



IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 297/2013

Reportable

In the matter between:

DEAN OF THE LAW FACULTY OF THE

UNIVERSITY OF NORTH WEST

First Appellant

VICE CHANCELLOR OF THE UNIVERSITY

OF NORTH WEST

Second Appellant

NORTH WEST UNIVERSITY STATUTORY

BODY REPRESENTED BY THE RECTOR OF THE

MAHIKENG CAMPUS

Third Appellant

and

MORAMANG SIMON MASISI

Respondent

and

HIGHER EDUCATION SOUTH AFRICA NPC

Amicus Curiae

Neutral Citation: *Dean of the Law Faculty of the University of North West & others v Masisi* (297/2013) [2014] ZASCA 2 (20 February 2014).

Coram: NAVSA, MHLANTLA and PETSE JJA, VAN ZYL and SWAIN AJJA

Heard: 20 February 2014

Delivered: 20 February 2014

Summary: **Appeal from Equality Court – complaint in Equality Court concerning university’s refusal to give credit for more than 50 per cent of courses completed at another university – university rules and policy with statutory underpinning set aside by Equality Court – failure to provide Minister of Education and other universities or their collective voice with opportunity to participate in proceedings – orders set aside and matter remitted.**

ORDER

On appeal from: The Equality Court of South Africa (North West High Court, Mahikeng) (Lacock J sitting as court of first instance).

The following order is made:

1. The appeal is upheld to the extent reflected in the paragraphs that follow.
2. The order of the Equality Court, North West High Court is set aside;
3. The dispute is referred back to the Equality Court, North West High Court to be dealt with *de novo*;
4. The respondent shall ensure that he will serve a copy of this order and founding papers stating the relief he seeks on all interested parties including (but not limited to) the Minister of Education, The Council on Higher Education, Higher Education South Africa (HESA) and affording them an opportunity to join the dispute and make representations thereon;
5. Any party so identified must respond within the time periods provided in Rule 6 of the Uniform Rules;
6. The Equality Court, North West High Court shall take steps to ensure that the dispute is determined as expeditiously as possible, and may issue directions for the conduct of the proceedings;

7. The costs of the proceedings in the Equality Court and in this Court shall be costs in the cause.

JUDGMENT

The Court:

[1] This is an appeal against a judgment of the Equality Court, Mahikeng (Lacock J). Simply put, the litigation leading up to the present appeal arose because the respondent, Mr Moramang Simon Masisi, was aggrieved that the three appellants, the Dean of the Law Faculty of the University of North West, the Vice Chancellor of the University of North West and the North West University Statutory Body represented by the Rector of the Mahikeng Campus, refused to give him academic credit for all the courses he had completed in obtaining his B.Proc degree from the University of the North in pursuance of his LLB degree for which he had latterly registered at the University of North West (UNW). Essentially, the respondent complained that he was being discriminated against and that his constitutional right to equal treatment had been violated. The reasoning on which this was based appears to be as follows: students who began and completed their B.Proc degrees at the UNW were given credit for all their courses or modules completed in attaining the degree, whilst those who obtained their B.Proc degrees from other universities were treated differently and only obtained credit for 50 per cent of the courses completed in obtaining their B.Proc degrees. This

discriminatory treatment, so it was alleged, was contrary to the provisions of the Promotion of the Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act).

[2] In refusing to recognise more than 50 per cent of the courses or modules completed by the respondent at the University of the North West, the University of the North West considered itself bound by its own General Academic Rules to that effect. Furthermore, the University of the North West considered itself bound by s 18(2) of the Joint Statute of the Universities in the Republic of South Africa approved by the Minister of Education, Arts and Science under the Universities Act 61 of 1955, the relevant provisions of which require a minimum period of attendance at the university to which he has applied for exemption and which in addition stipulates that a student has to complete at least half of the courses prescribed for the degree at such university.

[3] The respondent took his complaint to the Equality Court, established in terms of s 16 of the Equality Act, which made the following order:

‘1. The provisions contained in the paragraphs 15.1.1, 15.1.3, 15.2.1 and 15.2.3 of Rule G15 of the General Academic Rules of the North West University are hereby struck down and declared null and void.

2. The proviso to Rule A5.7.1 of the General Academic Rules of the North West University reading,, “provided that exemption shall not be granted for more than half of the number of modules required for the curriculum” is hereby struck down and declared null and void.

3. Section 18(2)(b)(i) and (ii) of the Joint Statute of the Universities in the RSA approved by the Minister of Education, Arts & Science under the Universities Act no 61 of 1955 (the Joint Statute), is hereby struck down and declared null and void, except to the extent that section 8(2)(b)(ii) apply to candidates writing the degree of Bachelor of Education (B.Ed) or Bachelor of Physical Education (B.Ed.Ph.) a Bachelor of Philosophy (B.Phil.).

4. The first to third respondents are directed to grant exemption to the applicant for purposes of writing the LLB degree of all those applicable courses and/or modules successfully completed by the applicant at the University of the North (presently the University of Limpopo) for his B.Proc degree.

5. The first to third respondents are directed to jointly and severally pay the applicant's costs of the application.'

[4] The breadth of the order referred to above is such that the Joint Statute of the Universities in South Africa, which has statutory underpinning and is consonant with The Higher Education Qualifications Framework, published by the Minister of Education acting within her statutory powers has been set aside. The order clearly affects all universities in South Africa and impacts on government policy. It is necessary to point out that, although the Minister of Education was cited as a party to the litigation in the Equality Court, the respondent ultimately indicated that no relief would be sought against the minister. As a consequence the minister did not participate in the proceedings in the Equality Court. None of the other universities was cited as a party.

[5] Before us the Higher Education South Africa NPC (HESA), a non-profit company registered in terms of the Companies Act, appeared as *amicus curiae*. HESA represents 23 South African universities and asserts that it is the voice of South Africa's university leadership. HESA referred to the joint statute referred to earlier in this judgment, which is delegated legislation and remains in force in terms of s 74(6) of the Higher Education Act 101 of 1997 and contended that all universities in South Africa are required to comply therewith and that the policy underlying the joint statute is supported by it. The Higher Education Qualifications Framework published in October 2007 by the Ministry of Education has the same underlying policy.

[6] In its application to be admitted as *amicus curiae* in this court, HESA provided the following justification for the policy referred to in the preceding paragraph:

'By conferring a degree, a university represents to the public that the graduate concerned received the training offered by that university and met its applicable requirements. Section 18(2)(b) of the Joint Statute has the effect that a student must complete at least half of his or her university courses at the university conferring the degree. This enables the university conferring the degree to have confidence that the student does indeed meet the standards which it proclaims and on which its reputation rests. . . .in passing that in certain prestigious foreign universities, no recognition whatsoever is given to courses passed at other universities, no doubt for much the same reason.'

[7] HESA was not a party to proceedings in the Equality Court. Its contentions are not evidence and evidence in this regard was not presented in the Equality Court nor were any representations made in that regard. It is necessary to point out that the University of North West was very brief in its opposition to the relief sought by the respondent and did not make submissions or present evidence on the issues raised by HESA.

[8] In the Equality Court a directions hearing in terms of s 10(5) of the rules of the Equality Court, resulted in the issues to be tried dubiously being narrowed as follows:

‘4.1 Whether the First Applicant has a justifiable cause of action against the Respondents, and whether any of the Respondents are liable for payment of damages to the First Applicant.

4.2 Whether any claim for the payment of damages – if any – had become prescribed.’

[9] The order set out above in para 3 went well beyond what was contemplated in the preceding paragraph. This was probably due to a lack of proper thought being given to whether those issues could viably be delinked from the statutory underpinning for university policy. Before us questions were raised about the power of the Equality Court to issue the order referred to above. The appellants also contended that it was not competent for the Equality Court to decide issues beyond those identified at the directions hearing.

[10] It is undesirable and inappropriate for courts to make orders declaring statutory provisions and policy directives thereunder invalid without providing relevant organs of state an opportunity to intervene. Indeed, it is undesirable for courts to make orders affecting any party without affording such party an opportunity to oppose the relief being sought. In the present case, the Minister of Education has a direct abiding and crucial interest in the issues that arise from the respondent's complaint and which are affected by the order referred to above.¹ In similar vein Rule 10A of the Uniform rules of Court provides:

'10A. If any proceedings before the court, the validity of a law is challenged, whether in whole or in part and whether on constitutional grounds or otherwise, the party challenging the validity of the law shall join the provincial or national executive authorities responsible for the administration of the law in the proceedings and shall in the case of a challenge to a rule made in terms of the Rules Board for Courts of Law Act, 1985 (Act. No. 107 of 1985), cause a notice to be served on the Rules Board for Courts of Law, informing the Rules Board for Courts of Law thereof.'

[11] Other universities or its collective voice, HESA, have a vital interest in the litigation and a possible result. They too were not cited nor involved in the litigation in the Equality Court. The Minister and HESA were both interested parties and ought, at the very least, to have been afforded an opportunity to deal with all the issues raised by the respondent's complaint, including the question of the competence of the Equality Court to make an order setting aside legislation. The parties might be well-advised to

¹ See *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 (2) SA 1 (CC) and *Parbhoo and others v Gets NO and another* 1997 (4) SA 1095 (CC).

consider whether it is not in everyone's interest that the litigation be shifted to the high court to obviate any further uncertainty. In this regard the provisions of s 20(3)(a) of the Equality Act are relevant. It should be borne in mind that this case is of vital importance to tertiary education in South Africa.

[12] Having regard to what is set out above, the parties were agreed and we are inclined to make the order that follows:

1. The appeal is upheld to the extent reflected in the paragraphs that follow.
2. The order of the Equality Court, North West High Court is set aside;
3. The dispute is referred back to the Equality Court, North West High Court to be dealt with *de novo*;
4. The respondent shall ensure that he will serve a copy of this order and founding papers stating the relief he seeks on all interested parties including (but not limited to) the Minister of Education, The Council on Higher Education, Higher Education South Africa (HESA) and affording them an opportunity to join the dispute and make representations thereon;
5. Any party so identified must respond within the time periods provided in Rule 6 of the Uniform Rules;
6. The Equality Court, North West High Court shall take steps to ensure that the dispute is determined as expeditiously as possible, and may issue directions for the conduct of the proceedings;

7. The costs of the proceedings in the Equality Court and in this Court shall be costs in the cause.

M S NAVSA

JUDGE OF APPEAL

N Z MHLANTLA

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X M PETSE

JUDGE OF APPEAL

D A VAN ZYL

ACTING JUDGE OF APPEAL

K G B SWAIN

ACTING JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANTS:

Adv J G Bergenthuin S.C.

Instructed by:

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FOR RESPONDENT:

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Instructed by

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