



IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 1471/2023

In the matter between:

SOL PLAATJE UNIVERSITY

Applicant

and

THE SRC OF THE SOL PLAATJE UNIVERSITY

1st Respondent

MAWETHU JERRY YONA

2nd Respondent

MASEGO MOTHLABI

3rd Respondent

OARABILE MOSWEU

4th Respondent

LETHOGONOLO EDWIN THINTHA

5th Respondent

QUINTON OLIPHANT NONOFO

6th Respondent

TSHIDISO BARRY BABE

7th Respondent

ZINTLE PRUDENCE XAKEKA

8th Respondent

OFENTSE CENTY MODIMAKOANA

9th Respondent

GUDANI LISWOGA

10th Respondent

SELLO LOUW

11th Respondent

KETSHEPOANE KEGAKILWE

12th Respondent

MBALI SKOSANA
THE UNIDENTIFIED PERSONS
PARTICIPATING IN THE UNLAWFUL
CONDUCT OF THE FIRST TO THIRTEENTH
RESPONDENTS AT THE SOL PLAATJIE
UNIVERSITY

13th Respondent

14th & Further
Respondents

THE PROVINCIAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE:
NORTHERN CAPE PROVINCE

15th Respondent

JUDGMENT

Lever J

1. This is an application for the confirmation of a *Rule Nisi* issued by this court on an urgent basis on 8 August 2023. The said *rule nisi* provided an interdict with immediate effect against the First to Thirteenth Respondents who were named and identified. However, the said interdict set out in the *rule nisi* also applied to persons who participated in the unlawful conduct of the First to Thirteenth respondents cited collectively as the fourteenth respondent.
2. The first respondent is the Student Representative Council (SRC) of the Sol Plaatje University. The second to the thirteenth respondents are individual members of the SRC. The fourteenth and further respondents are an unidentified group who associate themselves with the unlawful activities of the first to thirteenth respondents.

3. The relief sought against the said respondents is wide ranging and includes, *inter alia*: that they allow unhindered access to the campus of the university by students, staff, building contractors and/or subcontractors; that they are prohibited from locking and/or barricading entrances to buildings on the campus of the university; that they are prohibited from threatening or intimidating students, staff and building contractors and/or subcontractors; that they are interdicted from disrupting or interfering with the academic, logistic, administrative functions and day-to-day functions of the university; that they are prohibited from interfering with any of the applicant's employees, staff or building contractors/subcontractors in the exercise of their duties or functions; and that they are interdicted from blocking or obstructing access to a number of entry points to the university by vehicles and pedestrians.
4. Only certain of the individual members of the SRC opposed the confirmation of the *rule nisi* in this matter. The members of the SRC that opposed the confirmation of the *rule nisi* are: second respondent; third respondent; fourth respondent; fifth respondent; seventh respondent and eleventh respondent (the opposing respondents).
5. Although an appearance to defend was filed on behalf of the eleventh respondent the confirmatory affidavit filed on his behalf was never deposed. A confirmatory affidavit was also filed on behalf of the eighth respondent, but she was not included in the Notice of Opposition and her

confirmatory affidavit was also never deposed. These facts will only become relevant when I consider an appropriate order regarding the costs of this application.

6. It is clear from the papers that, at the material time, university staff and students were prevented from participating in the ordinary functions of teaching and learning that take place at a university. It is also clear that there was intimidation and violence that took place at the university at the material time. There was damage to property. There was blockading of access points to the university campus and access to other points on campus was also interfered with. Also, building activities on campus were disrupted. None of this is denied by the opposing respondents. In broad terms the opposing respondents take the position that none of these activities can be connected to identifiable persons by admissible evidence.

7. The defences raised by the opposing respondents include: the applicant has an alternative remedy; there was short service of the application and in reality, it is alleged, the order issuing the *rule nisi* was taken *ex parte*; it is alleged that a material fact was not disclosed when the *rule nisi* was sought, allegedly *ex parte*; the situation on the applicant's campus was now stable and there is no need for a final interdict; none of the respondents are linked to the unlawful acts described by the applicant in its founding affidavit; and applicant made out its case in reply and certain

of the evidence introduced in reply constitutes inadmissible hearsay evidence.

8. In their answering affidavit, the opposing respondents also raised the issues of urgency not being properly established and the authority of the Vice – Chancellor, the deponent to the applicant’s founding and replying affidavits, to launch the present application. However, at the hearing of this matter, Mr Babuseng who appeared for the opposing respondents, indicated that the opposing respondents were no longer proceeding with these points. Accordingly, I will not consider these issues.
9. Turning to the first issue, being the alternative remedy alleged by the opposing respondents. The alternative remedy alleged by the opposing respondents was that some of them had already been provisionally suspended at the time that the *rule nisi* was sought.
10. For the alleged alternative remedy to be considered a suitable alternative remedy in the circumstances, such alternative remedy needs to be: (a) adequate under the circumstances¹; (b) ordinary and reasonable²; (c) a legal remedy³; and (d) grants similar protection⁴.

¹ Berg River Municipality v Zelpy 2013 (4) SA 154 (C) at para [47].

² Martin v Kiesbeampste Newcastle Afdeling 1958 (2) SA 649 (D) at 654B-G.

³ Francis v Roberts 1973 (1) SA 507 (RAD) at 512D – E.

⁴ Cape Town Municipality v Abdulla 1974 (4) SA 428 (c) at 440H.

11. On the papers, the applicant has established that certain of the incidents of unlawful conduct occurred after the temporary suspension of the opposing respondents.
12. In these circumstances, the applicant contended that temporary suspension was an internal remedy that was not an alternative to the interdict, in that it did not offer similar protection as afforded by the interdict conferred under the *rule nisi* against the unlawful behaviour complained of. I agree with these contentions made by the applicant. The temporary suspension of the opposing respondents is accordingly not a suitable alternative remedy. Accordingly, this argument cannot stand and temporary suspension or even disciplinary action with a permanent effect, in these circumstances is not a suitable alternative remedy.
13. The next issue raised by the opposing respondents that needs to be considered is the issue of the alleged short service and the alleged taking of the *rule nisi* on an *ex parte* basis. Not much needs to be said on these matters. The opposing respondents contend that they were notified electronically but they were given very little time to obtain the services of legal representatives, put in a notice of opposition and be present to oppose the application for a *rule nisi*.
14. The notice given prior to the *rule nisi* was dictated by the events that unfolded on the applicant's campus. The adequacy of the notice period

is an issue that was dealt with by the judicial officer considering the application for the *rule nisi*.

15. If the opposing respondents were prejudiced in any way by inadequate notice, they could fall back on the provisions of Rule 6(12)(c) of the Uniform Rules of Court (the Rules). This would allow the respondents on notice to the other affected parties to set the order granted urgently, as a *rule nisi*, down for reconsideration. None of the opposing respondents or any other respondent took this route. The argument of short notice is not a substantive defence to the confirmation of the *rule nisi*. Other than possibly an issue to be considered in the context of costs, it is not a matter to be considered on the extended return day of the *rule nisi*.

16. The next contention made by the opposing respondents is that on the basis that they allege the *rule nisi* was taken on an *ex parte* basis, there was an obligation on the applicant to disclose all material facts that might influence the court in granting, or otherwise, of the *rule nisi*.

17. Firstly, there was notice albeit short notice. Secondly, the urgent court that issued the *rule nisi*, considered and to the extent required condoned the notice period given by issuing the *rule nisi*. If the respondents were in any way prejudiced, the order being taken in their absence, the opposing respondents could have invoked the provisions of Rule 6(12)(c). The respondents did not take that route. Thirdly, as set out

above the temporary suspension of the respondents concerned is not a suitable alternative remedy to the interdict. In these circumstances, its disclosure or otherwise, would not have affected the outcome of the application for the urgent *rule nisi* in this matter. Accordingly, the fact of temporary suspension was not a material fact that the applicant was under an obligation to disclose to the relevant urgent court. In these circumstances such defence also cannot stand.

18. The next defence proffered by the opposing respondents is that the situation on the applicant's campus is now stable and that there is now no need for a final interdict. The situation on the applicant's campus is now stable because of the *rule nisi* issued out of this court. This is not a defence to the confirmation of the said *rule nisi*.

19. The opposing respondents then contend that none of the respondents are linked to any of the unlawful acts described in the founding affidavit. Several issues arise from this contention. These issues are: Firstly, is there a basis for making an order against the fourteenth respondent, being those associating themselves with the alleged unlawful conduct of the first to thirteenth respondents; Secondly, whether there is in fact unlawful conduct that has been linked to certain of the respondents; and Thirdly, if any unlawful conduct is linked to any individual or group, is it justifiable to simply confirm the *rule nisi* or would it be better to trim down the final relief granted to fit the case made out in the papers.

20. Considering the position of the fourteenth respondent, being those unidentified persons who are alleged to have by their conduct associated themselves with the unlawful conduct of the first to thirteenth respondents.
21. No person claiming to have been a member of the group associating themselves with the unlawful conduct of the first to thirteenth respondents came forward to oppose the confirmation of the *rule nisi* even though the Court Order had been widely distributed amongst the applicant's students.
22. This court was referred to a number of authorities on this question, these authorities included: *City of Cape Town v Yawa and Others* [2004] 2 All SA 281 (C); *Mondi Paper v Paper Printing Wood and Allied Workers Union & Others* (1997) 18 ILJ 84 (D); *Consolidated Fine Spinners and Weavers Ltd & Another, ex parte in re Consolidated Fine Spinners & Weavers v Govender & Others* (1987) 8 ILJ 97 (D); *Durban University of Technology v Sphiwe Zulu & Others* unreported Case No. 1693/16P judgment delivered 27 June 2016 (Pietermaritzburg); *Rhodes University v SRC of Rhodes University & Others* Case No. 1937/2016 judgment delivered 1 December 2016 (Grahamstown); and *Sol Plaatje Local Municipality v Economic Freedom Fighters and 3 others* Case No. 702/2015 judgment delivered 9 October 2015 (Kimberley).

23. The principles that can be distilled from these authorities are: Firstly, the group of unidentified persons must be identifiable by some means, for example the unidentified persons in occupation of a specific piece of land. The association with that specific piece of land makes that group identifiable; Secondly, whether a group of unidentified persons is identifiable is a question of fact to be determined on the relevant evidence established in the papers; Thirdly, and related to the first principle, courts do not issue edicts calling upon unidentified persons to obey the law, even if nobody is prejudiced thereby; Fourthly, an order of court must be effective. An order of court can only be effective if it is issued against identified or identifiable person/s who have or had an interest in the issue decided by the court. It is only if such order is made against identifiable persons that an order is capable of being enforced. An order of court is only effective if it can be enforced. If persons wilfully defy a court order, they are guilty of contempt of court. It follows that they can only be convicted of that offence if they can be identified, and all the other requirements of that offence can be established against them.

24. On the facts placed before this court, it is clear from the applicant's own version that some students were pursuing their academic activities online to avoid the disturbances created by the SRC and its members. Understandably, those students would object to being identified with the

unlawful activities concerned. They would have every right to feel aggrieved.

25. On the facts presented to this court there is no way to separate the students who participated in the unlawful conduct at the time from those who did not participate in such conduct. The situation might have been different if there was video in which individuals could be identified whilst engaged in unlawful activity or if persons had been arrested by the South African Police Service for engaging in unlawful activity. In those circumstances persons identified by video or arrest could have been cited as respondents. It so happens, in circumstances that will be discussed later, the security cameras of the applicant were turned off. Also, there is no evidence that anyone was arrested for unlawful activity at the material time. No doubt, the ease with which the security camera network was disabled is something the applicant will have to deal with in future.

26. In short, on the facts placed before this court, the fourteenth respondent does not constitute an identifiable group of persons. Accordingly, no order can be made against the fourteenth respondent in these circumstances.

27. On the 6 August 2023 the first respondent issued a statement by way of a media release. The said media release dealt mainly, but not exclusively with grievances with the decisions and conduct of The

National Student Financial Aid Scheme (NSFAS), something the applicant had no direct control over. The uncontested evidence shows that the applicant tried to take steps to ameliorate the effect of the decisions taken by NSFAS on the student body of the applicant.

28. The offending portion of the first respondent's media statement reads as follows: "The SRC took a resolution that: **NO STUDENT OF RETAIL BUSINESS MANAGEMENT, BACHELOR OF EDUCATION AND COURT INTERPRETING WILL ATTEND PRACTICALS. NO ACADEMICS** (sic) **ACTIVITIES WILL ALSO TAKE PLACE UNTIL ALL DEMANDS OF THE SRC AND THE STUDENTS ARE MET.**" (Emphasis as it appears in the said media statement)

29. It can be seen from this statement that this is not merely a call for students and the SRC to stage a protest to air their grievances as contemplated by section 17 of the Constitution⁵. The SRC by way of their statement closed the space for academic activity of any description despite the uncontested evidence of the applicant that there were indeed students that were pursuing their studies online at the time of the relevant disturbances. The statement is imperative and imposes the will of the SRC on the student body in an unlawful manner. It oversteps the bounds of peaceful and lawful assembly and demonstration in that it

⁵ Act 108 of 1996.

infringes the rights of those who chose to continue with their studies and academic pursuits despite the demonstration.

30. The SRC instigated the academic disturbances. None of the opposing respondents disputed the blockade of the entrances to the university. They merely claimed that the persons who did so had not been identified. Clearly, the media statement of the SRC instigated this blockade.

31. There is disputed evidence, that if accepted, shows that certain individual respondents went further. It is convenient to deal with the admissibility of this evidence now. This evidence includes: a voice note that has been transcribed and attached to the replying affidavit although the person who made the recording asked not to be identified as that person feared reprisals; screenshots of a WhatsApp group conversation, the person who provided the said screenshots also did not want to be identified as that person also feared reprisals; a warning statement made in the presence of a security officer which formed the basis of subsequent disciplinary action; and the identification in the replying affidavit of the seventh respondent as the person who threatened and intimidated a building contractor.

32. Hearsay evidence is ordinarily not admitted as evidence. The situation is regulated by section 3 of the law of Evidence Amendment Act⁶. The said section reads as follows:

⁶ Act 45 of 1988.

“3(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless -

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
- (c) the court, having regard to –
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account,is of the opinion that such evidence should be admitted in the interests of justice.”

33. In respect of the first two examples of hearsay evidence, being the transcribed voice note and the screenshots of the WhatsApp group, I need to apply section 3 of the Law of Evidence Amendment Act.

34. In respect of these examples of hearsay evidence, the Vice – Chancellor of the applicant being the deponent to the founding and replying affidavits states that where the content of his affidavit is not within his personal knowledge, he believes the averments that he makes in his affidavits are true and correct in all respects. The deponent to the

applicant's affidavits also states that both persons who provided him with the relevant information fear for their safety and that he was not willing to disclose the identities of these people. In my view, applicant has not made out a case for this court to admit this hearsay evidence under the provisions of section 3(1)(c) of the Law of Evidence Amendment Act⁷ as contemplated in the matter of Hlongwane & Others v Rector, St Francis College and Others⁸. Accordingly, I do not think it is in the interests of justice for this court to admit such hearsay into evidence.

35. The warning statement by the student Bennett Potgieter stands on an entirely different footing. Mr Potgieter is a student registered with the applicant. He is a person who was identified as being involved in switching off the electricity to a part of the applicant's campus. Mr Potgieter wrote and signed his warning statement in the presence of a security officer who confirmed same in a supporting affidavit. The said warning statement is a statement against the interest of Mr Potgieter as when he made the said statement it was contemplated that it would form the basis of a disciplinary hearing against him. In the said warning statement Mr Potgieter identified the second respondent as one of the persons who gave instructions to turn off the electricity which Mr Potgieter carried out. In these circumstances and after considering the provisions of section 3(1)(c) of the Law of Evidence Amendment Act⁹ I

⁷ Above.

⁸ [1989] All SA 55 (D).

⁹ Above.

conclude that it is in the interests of justice to admit this evidence to the record.

36. Mr Babuseng who appeared for the opposing respondents also objected to this evidence on the basis that it was raised in the replying affidavit for the first time.

37. In motion proceedings a proper case must be made out in the founding affidavit and that ordinarily an applicant may not make out a case or supplement his case in reply.¹⁰ This, however is not an absolute rule and the court has a discretion to allow the new matter to remain in reply and afford the respondent an opportunity to file an extra affidavit to deal with the new matter.¹¹ New matter in reply will only be allowed in appropriate circumstances.¹²

38. In the present matter the urgent application was launched on the 8 August 2023. In circumstances where it is undisputed that tyres were being burned and applicant's property was being damaged. It was also undisputed that applicant was prevented from functioning normally and that there were threats, intimidation, and violence on its campus. Applicant has laid a basis for the evidence of Mr Potgieter in that it has contended in the founding papers that certain students had switched off the electricity supply on campus. It appears from the warning statement

¹⁰ Shephard v Tuckers Land & Development Corp (1) 1978 (1) SA 173 (WLD) at 177G.

¹¹ Shephard v Tuckers Land., Above at 177H to 178A.

¹² Shephard v Cotts Seafreight (SA) (Pty) Ltd 1984 (3) SA 202 (TPD) at 205F-H.

itself that such statement only became available to the applicant on the 23 August 2023. This evidence could not have been included in the founding affidavit.

39. In these circumstances the foundation was laid in the founding affidavit, and it was supplemented in reply. This is a case where the second respondent ought to have sought the leave of this court to file an extra affidavit to deal with this new evidence. If the second respondent had asked to file an extra affidavit to deal with the new evidence, in these circumstances such permission would certainly have been granted. Instead, the opposing respondents contented themselves with arguing that this court should simply ignore the new evidence. The circumstances of this case are such that this new evidence ought to be allowed. The evidence is such that it called for a response. The opposing respondents in these circumstances were opportunistic in arguing that this court ought to ignore the contentions in reply instead of dealing substantively with those contentions.

40. Turning now to the identification of the seventh respondent as the person who intimidated and forced a building contractor to cease work at the material time. The opposing respondents objected to this evidence on two grounds. Firstly, the opposing respondents contend that this arises for the first time in the replying affidavit. Secondly, that although the contractor identifies the seventh respondent, there is no confirmatory affidavit from the person who showed the sub-contractor

the photographs that indeed it was the seventh respondent identified by the sub-contractor.

41. Dealing with the opposing respondents' complaints in regard to the affidavit of Mr Darryl Stroebel on behalf of the relevant contractor. Again, a basis was laid in the founding affidavit of students interfering with contractors on the applicant's campus. The seventh respondent was only identified by way of a confirmatory affidavit to the replying affidavit. In the circumstances of this case and on the basis of the authorities already cited above, I believe this supplementary evidence should be accepted and that the opposing respondents ought to have dealt with this evidence substantively in a further affidavit. As set out above, the opposing respondents failed to seek leave to file a further affidavit to deal substantively with this new evidence and contented themselves with asking this court to ignore such evidence. In the prevailing circumstances, I accept this evidence into the record of these proceedings.

42. Turning now to the second complaint in regard to the identification of the seventh respondent, being that there is no confirmatory affidavit from the person who showed Mr Stroebel the photographs of students that Mr Stroebel in fact identified the seventh respondent. Mr Stroebel has stated under oath that he identified the seventh respondent from photographs shown to him. In proceedings of this kind this is sufficient to call for a response or answer from the seventh respondent. As set out

above, in these circumstances, seventh respondent would have been granted leave to file a further affidavit to respond to this new evidence. The seventh respondent has failed to respond to this evidence. These are not criminal proceedings, and the applicant cannot be held to the criminal standard of proof.

43. To sum up, the media statement issued by the first respondent went beyond the right to assembly, demonstration, picket, and petition. Such statement also went beyond any other right contemplated in Chapter 2 of the Constitution¹³. Such statement shows an intention to unlawfully disrupt the applicant's ordinary day to day functions and activities and infringes the rights of both students and staff who chose to continue with their lawful academic activities. Also, the second respondent has been shown to have issued instructions to another student to turn off the electricity supply to a portion of the applicant's campus. Thereby unlawfully interfering with the applicant's ordinary day-to-day functions and activities. These activities can only be attributed to the first up to and including the thirteenth respondents. In these circumstances, the following final interdict will be issued:

"That the first to thirteenth respondents are interdicted and prohibited from disrupting and/or interfering with any of the applicant's academic, logistical, and administrative functions."

¹³ Above.

44. The seventh respondent has been shown to have threatened, disrupted, interfered with and intimidated one of the applicant's contractors. In these circumstances the seventh respondent will face the following final interdict:

"That the seventh respondent is interdicted and prohibited from threatening, intimidating, disrupting or interfering with any of the applicant's contractors."

45. Turning now to the issue of the costs of the application. There are several factors to consider in this regard. Firstly, applicant only sought an order of costs against those respondents who opposed the matter. A notice of opposition was filed on behalf of the second, third, fourth, fifth, seventh and eleventh respondents. The eleventh respondent never signed or deposed to his confirmatory affidavit filed in opposition to the application. However, an appearance to defend was filed by an attorney on his behalf. Accordingly, eleventh respondent has opposed this application and will be treated in the same manner as all of the other opposing respondents.

46. Secondly, the SRC which included at the material time the second to thirteenth respondents, overstepped the bounds of legitimate protest and demonstration and in the course of action that they pursued as evidenced by the media statement quoted above, unlawfully infringed the rights of others.

47. Thirdly, the bulk of the opposing respondents as well as the SRC's complaints related to NSFAS over which the applicant had no direct control. Furthermore, the applicant took steps to try and ameliorate the consequences of the steps taken by NSFAS on their students. Also, a senior official of the applicant tried to engage with the SRC to avoid the unlawful disruptions that took place. However, the members of the SRC in authority at the material time refused to engage with the senior officials of the applicant and chose to pursue their chosen course of action to unlawfully disrupt the activities of the applicant. These facts were not disputed by the opposing respondents and the opposing respondents never individually distanced themselves from the relevant unlawful conduct of the SRC.

48. Also, although the respondents affected by the Order has been trimmed down significantly and the relief sought has also been trimmed significantly, in substance the applicant has been successful, particularly against the opposing respondents. The secondary rule, being that costs should follow the event is still applicable in these circumstances. The opposing respondents have not shown any good reason why this rule should not be applied.

49. In all of these circumstances, it is equitable and appropriate that the opposing respondents should be held jointly and severally responsible for the costs of this application.

Accordingly, the following order is made:

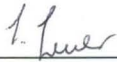
- 1) As against the first to the thirteenth respondents, the following final order is made:

"That the first to thirteenth respondents are interdicted and prohibited from disrupting and/or interfering with any of the applicant's academic, logistical, and administrative functions."

- 2) As against the seventh respondent, the following final order is made:

"That the seventh respondent is interdicted and prohibited from threatening, intimidating, disrupting or interfering with any of the applicant's contractors."

- 3) The second, third, fourth, fifth, seventh and eleventh respondents will jointly and severally, the one paying the others to be absolved, pay the applicant's costs of this application on the ordinary party and party scale.



Lawrence Lever
Judge
Northern Cape Division, Kimberley

Representation:

For The Applicant:

Adv JL Olivier

Instructed by:

Van De Wall Inc.

For The 2nd, 3rd, 4th, 5th, 7th and 11th Respondents:

Adv B Babuseng

Instructed by:

Lulama Lobi Inc.

Date of Hearing:

03 November 2023

Date of Judgment:

26 January 2024