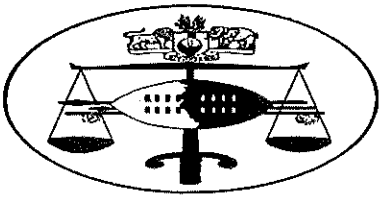


IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO: 1364/2022

HELD IN MBABANE

IN THE MATTER BETWEEN

LIMKOKWING UNIVERSITY CREATIVE TECHNOLOGY **APPLICANT**

AND

SENETISO MAMBA **RESPONDENT**

NEUTRAL CITATION: **LIMKOKWING UNIVERSITY CREATIVE TECHNOLOGY *VS* *SENETISO MAMBA* *(1364/2022) SZHC – 166 [08/08/2022]***

CORAM: **B W MAGAGULA J**

HEARD: **03/08/2022**

DELIVERED: **09/08/2022**

SUMMARY: *Urgent application in terms of rule 6 (25) – Respondent raising points in limine. Prayers sought not competent in light of the fact that the Applicant has all along considered the Respondent as a student.*

- *Applicant raised new issues in Reply – Notice to strike out granted – Points in limine upheld. Requirements of an interdict considered. – Application dismissed with costs.*

JUDGMENT

BRIEF BACKGROUND FACTS

[1] The Applicant is a University based at Sidwashini area in the District of Hhohho. It seeks to interdict one of it's students, the Respondent from entering it's premises.

[2] The Applicant further seeks that this court must order and direct the Respondent to refrain from participating in any student affairs and activities.

[3] The University also wants this court to order and direct the Respondent to keep a distance of 100 meters away from the Applicant's main gate.

[4] In a nutshell, the Applicant's basis for the orders sought are the following;

4.1 The Respondent was allegedly involved in the convening of an unauthorized meeting of the student body.

4.2 On Thursday the 7th of July 2022, the Respondent was allegedly involved in manhandling of a staff member of the Applicant, who is the head of Applicant's security.

4.3 The Respondent on the same date, is alleged to have been involved in holding hostage the Campus Director, staff members and students by locking the Applicant's main gate with a padlock. In the process, he prevented anyone from entering or leaving the University premises.

4.4 The Respondent is also alleged to have been involved in damaging of the Applicant's property, being the SSC door.

4.5 The Respondent is not registered with the Applicant for the current semester. As such, he is not considered a student by the Applicant.

4.6 The Respondent had made threats to the effect that he will burn down the Applicant's campus.

4.7 The Respondent was at the forefront of a group of students who threw stones into the Applicants premises.

[5] The application is opposed by the Respondent. When the matter first appeared before court on the 21st July 2022, the Applicant's Counsel applied that an interim order be granted, despite that the Respondent had indicated that it was opposing the application. The court was not inclined to grant the interim order without hearing both parties;

[6] To balance the interest of the parties, the court recorded an undertaking that was made by the Respondent's Counsel, Mr S. Zwane, which was to the effect that he had been assured by the Respondent that he will not disrupt operations at the Applicant's undertaking in any manner or whatsoever.

[7] Subsequent thereto, the Respondent filed his answering affidavit on the 25th July 2022. During the court hearing of the 26th July 2022, Applicant's counsel submitted that she required time to file a replying affidavit and as such she applied for a postponement. The Applicant was ordered to file it's replying affidavit by close of business on Thursday the 28th July 2022. The replying affidavit was only filed on the 29th July 2022 with no explanation for the lateness.

NOTICE TO STRIKE OUT

[8] After the Applicant had filed it's replies, the Respondent filed a notice to strike out certain paragraphs in the replying affidavit on the basis that they raised new issues for the first time, which were not canvassed on the founding affidavit. I granted the notice to strike out, and I now give my reasons for doing so.

[9] In paragraph 2 of the replying affidavit the Applicant's director sought to bring to attention of the court, the turn of events that had occurred on the 25th July 2022. This is despite the fact that she had an opportunity to do so, initially in her founding affidavit. The settling out of events that had occurred on the 25th of July 2022, did not from part of the Applicant's case in the founding affidavit. Certainly, the deponent was venturing to new facts that she had not stated in her founding affidavit.

[10] In paragraph 2.1 the deponent also traverses on an issue that some students started to boycott classes at about 10am and made several demands including that Respondent's bar should be uplifted. Also that the Respondent must be allowed to return to class. This boycott resulted in riots and classes were disrupted. This again was not part of the Applicant's case in the founding affidavit and it does not appear to which averments as set out in the answering affidavit were these assertions responding to.

[11] Despite the fact that I do not see the relevance of these assertion, *visavis* the prayers sought in the notice of motion. The fact of the matter is that the canvassing of the fact relating to events pertaining to the riot, traverses on new issues that were not dealt with in the founding affidavit. Clearly, this being the last affidavit accepted, the Respondent will not have an opportunity to respond to the accuracy and correctness thereof. How does the Respondent for instance respond to the allegation that when the boycott started he was briefly seen on campus by security. This is besides the fact that no confirmatory affidavit of the security that saw him was filed by the Applicant.

[12] The same applies to paragraphs 2.2, 2.3 and 2.4. The contents of these paragraphs bring new issues that were not canvassed in the initial founding affidavit of the Applicant.

[13] The primary purpose of a replying affidavit is to put up facts which serve to refute the case made out by the Respondent in the answering affidavit[1].

[1] See Standard Bank of South Africa Ltd Vs Sewpersadh 2005 (4) SA 148 (C) at 159

[14] There is a plethora of decisions in this jurisdiction which settle the legal position that new issues are not permissible in a replying affidavit[2]. It is for the aforegoing reasons that I granted the application to strike out those offending paragraphs. They were accordingly struck out and expunged from the replying affidavit.

POINTS IN LIMINE

[15] The Respondent raised points in limine, incorporated in his answering affidavit. They are as follows:-

Incompetent Prayers

3.1 ***The prayers being sought herein are incompetent. This is in light of the fact that I am a student with the Applicant having enrolled in the course of Business Information Technology (BIT). I am presently doing my second year and I am on the fourth (4th) semester. I have been attending classes both face to face lessons and online since the commencement of the semester. It is therefore impossible that I cannot attend classes as that will be prejudicial for my education.***

3.2 ***In order to prove that, I have been attending classes, my lecturers have been religiously emailing me assignments and tests for consideration. For ease of reference, see annexure for recently emailed school work from different lecturers for the month of July 2022 marked "A".***

[2] See Ngwane Mill (PTY) LTD v Swaziland Competition Commission (2589 of 2011) [2012] SZHC 2 (10 February 2012);

*3.3 **Furthermore, see the annexed timetable marked "B" which is a proof that I have been attending lessons. It is therefore impossible that I be interdicted from attending classes. My only desire with the Applicant is to further my education. I am presently doing five modules this semester. I therefore cannot be interdicted from attending classes. In the events the prayers are granted, same would have a negative impact in that I would be required to repeat the whole semester.***

[16] The Respondent argues that the prayers sought in the Applicant's application are incompetent. This is because he is a student of the Applicant, having enrolled in the course of Business Information Technology (BIT). He avers that he is presently doing his second year, and he is on the fourth semester. He further states that he has been attending classes both face to face lessons and online lessons since the commencement of the semester.

Matter Prematurely before Court

The Respondent has articulated his point as follows:-

4.1 It is submitted that the present matter is prematurely before court. The Applicant is well aware of the fact that I am a student with the institution. As of present, the Student Representative Council has not assumed office. Therefore I am presently running students' affairs in my capacity as the Electoral Officer (EO). See annexure **"C"**.

4.2 I am presently a democratically elected Electoral Officer. It is therefore impossible that I be prevented from executing my

duties. I further submit that the Applicant has not exhausted internal the dispute resolution process. It is therefore premature to rush and institute the present proceedings. The University would have objected to having me elected to the position of Electoral Officer wherein it felt I was not a student with the institution. Additionally, in their annexure **"L"**, the University states that they are investigating my status as a student. It is quite clear thereto that they have not concluded their investigations. It is thus prematurely to rush to court. The Applicant does not have an alternative remedy which is to run its investigations to completion and exhausting internal dispute resolution process before rushing to court.

Lack of Urgency

5.1 The urgency herein is self-created. This is in light of the fact that the Applicant is well aware of the fact that I am enrolled with the institution and I have been attending classes ever since the semester commenced. The Applicant does have an alternative remedy than to file the present application. I am presently running the students affairs as the electoral officer. I have been in direct contact with the University Management. I therefore submit that I have been engaging directly with the University on students' affairs.

5.2 The University is clear in their annexure **"L1"** that it has not concluded their investigations for my status as a student. Therefore to rush to court whilst making their investigations amounts to a self-created urgency. I submit further that there is no way wherein I can interfere with the daily business of the Applicant as I value education.

APPLICANT'S ARGUMENTS IN RESPONSE TO THE POINTS IN LIMINE

[17] The Applicant in response to the point in line in respect of the prayers being incompetent, has not offered much arguments contra. However, in it's heads of argument, the Applicant persist that it is entitled to the final interdict. The Applicant advanced it's arguments as follows:-

17.1 A final interdict effects such a final determination of rights. It is granted in order to secure a permanent cessation of an unlawful course of conduct or state of affairs. For the granting of such an order there are three requisites, all of which must be present; clear right; an act of interference; no other remedy.

17.2 In this matter the Applicant seeks to; interdict Respondent from entering its premises, interdict him from participating in any student affairs, and to have Respondent to be ordered to keep a distance of 100 meters away from Applicant's main gate, therefore it is submitted that one question to be answered is whether or not the Respondent is a student and that therefore the Applicant has a right to interdict him as submitted above.

17.3 It is submitted that the Applicant's High Flyers Manual, is a document that stipulates inter alia what the academic regulations and procedures of the institution to be applied or followed in respect to admissions/registration of students, specifically regulations 3.143 stipulates what the proof of being a registered student is, being a print out of a Course Advisory Form (CAF).

17.4 It is submitted that the Applicant is not a public body but a Company duly incorporated with limited liability, therefore it has a right to interdict any person from entering its premises as well as to interdict any person from participating in any student affairs and to have that person be ordered to keep a distance of 100 meters away from its main gate if that person is not its student.

17.5 It further submitted that Applicant is not a public body therefore it exercises an absolute discretion of who should participate in its activities and who should have access to its premises, in the Court in the case of **Sipho Cyprian Mohale v The Swaziland Medical & Dental Council and others [116/2018] [2018] SZHC 16 (16 February 2018), at paragraph 32** the Court quoted Professor Sir William Wade who stated that **"the powers of public authorities are ....essentially different from those of private persons .....a private person has an absolute power to allow whom he likes to use land"**.

17.6 It is submitted that once a person is a registered student that is when a contract is conclude between the student and Applicant, the effect thereof is that the person can enjoy rights stipulated in the High Flyers Manual i.e those that are stipulated in regulation 7.0, and the student will also have obligations and rules and regulations to comply with of the Applicant i.e adhere to regulations 8.0 and 9.0 of the said manual.

COURT'S ANALYSIS

[18] It is therefore necessary for the court to consider the nature of the prayers sought by the Applicant, to ascertain if indeed they are incompetent.

[19] Other than the prayers relating to urgency, in essence Applicant seeks the following prayers;

> **3.1** ***Interdicting the Respondent from entering the Applicant's premises.***
>
> ***3.2*** ***Further ordering and directing the Respondent to refrain from participating in any student affairs and Respondent activities.***
>
> ***3.3*** ***Further ordering and directing the Respondent to keep a distance of 100 meters away from the Applicant's main gate;***
>
> ***3.4*** ***That prayers 3.1, 3.2 and 3.3 operate up until October 2022, when Applicant is eligible to register as a student and he becomes a registered student of Applicant;***

[20] I will begin by interrogating the relief sought in 3.1. The Applicant seeks to interdict the Respondent from entering the Applicant's premises. I comprehend the Applicant's argument to be that this relief of an interdict is incompetent to the Applicant to seek, as the Respondent has a right enter the Applicant's premises because he is a registered student.

[21] Respondent avers that he is enrolled with the Applicant and that he is doing his second year. He has also been attending classes this semester. He also argues further that his lecturers have been religiously emailing him assignments and tests. To prove that, Respondent has annexed a trail of emails relating to school work that he has received from different lecturers, for the month of July 2022. The Applicant has not denied that the emails originate from it's academic staff, being the lecturers. The lecturers themselves have not filed supporting affidavits to refute the Respondents assertions. The Applicant in it's reply also paint a picture that the Respondent did not sign the attendance register on some dates. I fail to appreciate how this proves that the Respondent is not a student. It is not uncommon for students to absent themselves from class. But that does not mean they are not registered students.

[22] The consideration of the annexures annexed to the Respondent's papers reflect the following;

22.1 They were emailed to the Respondent between the 11th – 21st of July 2022.

22.2 The content reflected in annexure **"A"** contains a subject heading reflecting that one Xolile Mnisi – Sacolo sent an email with a heading **new material unit 3**….." Senetiso, Xolile Mnisi posted…."

[23] The court can reasonable take judicial notice that Senetiso is one of the recipients referred to in annexure **"A"**. The Respondent before court is also Senetiso. The Applicant has not denied in it's replying affidavit that the Senetiso referred to in the trail of emails, is not the Senetiso who is the Respondent before court. The Applicant has also not refuted that Xolile Mnisi – Sacolo, is one of the lecturers employed by the University.

[24] I now turn to the contents of the Applicant's application to assess on what basis it is alleged that the Respondent is not registered student for the current semester. What is perplexing though, is that the Applicant's director in her founding affidavit, acknowledges that the Respondent was the appointed electoral member for the student body of the Applicant[3]. It then boggles one's mind, as to how can a person who is not registered as a student be appointed and recognized as an electoral member of the students?. It has not been denied by the Applicant that at some point, the Applicant recognized and dealt with the Respondent in his capacity as the electoral officer.

[25] In paragraph 9, Applicant states as follows:-

> ***"After the 7th of July the Applicant discovered that at the time of Respondent's involvement in the conducts of 7th of July 2022, the Respondent had not registered with the Applicant for that semester, therefore he was not considered a student by Applicant. May I state that the modules of the Respondent has not completed for the academic year is only open for registration around October 2022, therefore the Respondent is only legible to register for the outstanding module around October 2022".***

[26] In as much as part of this above paragraph is not comprehensible, especially where the deponent states *that "the module of the Respondent's student has not completed for the academic year is only open for registration for around October 2022"*. I honestly do not understand the import of this averment. The other question that arises is that the Applicant has not taken the court into it's confidence by supporting the bold averment that it makes against the Respondent. Especially to the effected that he is not a registered student. It can reasonably be assumed that the Applicant being an academic institution, has records to show which students are registered with it for this semester. It is expected that the Applicant should have a record of students registered with

[3] See paragraph 3 of the founding affidavit at page 8 of the book of pleadings.

it for each course this semester. The Applicant could have simply annexed the list of students in this program to demonstrate that the Respondent is not registered for this semester. The court would then be able to see that the Respondent's name is not listed amongst those registered. In the circumstances, the Applicant has not placed sufficient material before court to support it's assertion that the Respondent is not registered with it. There is also the question of what internal active steps were taken by the Applicant to correct the anomaly of a student who attends classes, serves as an electoral officer of the student body whilst not being registered as a student.

[27] On the other hand, to the Respondent's credibility, he has adequately demonstrated that he is considered and regarded as a student by the Applicant's own lecturers. They include him in emails that they send to other students relating to the course that he is doing. There is no reason why the court should not consider this act as part of the teaching methods or process employed by the lecturers. The Respondent is evidently a recipient of this learning process. Knowledge is being imparted on him by the Applicant's lecturers.

[28] Having said so, the question now would be, if the Respondent is recognized as a student by the Applicant's own lecturers, what would be the basis of the Applicant to seek that he be interdicted from entering the Applicant's premises. As a student, he is entitled and expected to enter the campus for purposes of learning.

[29] This then leads me to consider whether the Applicant has satisfied the requirements for the granting of an interdict, especially a final interdict as it has been prayed for. One of the requirements for the granting of a final interdict, is a clear right[4]. The Applicant premises it's prayer for an interdict

[4] See the case of Setlogelo Vs Setlogelo 1914 AD 221at 227 see also Herbstein and Vanwinsen's; The Civil Practise of the Supreme Court of South Africa, 4th Addition, Jutta and Company at page 1064 - 1065; "in order to succeed in obtaining a final interdict, whether it be prohibitory or mandatory an Applicant must establish; a - a clear right; b.

on that he is not a fully registered student. Yet the Respondent has demonstrated that he is a student. This then clouds the right of the Applicant to the order sought. On what basis would the Applicant be said to have complied with the requirement of a clear right, when that right has been put to question by the Respondent. In as much as the issue of a clear right has not been raised as a point of law by the Respondent. The court must be satisfied that all the requirements for the relief sought have been satisfied. It cannot argued that the Applicant has a clear right to interdict the Respondent from entering it's premises on the ground that he is not a registered student, when it's own lectures dispatch to him learning material. There is definitely merit in the legal point raised by the Respondent pertaining to the competency of the relief sought by the Applicant.

[30] The Applicant can also not rely on the argument that it is the owner of the premises. In as much as it may be so, it is in the business of being a University. It is expected that students will enter and exit it's campus for learning purposes. How competent then is a pray to interdict some of them.

Failure to exhaust internal remedies

[31] The Respondent has also raised another legal issue, being that the Applicant has jumped the gun by coming to court on a certificate of urgency without exhausting the internal remedies that are obtainable within the Applicant's own processes. The Respondent argues that the rules of the University have remedies that could have been resorted to before it could approach this court.

[32] This point in a way, is related to what an Applicant must establish before it is granted the relief of a final interdict. What is relevant amongst those

---

an injury actually committed or reasonable apprehended; and – c. the absence of similar protection by any other ordinary remedy.

requirements, is the absence of a similar protection by any other ordinary remedy[5]. If I am to consider the Respondent's legal objection, then it is necessary that I apply one of the requirements for the granting of an interdict, even before we get to the exhaustion of internal remedies. If it is correct that the internal remedies exist, was it then competent for the Applicant to rush to court to seek an interdict, when there is in existence a similar protection in the internal rules of the Applicant?. The answer is no. If the Applicant has not exhausted the internal remedies, indirectly it means it has also failed to satisfy one the requirements of a final interdict as stated by **Herbstein and Van Winsen** (supra) which is the absence of a similar protection by any other remedy.

[33] Again, this legal point has merit and it must succeed.

CONCLUSION

[34] It is not necessary to consider the other legal points. On the basis of the two legal points that I have considered, the Applicant's application cannot succeed. For the aforegoing reasons, I uphold the points and the Applicant's application is hereby dismissed.

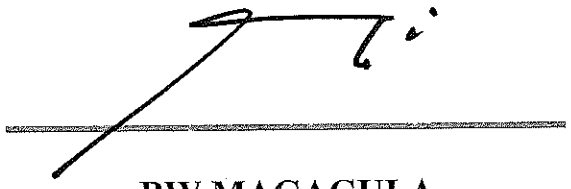
[35] It is the general rule that costs follow the event. I am not inclined to depart from this general rule. The Applicant will therefore be ordered to pay costs of suit.

[5] See: JR v TR and Another (2021 /21609) [2022] ZAGPJHC 392 (13June 2022); City of Johannesburg v Nair and Another (4532 of 2020) [2021] ZAGP JHC 414 (27October 2021). The court will not, in general, grant an interdict when the Applicant can obtain adequate redress in some other form of relief – C.B. Prest, The Law and Practice of Interdicts (1993) at page 45 and the cases cited threat.

ORDER

a) The Applicant's application is hereby dismissed.

b) The Applicant to pay costs of suit.



BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For the Applicant:	Miss Q. Dlamini from Musa M. Sibandze Attorneys
For the Respondent:	Mr S. Zwane from Sithole & Magagula Attorneys