this statement. He has applied without success for his re-registration. Even if he had decided to follow the PAJA route to have the defendant directed to confer the degree on him, that would not be granted in the face of his deregistration as the defendant's student.

[30] The fact that the relationship between the plaintiff and the defendant has been terminated, whether rightly or wrongly, cannot be ignored where the defendant is to be directed to confer the degree on the plaintiff. The granting of a prayer for specific performance is discretionary²⁷ and must be done with due regard to the consequence of such an order. It should not be granted where it will result in illegality, where compliance is difficult or impossible or is likely to subject a defendant to the danger of contempt of court. Section 65B (2) the HEA prohibits the conferral of the degree on the plaintiff for as long as he remains not registered with the defendant. Directing the defendant to confer the degree on the plaintiff will be directing it to commit an

²⁷ Christie's The law of contract in South Africa : 6th edition- Page 546/7

illegality.

[31] There is no basis to grant an order for the suspension of the proceedings pending the review application. The plaintiff has deliberately elected not to avail himself of the review proceedings and this cannot impose that on him. He has decided to avail himself of contractual rather than administrative rights.

Order

- [1]. The defendant's special plea is upheld.
- [2] The prayer for the conferral of the degree of Doctor Commerce on the plaintiff is dismissed.
- [3] The plaintiff is ordered to pay the cost, including the cost relating to the employment of two counsels.

LEDWABA LGP

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION : POLOKWANE

APPEARANCES

For the Plaintiff : Adv PF Louw SC

Instructed by: DS Sello Attorneys

Polokwane

For the Defendant: Adv VS Notshe SC

Adv Majozi

Instructed by: Motalane Inc

C/O Dikgati Mphahlele

Polokwane

Heard on: 24th August 2021

Judgement delivered on: October 2021

