IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN CASE NO. 4976/2016

Date heard: 27 October 2016
Date delivered: 10 November 2016

REPORTABLE

In the matter between:

THE CONCERNED ASSOCIATION OF PARENTS & OTHERS FOR TERTIARY EDUCATION AT UNIVERSITIES Applicant

and

THE NELSON MANDELA METROPOLITAN UNIVERSITY First Respondent

SIBONGILE MUTHWA Second Respondent

JUDGMENT

Beard AJ :

[1] This is an urgent application in which the applicant seeks an order for specific performance, directing the respondents to resume all

academic activities and normal business operations of the first respondent within 48 hours of the granting of the order, together with ancillary relief ordering the respondents to :

[1.1] appoint additional security personnel in the event of this being necessary, and in the sole discretion of the respondents;

[1.2] report any illegal activity on the first respondent's campuses on the part of any student of the first respondent or other party to the South African Police Services ("the SAPS") as soon as such illegal action comes to the attention of the respondents;

[1.3] request the assistance of the SAPS as soon as it is apparent that their services are required to protect the students and staff of the first respondent together with their property, and the property of the first respondent; and

[1.4] take the appropriate disciplinary action against any student infringing the first respondent's student disciplinary code and to act strictly in accordance with the first respondent's student disciplinary code.

[2] The application is opposed by both respondents. The first respondent is a university as defined in section 1 of the Higher Education Act 101 of 1997 ("the Higher Education Act"). In terms of section 27 (1) of the Higher Education Act, read with section 26 (2) thereof, the council of

the first respondent is the body charged with governing the first respondent. The second respondent is the acting Vice-Chancellor of the First Respondent.

[3] The powers of the council in governing the first respondent are set out in section 4 of the Institutional Statute for Nelson Mandela Metropolitan University ("the Institutional Statute") published in GN 1037 of 17 December 2014 (see *Government Gazette* No. 38344). This section provides that council has, *inter alia*, the following powers :

[3.1] to approve policies and strategic plans of the University at institutional level (section 4(3)(b));

[3.2] to identify and monitor the risks relevant to the business of the University (section 4(3)(d));

[3.3] ensures that the University complies with all relevant laws and regulations (section 4(3)(e));

[3.4] to approve, after consultation with the students' representative council, the tuition fees, accommodation fees and any other fees payable by the students (section 4(3)(l)(i));

[3.5] to determine, after consultation with the senate and the students' representative council, the disciplinary measures and disciplinary procedures applicable to the students (section

4(3)(m)); and

[3.6] to approve the annual budget of the University.

Section 4(3)(t) further requires council to *"…act with care, skill, diligence and in good faith in the best interests of the University."*

[4] The applicant is described as *"a voluntary association with perpetual succession and authorised by its constitution to act on behalf of its members"*. It is described in its constitution as comprising *"a group of concerned parents and others who have paid for tertiary education for students … currently enrolled and studying at universities."* The applicant's intention, as contained in its constitution, is *"to create a safe learning environment for students at universities in South Africa to obtain a quality education."*

[5] The applicant launched this application pursuant to the suspension of academic activities of the first respondent. This suspension occurred as a result of protest action by a group of persons, most of whom are presumed by the applicant and respondents to be the first respondent's students, under the banner of the #FeesMustFall movement. The protest action was undertaken in response to the announcement by the Minister of Education of an 8% cap on the increase of fees at tertiary institutions. I wish, at the outset of this judgment, to indicate that, whilst it is necessary to describe the events that occurred on the first respondent's campuses as a consequence of the protest action, this judgment is *"not about the merits or legitimacy*

of those protests."[1] To the extent that this matter concerns the protest action, it concerns only the actions of the protesters and not the cause they represent. Further, I am not called upon to determine whether the unlawful activities perpetuated on the first respondent's campuses were, in fact, perpetuated by students of the first respondent. I merely accept, for the purposes of this judgment and as it is common cause, that unlawful activities have been perpetuated on the first respondent's campuses by those engaged in protest action.

[6] Initially, on 20 September 2016, the protest action resulted in barricades being erected, blocking the entrances to the first respondent's campuses. However, events then took a violent turn which resulted in the first respondent obtaining an order from Eksteen J on 14 October 2016 interdicting the respondents in that application, which included *"the general body of NMMU students"*, from, *inter alia*, interfering with, obstructing or disrupting the business and academic operations of the first respondent and unlawfully damaging the movable and immovable property of the first respondent.

[7] The interdict appears, however, to have had no effect on the violent nature of the protest action and, on 16 and 20 October 2016, buildings on the first respondent's campus were set ablaze and vehicles

[1] See *Hotz v University of Cape Town* (730/2016) 2016 ZASCA 159 (20 October 2016) at para. [1].

damaged. Moreover, notwithstanding the interdict, those engaged in protest action *"have continued stoning the police, threatening students, and have repeatedly stated that the ongoing protests will not be resolved unless total free education is granted."*

[8] Before the first respondent obtained the interdict referred to above, and on 7 October 2016, this application was launched and set down for hearing on 11 October 2016. Prior to it being heard, however, on 10 October 2016, the first respondent commenced a process of constructive engagement, or mediation, with various parties described as stakeholders. When this application was heard on 11 October 2016, Alkema J made an order, by agreement, postponing the application to 18 October 2016 and a further order :

> *"THAT the Respondents are immediately to engage the services of a trained, independent and suitably skilled mediator to engage all stakeholders identified as necessary by the Respondent in the mediation initiated urgently by the NMMU on 10th October 2016, namely the Applicant, the Student Representative Council of the First Respondent, NMMU #FeesMustFall, NMMU Sasco, the NMMU Economic Freedom Fighters Student Command and NMMU Black Stokvel/Marikana, in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the NMMU and the rights and duties of the staff concerned."*

The parties were also provided with an opportunity of filing an affidavit

reporting on the outcome of the mediation, should they wish to do so. This the applicant did, in which it indicates that the first respondent withdrew from the mediation process on the afternoon of 14 October 2016, immediately prior to it obtaining the interdict form Eksteen J.

[9] Thereafter, on 18 October 2016 (this being the date to which Alkema J postponed the matter) and at the respondents' request, Plasket J made an order :

[9.1] postponing the application to a date to be arranged between the parties and Registrar for argument;

[9.2] instructing the parties and stakeholders mentioned in the order of Alkema J to recommence the mediation process; and

[9.3] instructing the parties and mediators to report to the court, pending the final hearing of the matter, on the progress of the mediation.

[10] The applicant filed a report in terms of the order made by Plasket J dated 21 October 2016 on the progress of mediation, in which it indicated that it held the view that the mediation process had failed and that the matter could not be resolved. Thereafter, on 24 October 2016, the applicant set the application down for hearing on 27 October 2016.

[11] As I have already noted, the applicant seeks, by way of a mandatory

interdict, to enforce specific performance in terms of the contracts entered into with its students and the parent body responsible for the payment of student fees. The contractual obligation relied upon by the applicant is the obligation of the first respondent to continue with its academic programme and the right to participate therein, which students of the first respondent have secured through the payment of fees. The existence of this contractual obligation was not disputed by the respondents.

[12] The law relating to orders for specific performance is well settled. The court has a discretion as to whether or not to grant such an order.[2] The *locus classicus* is the judgment of Innes J in *Farmers' Co-operative Society* (*Reg*) *v Berry* 1912 AD 343 at 350, which states :

> *"Prima facie every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by KOTZE, C.J., in Thompson v Pullinger (1 O.R., at p. 301), 'the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt.' It is true that Courts will exercise a discretion in determining whether or not decrees of specific performance should be made. They will not of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that a defendant who has broken his undertaking has the option to purge his default by the payment of money. For in the words of Storey (Equity Jurisprudence, Sec. 717(a)), 'it is against conscience that a party should have a right of election whether he would perform his contract or only pay damages for the breach of it.' The election is rather with the injured party, subject to the discretion of the Court."* (Footnotes omitted)

[2] See *Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd* [2009] 2 All SA 7 (SCA) at para. [18].

[13] As a consequence, the Court will as far as possible give effect to a plaintiff's choice to claim specific performance, notwithstanding that it has a discretion in a fitting case to refuse to decree specific performance and leave the plaintiff to claim and prove its *id quod interest.* This discretion must be exercised judicially. Whilst our courts have repeatedly stressed that it is not confined to specific types of cases, and is not circumscribed by rigid rules, it is, nevertheless, not unfettered. Each case must be judged in the light of its own facts and circumstances.[3]

[14] As a result, whilst *"it is not possible to lay down any rules and principles which are of absolute obligation and authority in all cases; and therefore it would be a waste of time to attempt to limit the principles or the exceptions which the complicated transactions of the parties and the ever-changing habits of society may at different times and under different circumstances require the Court to recognise or consider"*[4] there are certain recognized categories of cases in which courts will refuse to grant an order for specific performance. These categories have been succinctly summarized by De Villiers AJA in *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 at 378H – 379A as follows :

[3] See *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 at 378F – G and *Standard Bank of South Africa v Bekker and Four Similar Cases* 2011 (6) SA 111 (WCC). The reference to 'rigid rules' was explained by Hefer JA in *Benson v SA Mutual Life Assurance Society Ltd* 1986 (1) SA 776 (A) at 782F – C as meaning that there are no rules except the rule that the court's discretion is to be exercised judicially upon a consideration of all the relevant facts.

[4] Story, *Equity Jurisprudence,* sec. 742 cited with approval in *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 at 379E – F.

> *"As examples of the grounds on which the Courts have exercised their discretion in refusing to order specific performance, although performance was not impossible, may be mentioned: (a) where damages would adequately compensate the plaintiff; (b) where it would be difficult for the Court to enforce its decree; (c) where the thing claimed can readily be bought anywhere; (d) where specific performance entails the rendering of services of a personal nature.*
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> *To these may be added examples given by Wessels on Contract (vol 2, sec. 3119) of good and sufficient grounds for refusing the decree, (e) where it would operate unreasonably hardly on the defendant, or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice, or would be inequitable under all the circumstances."*

[15] In support of my exercising this discretion in its favour, the applicant urges reliance upon the following :

[15.1] that the academic year end is fast approaching with the result that those students who are due to complete their degrees may not do so;

[15.2] that if students are unable to complete their degrees and qualify, they will not, in the event that they have secured employment for 2017, be able to take up those positions;

[15.3] that this will have a negative impact upon health services in the province, as students in the medical field will not be able to take up their internships in 2017 if they fail to qualify in 2016;

[15.4] that if students are not able to complete the current academic year in 2016, the first respondent will not be able to offer positions to incoming students in 2017, leaving many

matriculants unable to commence with their tertiary programmes at the first respondent in 2017;

[15.5] that many students receving financial assistance may lose their bursaries in the event that they are unable to complete the current academic year in 2016; and

[15.6] that foreign students will suffer financial harm in the event that they are forced to return to South Africa in order to complete the 2016 academic year in 2017.

The applicant further urged that cognisance be taken of the fact that the protesting students constitute a small minority of students at the first respondent and that their actions were imperilling the futures of some 27 000 others.

[16] That the first respondent was forced to suspend its academic activities and for a period certain of its campuses, in particular its South campus, were closed, is not in dispute; nor are many of the factors I am urged by the applicant to consider in the exercise of my discretion to grant the relief sought. What I am urged to consider by Mr Du Plessis, who appeared together with Ms Ntsepe for the respondents, in the exercise of my discretion is the following :

[16.1] that the order sought is final in effect and would bind the first respondent *"in perpetuity".* It could thus be used by the

applicant to force the first respondent to act in terms thereof when responding to a completely different crisis in the future;

[16.2] that the first respondent is required to make policy decisions concerning its response to a fluid and constantly changing situation and that, as a consequence, a degree of judicial deference thereto is appropriate;

[16.3] that the actions taken by the first respondent in response to the unfolding crisis have, in the circumstances, been reasonable; and

[16.4] that one cannot predict what response the protesters and others will have to the granting of the relief sought by the applicant and that, as a consequence, one cannot predict whether or not the granting of the relief sought will, as the applicant contends, minimise the risk posed by the unlawful activities occurring on the first respondent's campuses to the first respondent's students, staff and property.

[17] That the order would bind the first respondent in perpetuity is evident from its terms. The order sought by the applicant is not linked specifically to the #FeesMustFall protest action, nor does it specify that it will operate for a limited period of time, coming to an end either upon the future happening of some specified event or on a particular date by which it is envisaged the relief sought will no longer be

required. As a result of this, were the relief sought in prayer 1 of the applicant's notice of set down to be granted, the first respondent would by obliged to *"resume all academic activities and normal business operations … within 48 hours of the granting of [the] order"* and could not close – not even in circumstances in which the respondents were no longer able to guarantee the safety of its staff and students and irrespective of whether those circumstances are linked to the #FeesMustFall protest action or not. This would result in an order that would *"operate unreasonably hardly on the defendant, … or would produce injustice, or would be inequitable under all the circumstances."*[5] This, in my view, is sufficient basis for me to exercise my discretion in favour of the respondents and refuse to the grant the applicant to relief it seeks in prayer 1 of the notice of set down.

[18] However, in the event that I am incorrect in my interpretation of the relief sought by the applicant, I turn to consider the remainder of the factors raised by the respondent as being those which militate against the exercise of my discretion in favour of the applicant.

[19] The second and third factors raised by the respondents' counsel are, in my view, closely related. The first of these two factors is that of judicial deference and the second concerns the reasonableness of the actions taken by the first respondent in response to the unfolding events. The applicant disputes the sufficiency of the action taken by

[5] *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 at 378H – 379A.

the first respondent in response to the protest action and the unlawful activities taking place on its campuses, and characterises its actions as constituting a policy of *"appeasement"* of those engaged in the protest.

[20] Judicial deference, termed *"respect"* by O'Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para. [48], entails that :

> *"[a] court … give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker. This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker."*

[21] Although stated in the context of administrative law and the separation of powers doctrine, in my view, this accurately encapsulates the approach I should adopt in relation to the decisions taken by those entrusted with the management of the first respondent. From this it is also evident how the factors of judicial deference and the reasonableness of decisions are linked. There are echoes of this principle found in the recent decision of Wallis JA in *Hotz v University*

of Cape Town (730/2016) 2016 ZASCA 159 (20 October 2016) at para. [82], where he discussed the limits placed upon *"judicial creativity"* in fashioning remedies in particular cases. He states that courts are *"ill-suited to understanding the full implications and underlying nuances that would affect the terms of such broad and general orders."* These comments concerning the limits placed upon *"judicial creativity"*, in my view, constitute the other side of the same coin in the manner in which these two principles are to be applied in this matter.

[22] To grant the applicant the relief it seeks in this matter would be to utilise a blunt instrument to in an attempt to *"provide [a] solution to [a] social problem"*[6] that *"…requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by [an] institution with specific expertise in that area".*[7] It would also have the effect of imposing fetters on the managerial discretion legislatively vested in the first respondent – and this with no idea of the practical and budgetary consequences. Accordingly, unless the decisions taken by the respondents are unreasonable and would never result in their achieving their stated goal, namely the completion of the 2016 academic programme, I should defer to the decisions made by those with greater expertise in dealing with unfolding events

[6] *Hotz v University of Cape Town* (730/2016) 2016 ZASCA 159 (20 October 2016) at para. [82].
[7] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para. [48].

and the resumption and continuation of the academic business of the first respondent. To this end I can find nothing unreasonable in the respondents' actions. Whilst the campuses of the first respondent were closed and academic activities ceased for a period, this was as a consequence of the respondents being unable to guarantee the safety of its staff and students. The respondents have not simply sat supinely by whilst the crisis unfolds, either. The first respondent has employed additional private security personnel (exceeding its budget in this respect by almost R1 million) and has called upon the assistance of the SAPS, who have maintained a presence on its campuses at various stages. Designated protest areas have been demarcated on the first respondent's campuses. Although it failed to achieve a positive outcome, the first respondent and its duly authorized officials engaged in a process of mediation with the protesters and various stakeholders. In addition, alternative teaching methods are to be implemented, which includes online learning programmes, tuition off campus at various secure venues, and the redesigning of assessment tasks. The first respondent has engaged the assistance of the business community and relevant municipality in sourcing secure off campus examination venues. It is difficult to imagine what more the respondents could do.

[23] Moreover, the first respondent must be able to respond to a fluid situation such as the present with a degree of flexibility. To grant the

relief sought would thus result in undue hardship to the respondents, as it would deprive them of the degree of latitude required to address an ever-changing set of circumstances. In this respect, I agree with the submission made in the heads of argument filed on behalf of the respondents to the effect that the relief sought over and above that directing the first respondent to resume its academic activities constitutes little more than a *"shopping list"* of directions, designed to ensure that the first respondent's business is managed in the manner contended for by the applicant. In this respect, the applicant seeks to ensure that the first respondent's activities are managed as it deems best and in so doing, it wishes to deprive the respondents of their statutorily mandated fiduciary duty to *"act with care, skill, diligence and in good faith in the best interests of the University."* The situation is akin to that in *Coronation Syndicate Ltd v Lilienfield and the New Fortuna Co Ltd* 1903 TS 489. In that matter, the directors of a company bound themselves by contract with a third party to call a general meeting of the company of which they were directors and to submit and support certain proposals for increasing the share capital of the company. This support never materialized and the appellant launched an application for an interim interdict pending an action to be instituted for an order for specific performance. In considering whether or not to grant the relief sought, the appeal court held :[8]

[8] At 486 – 497.

"It appears to me that there is a very great difference in principle between the case of a shareholder binding himself by such a contract and the directors of the company undertaking such an obligation. The shareholder is dealing with his own property, and is entitled to consider merely his own interests, without regard to the interests of the other shareholders. But the directors are in a fiduciary position and it is their duty to do what they consider will best serve the interests of the shareholders. If therefore, they have bound themselves by contract to do a certain thing, and thereafter have bona fide *come to the conclusion that it is not in the interests of the shareholders that they carry out their undertaking, I do not think that the Court would be justified in interfering with their discretion and compelling them to do what they honestly believe would be detrimental to the interests of the shareholders."*

The court thus declined to grant the interdict. In coming to the conclusion it did, the court assumed, without deciding the issue, that the agreement to support the resolution was valid. I am of a similar view in this matter. This court cannot, by making the order sought by the applicant, deprive the respondents and the first respondent's council, of their discretion to act in what they honestly believe to be the first respondent's best interests.

[24] Relief was also refused by the House of Lords in a matter involving the exercise of a discretion of a similar nature in *R v Chief Constable of Sussex, Ex parte International Trader's Ferry Ltd* [1999] 2 AC 418 (HL). In that matter the applicant company was incorporated for the purpose of ferrying livestock across the Channel to the continent, as most major cross-Channel ferry operators refused to do so because of the difficulties caused by those protesting against the transport of live animals to the continent. The protest action against the applicant company's business continued and, initially the Chief Constable provided high levels of policing in order to minimise the harm caused

to the applicant's vehicles and drivers through the unlawful actions of certain of the protesters, thus enabling the applicant company to ship the livestock five days per week. The Chief Constable then decided that the financial and human resources required for this was interfering with the efficient policing of other areas of the county. He accordingly reduced the level of policing to two consecutive days per week. On days on which no police cover was provided, police turned the applicant's vehicles back if it was thought a breach of the peace might otherwise occur. Dissatisfied with this decision, the applicant company sought to review and set aside the Chief Constable's decision. In coming to his conclusion to refuse the relief sought, Lord Slynn of Hadley held (at 430C) that :

> *"In a situation where there are conflicting rights and the police have a duty to uphold the law the police may, in deciding what to do, have to balance a number of factors, not the least of which is the likelihood of a serious breach of the peace being committed. That balancing involves the exercise of judgment and discretion."*

[25] This is precisely the situation here. Those entrusted with the management of the first respondent clearly have a discretion as to the manner in which the business activities of the first respondent are best to be conducted. They are required to exercise that discretion by balancing the competing rights of students and staff to a safe learning environment and those of the protesters to demonstrate peacefully. I am not at liberty to circumscribe to them the manner in which they are

to exercise that discretion and attach to the order directions of the type sought by the applicant. It is, after all, *"not for a court to instruct the university whether to pursue or abandon disciplinary proceedings in terms of its student code of conduct",*[9] to use but one example of the relief sought.

[26] As regards his submission as to the effect such an order will have on the protest action and situation on the first respondent's campus, I agree with Mr du Plessis. I cannot predict what the outcome of granting such an order will be. I can thus in no way be assured that it will result in greater security for the first respondent's students and staff or that it will minimize the risk of damage to the first respondent's property. It could have quite the opposite effect. In the absence of being able to gaze into a crystal ball, and accurately predict the future, I am simply left guessing. For these reasons, I am of the view that this is an appropriate matter in which to refuse the applicant the order for specific performance that it seeks.

[27] In doing so I am mindful of the potential harm that will be suffered by the first respondent's students and I have the greatest sympathy with their plight. However, I simply cannot, on the basis of the factors advanced by Mr Smuts SC, who appeared together with Ms Redpath for the applicant, ignore the serious concerns raised on behalf of the respondents, and thus the hardship that may result, were I to grant the

[9] *Hotz v University of Cape Town* (730/2016) 2016 ZASCA 159 (20 October 2016) at para. [82].

relief sought.

[28] That leaves the question of costs. There is no reason why the ordinary rule relating to costs, namely that they follow the result, should not apply in this matter. The relief the applicant sought was strikingly inappropriate. It is not open to litigants to seek to dictate to tertiary education institutions the manner in which they are to conduct their affairs through the courts.

[29] In the result, I make the following order :

1. The application is dismissed with costs, which costs are to include the costs of two counsel where so employed and the reserved costs of 11 October 2016 and 18 October 2016.

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M L BEARD
ACTING JUDGE OF THE HIGH COURT

Appearing on behalf of the Applicant: Mr Smuts SC, with Ms Redpath
Instructed by: Wheeldon, Rushmere & Cole Inc

Appearing on behalf of the Respondents: Mr Du Plessis, with Ms Ntsepe
Instructed by: Huxtable Attorneys