



IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION – BHISHO]

CASE NO.: 330/2023

In the matter between:-

LUBABALO OSCAR MABUYANE

APPLICANT

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

1ST RESPONDENT

SPECIAL INVESTIGATING UNIT

2ND RESPONDENT

UNIVERSITY OF FORT HARE

3RD RESPONDENT

JUDGMENT

NORMAN J:

[1] On 31 May 2023, the applicant, who is the Premier for the Eastern Cape Province, brought an application against the President of the Republic of South Africa ('the President'), the Special Investigating Unit ('the SIU') and the University of Fort Hare ('the university') seeking, *inter alia*, the following orders; in Part A an order:

- "1. That the applicant's non-compliance with the forms of service and time periods prescribed in the Uniform Rules of Court be condoned and that leave be

granted for the relief sought under Part A of this application to be heard on an urgent basis in terms of Uniform Rule 6(12).

2. *That the second respondent is interdicted from implementing Proclamation 84 of 2022 published in Government Gazette No. 47199 on 5 August 2022 pending the finalization of Part B of the application.*
3. *That the costs of this application be paid by the respondents that oppose the relief sought in Part A of this application.*
4. *That the applicant be granted such further or alternative relief as this court considers appropriate."*

[2] In Part B of the application he sought:

- "1. *That the time period for instituting judicial review proceedings in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) is extended in terms of section 9(1)(b) of PAJA in relation to the decision by the first respondent, the President of the Republic of South Africa to refer various allegations concerning governance and operations at the University of Fort Hare for investigation by the second respondent under Proclamation 84 of 2022, published in Government Gazette No. 47199 on 5 August 2022(Proclamation)".*
2. *That the first respondent's decision to issue the Proclamation(and the Proclamation) is declared unlawful and invalid.*
3. *That the Proclamation is set aside.*
4. *That it is declared that the second respondent's investigation of the applicant in terms of the Proclamation is unconstitutional and invalid.*
5. *That the costs of this application be paid by the respondents that oppose the relief sought in Part B of this application.*
6. *That applicant be granted such further or alternative relief as this court considers appropriate."*

[3] On 8 June 2023, the applicant amended its notice of motion in respect of both Part A and Part B and he sought the following relief:

"In respect of Part A by replacing paragraph 2:

1. *The SIU is interdicted from enforcing Proclamation 84 of 2022, published in Government Gazette 47199 on 5 August 2022 insofar as the SIU has taken steps or intends to take steps that are directed at the Applicant, pending the determination of Part B.*

"In respect of Part B by replacing paragraphs 2,3 and 4 with the following:

- 2.1 *It is declared that the conduct of SIU in its investigation of the Applicant is an abuse, unconstitutional and is reviewed and set aside.*
- 2.2 *It is declared that the SIU's decision to embark on an investigation against the Applicant is ultra vires the terms of the Proclamation and is reviewed and set aside.*
- 2.3 *The Applicant reserves the rights to supplement the notice upon receipt of the Rule 53 record."*

[4] It is common cause that when the amended notice of motion and affidavit in support thereof were delivered on 8 June 2023, that was the day upon which all the respondents were expected to file their answering affidavits in respect of the original notice of motion. At the hearing of the matter and after the applicant's counsel, Ngcukaitobi SC had completed his argument, Counsel for the President, Gabriel SC, invited the applicant to withdraw the application against the President. That invitation was accepted and this court accordingly granted the applicant leave to withdraw the application against the President and tendered his costs.

[5] Central to the issues in this matter is the Proclamation. It is important to quote its contents for ease of reference:

"SPECIAL INVESTIGATING UNITS AND SPECIAL TRIBUNALS ACT, 1996: REFERRAL OF MATTERS TO EXISTING SPECIAL INVESTIGATING UNIT: UNIVERSITY OF FORT HARE

WHEREAS as allegations as contemplated in section 2(2) of the Special Investigating Unit and Special Tribunals Act, 1996 (Act No. 74 of 1996) (hereinafter referred to as "the Act"), have been made in respect of the affairs of the University of Fort Hare, situated in the Eastern Cape Province (hereinafter referred to as "the University");

AND WHEREAS the University or the State may have suffered losses that may be recovered;

AND WHEREAS I deem it necessary that the said allegations should be investigated and civil proceedings emanating from such investigation should be adjudicated upon;

NOW, THEREFORE, I hereby, under section 2(1) of the Act, refer the matters mentioned in the Schedule, in respect of the University, for investigation to the Special Investigating Unit established by Proclamation No R118 of 31 July 2001 and determine that, for the purposes of the investigation of the matters, the terms of reference of the Special Investigating Unit are to investigate as contemplated in the Act, any alleged –

- (a) serious maladministration in connection with the affairs of the University;*
- (b) improper or unlawful conduct by officials or employees of the University;*
- (c) unlawful appropriation or expenditure of public money or property;*
- (d) unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;*
- (e) intentional or negligent loss of public money or damage to property;*
- (f) offence referred to in Parts 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), and which offences were committed in connection with the affairs of the University; or*
- (g) unlawful or improper conduct by any person which has caused or may cause serious harm to the interest of the public or any category thereof,*

which took place between 1 November 2012 and the date of publication of this Proclamation or which took place prior to 1 November 2012 or after the date of publication of this Proclamation, but is relevant to, connected with, incidental or ancillary to the matters mentioned in the Schedule or involve the same persons, entities or contracts investigated under authority of this Proclamation, and to exercise or perform all functions and powers assigned to or conferred upon

the said Special Investigating Unit by the Act, including the recovery of any losses suffered by the University or the State, in relation to the said matters in the Schedule.

SCHEDULE

1. *The procurement of, or contracting for goods, works or services by, or on behalf of, the University and payments made in respect thereof in a manner that was -*
 - (a) *not fair, competitive, transparent, equitable or cost-effective; or*
 - (b) *contrary to applicable –*
 - (i) *legislation;*
 - (ii) *manuals, guidelines, practice notes, circulars or instructions issued by the National Treasury; or*
 - (iii) *manuals, policies, procedures, prescripts, instructions or practices of, or applicable to the University,*

and any related unauthorized, irregular or fruitless and wasteful expenditure incurred by the University in relation to –

- (aa) *the appointment of a service provider for cleaning and gardening services during the period 1 November 2012 to 31 July 2019;*
 - (bb) *the leasing of student accommodation since 1 July 2013;*
 - (cc) *the appointment of a service provider for the maintenance and repair of air conditioning systems in terms of bid reference UFH-SCM04/2018; and*
 - (dd) *the collusion between officials of the University and suppliers or service providers in which such officials held direct or indirect interests.*
2. *Maladministration in the affairs of the University's Faculty of Public Administration in relation to the –*
 - (a) *Awarding of honours degrees;*
 - (b) *management of funds;*
 - (c) *sourcing of public servants for study into various Faculty programmes by an individual for personal gain.*
3. *Any unlawful or improper conduct by –*
 - (a) *officials or employees of the University;*
 - (b) *suppliers or service providers of the University; or*
 - (c) *any other person or entity,*

in relation to the allegations set out in paragraphs 1 and 2 of this Schedule."

The conduct of the SIU complained of

- [6] In his supplementary affidavit in support of the amended notice of motion, the applicant, stated that upon reflection, he realized that although the primary legal argument remains that the Proclamation is unconstitutional he had been advised to narrow the scope of the relief. The reason for that is because he supports the investigation into corruption and maladministration at the university. The Proclamation never envisaged that he would turn to be a subject

of the investigation. It appears that there is a malicious plan to cause him grave embarrassment. When an investigation is an abuse, it must be put to an end. He tendered his full cooperation with the investigation. He regarded the notice issued by the SIU as draconian. In his view, there was no need for the SIU to subpoena him because any failure to comply with that subpoena carried with it criminal consequences. The subpoena created a false impression that he was the culprit and was unwilling to cooperate. Whilst these proceedings were pending before court, the SIU sought a search and seizure warrant against him directed at his private residence. The search and seizure warrants in respect of proceedings which are being challenged in court, amount to constructive contempt of the court. It shows bad faith by the SIU because his house is entirely irrelevant to the issue being investigated against him. These warrants were sought for an ulterior purpose, he contends.

[7] He listed the documents that the SIU requested from him being:

- "1. Copy of the identity document,
2. The original copy of your Bachelor's degree Certificate from an institution of higher learning, if any,
3. The original copy of your Honour's degree Certificate from an institution of higher learning, if any,
4. Any other tertiary qualification(s) that you are in possession thereof,
5. The original copy of your Recognition of Prior Learning (RPL) assessment, if any,
6. A copy of confirmation of approval of the RPL relating to yourself by the Senate of the University of Fort Hare (UFH) to you to study, if any,
7. The original copy of your proposal, which is a requirement for a study towards a Master's degree by research,
8. Any other information which in your view, is relevant and necessary for the purposes of the hearing."

[8] The applicant alleges that he does not object to produce these documents in a lawful investigation. However, he objects to the unconstitutional methods of

investigation employed by the SIU. He offers his full cooperation if his constitutional rights and dignity and equality were to be respected. He contends that the President in issuing the Proclamation excluded the registration into the Master's programme as part of the alleged 'maladministration'. The only way he became a focal point of these investigation is the deliberate strategy of the SIU to make the whole investigations about him, he stated. The SIU is trying to extend the ambit of the Proclamation to include a Master's programme when the Proclamation makes reference only to the Honour's programme.

SIU's case

- [9] In its answering affidavits the SIU stated that its investigations upon the Proclamation having been issued revealed, amongst others, maladministration in the affairs of university's faculty of Public Administration. The SIU found evidence which *prima facie* showed that some students were irregularly registered into the Master's degree programme without satisfying the prerequisite of having an Honour's degree . That had a ripple effect on how students were allowed to irregularly register and be admitted to pursue Masters and/or Doctoral qualifications. It also found evidence which *prima facie* showed that a team of university officials and researchers produced a thesis on behalf of the applicant who was pursuing a Master's and Doctorate qualifications at the relevant time without having been awarded an Honour's degree or its equivalent.
- [10] It also appeared to the SIU that the applicant was irregularly registered and admitted for a Master's degree without satisfying the prerequisite of having an Honour's degree. It further appeared that the applicant was already enrolled for

a PhD degree at the time he registered for the Master's degree. The SIU also emphasized that the applicant's supervisor was Professor Ijeoma who was a key person of interest in the SIU's investigation and was the former head of the university's department of public administration. The SIU also stated that: *'The evidence obtained by the SIU to date in its investigations concerning maladministration in the affairs of the University's faculty of public administration prima facie implicates the applicant in the commission of fraud, forgery and uttering'*.

- [11] The SIU contended that there was no case made out for the interdict and for the review. It asked for the dismissal of the application with costs.

Professor Edwin Chikata Ijeoma's affidavit

- [12] On the date of the hearing, the applicant relied on a supporting affidavit deposed to by Professor Ijeoma. Professor Ijeoma outlined the process of registering students for a Master's programme without them possessing an Honour's degree. He stated that one of the requirements is that an employed applicant with no Honour's degree must have extensive work experience post their undergraduate degree. This process is governed by the recognition of prior learning policy (RPL policy) of the university , which he attached.

- [13] He contends that he was chairing the selection committee when the applicant applied. The committee comprised of senior academics and senior administrators from the department of public administration. The selection committee at the Bhishe campus did not deal with the admission but merely selected the applicants from a list of those that applied. That, according to him was the extent of his involvement. Other processes of registration were

attended to by the faculty and the registrar's office. He, however, was the supervisor of the applicant in his Master's programme. He stated that in addition to the requirements to be followed, the RPL policy was applied, in the case of the applicant and he directed the court to the applicant's work experience reflected on the applicant's curriculum vitae attached to his replying affidavit.

- [14] He denied that he wrote any research proposal for the applicant because he was busy supervising other students. He also confirmed that the applicant was deregistered for the program on 15 March 2021 based on the reasons that he had not met the minimum requirements for admission. He contends that the deregistration of the applicant was not correct. He stated that there were no irregularities with the applicant's application otherwise they would not have admitted him into the Master's programme. Professor Ijeoma focused on his role as a Professor at the University and as the supervisor of the applicant.

University's case

- [15] The Vice- Chancellor of the university, Mr Sakhela Buhlungu deposed to the answering affidavit. He stated that the university had received reports of misconduct, mismanagement of funds and corruption submitted by staff, students and persons outside the university. Due to the enormity of those allegations and lack of capacity on the part of the university, it engaged forensic firms, such as Price Waterhouse Coopers and Horizon Forensics to conduct the investigations. Of relevance to this application are allegations that certain students were registered without meeting the minimum requirements. There was a facilitation of public servants into the public administration programme under Professor Ijeoma. The university had taken disciplinary measures

against some of its employees. He mentioned that the university lost millions of rands as a result of rampant corruption at the university. He alluded to a criminal network operating within the university. He contended that the scope of the Proclamation must be extended to any person involved in the maladministration of the university, and not be limited to staff only.

- [16] The university supported the investigation of the applicant because it alleged that he had been complicit in the maladministration that took place within the department of Public Administration. He contends that the applicant is one of the students who were admitted to the Master's programme without meeting the requirements. He stated that it appeared that the applicant was a witness in the investigation. During the course of the investigation the university discovered that there is prima facie evidence of the applicant's complicity in having his research proposal for his Master's degree prepared for him by post-doctoral students under Professor Ijeoma. He contended that there was no legal basis for the interdict because there were no prospects of success in the review application. The university asked for a punitive costs order against the applicant. In reply, the applicant denied any involvement in commission of fraud, forgery and uttering offences. He alleged that the SIU was making baseless claims without providing a factual basis for those claims. He regarded the conduct of the SIU in this regard as malicious and reckless. He contended that that conduct was aimed at impugning his reputation. He denied the allegations that his research proposal was prepared by other people. He confirmed that he prepared his proposal with the assistance of his supervisor.

Applicant's legal submissions

- [17] Mr Ngcukaitobi SC submitted that the Proclamation excluded the Master's programme from the scope of the investigation. He submitted that in interpreting the Proclamation the court must find that because the Honour's programme is expressly included, the exclusion of the Master's programme must be found to be outside the scope of the investigation. In this regard he made reference to the documentation that was placed before the President prior to him listing matters under investigation and submitted that those documents had included the Master's programme but the President decided not to include it.
- [18] In attacking the argument by the SIU that the Master's programme is 'incidental' to the Honour's programme. His submission was that the fact that the SIU makes reference to 'incidental' is indicative of the fact that it is aware that the Master's programme is not included in the Proclamation. Therefore it ought not to investigate it. He submitted that what the SIU is doing is to try to extend the ambit of its investigation and by so doing it is acting unlawfully. In this regard he relied on, *inter alia*, ***Special Investigating Unit v Nadasen***¹.
- [19] He submitted that the notice from the SIU to the applicant raised, two questions, whether the applicant is being regarded as a witness, or , whether he is a subject of the investigation. He submitted that even if he was initially regarded as a witness but because they allege now that the applicant's complicity continues he has to be dealt with expeditiously, according to the response of Professor Buhlungu.

¹ 2002 (1) SA 605 (SCA)

[20] Mr Ngcukaitobi submitted that once the SIU came across the evidence that suggested impropriety on the part of the applicant they were not entitled to expand the scope of the Proclamation on their own, they ought to have approached the President to include the Master's programme in the Proclamation. In addressing the fact that it is the applicant himself who first approached the SIU, his submission was that his conduct is not an answer to the *ultra vires* point because they cannot be granted the power by the client when such power is not contained in the Proclamation itself. He submitted that the applicant is entitled to interdict the SIU from continuing with an unlawful investigation. In this regard, he submitted that the applicant was entitled not to subject himself to an unlawful process. He relied on ***President of the Republic of South Africa v Jacob Zuma***², with specific reference to paragraph 17, for the submission that the critical harm concerns a fundamental constitutionally guaranteed right to personal freedom.

[21] He submitted that the SIU contends that it is not investigating individuals. Mr Ngcukaitobi submitted that the fact that the SIU invoked the provisions of section 5 of the SIU Act when seeking documents from the applicant demonstrates that it was conscious of the fact that it did not have authority over the applicant. It decided that it would, in any event, invoke the provisions of section 5(2) in a matter where it did not have jurisdiction. He submitted that section 5(2) does not create jurisdiction, it only applies where the SIU already has jurisdiction. He submitted that the university and the SIU cannot produce

² 2023 (1) SACR 610 (GJ) at para 17

evidence that justifies on a *prima facie* basis , the wrong that the applicant has done. He submitted that Professor Ijeoma is an objective witness and he has confirmed that the applicant's registration with the university for the Master's programme was proper.

[22] He contended that the investigation by its very nature is irrational because although the applicant had been admitted to the programme his registration was terminated in an improper manner. He also submitted that the SIU is abusing its power for its ulterior ends . It is not doing it to achieve any of the objects that are contained in the Proclamation, he argued. He submitted that the extension of the scope by the investigators contrary to the Proclamation constitutes abuse. In this regard, he relied on the *Thint (Pty) Ltd v National Director of Public Prosecutions : Zuma v National Director of Public Prosecutions*³. He further submitted that the fact that whilst the SIU was aware that there was this pending application it attempted to get a search warrant against the applicant, also demonstrates , the abuse of power.

[23] He submitted that there is a *prima facie* right to the interdict because the Proclamation does not cover the Master's programme and that the actions of the SIU are irrational. He further submitted that if the investigation were to proceed the applicant would suffer irreparable harm because there is a threat of a criminal sanction. He submitted that once there is a threat of a criminal sanction then there is harm.

[24] He submitted that the irreparable harm ,is in his client, having to subject himself and appear in an illegal process. If he does so that would affect his freedom to

³ Thint (Pty)Ltd v National Director of Public Prosecutions ; Zuma v National Director of Public Prosecutions 2009 (1) SA 1 (CC)

privacy and once he is subjected to an unlawful action that cannot be undone. On the issue of costs he submitted that the applicant should benefit from the Biowatch rule because this is a constitutional matter.

- [25] Ms Gabriel SC who appeared for the President , as aforementioned, invited the applicant to withdraw the application, once that was accepted, she was excused from further participation in the proceedings.

SIU's legal submissions

- [26] Mr Marcus SC , appearing on behalf of the SIU , in his opening address referred to the words of Lord Denning, in **Moran v Lloyd's**⁴ , where he stated:

"To my mind the law should not permit any such tactics. They should be stopped at the outset. It is no good for the tactician to appeal to 'rules of natural justice'. They have no application to a preliminary enquiry of this kind. The inquiry is made with a view to seeing whether there is a charge to be made. It does not decide anything in the least. It does not do anything which adversely affects the man concerned or prejudices him in any way. If there is , there will be a hearing, in which an impartial body will look into the rights and wrongs of the case. In all such cases, all that is necessary is that those who are holding the preliminary inquiry should be honest men- acting in good faith- doing their best to come to the right decision."

- [27] He submitted that there are four overarching principles, namely, first , that an interim interdict restraining the exercise of a statutory power is exceptional. In this regard, he referred to the OUTA judgment⁵. He submitted that , second, the separation of powers is an even vital component and it must be considered when a test for an interim interdict is to be applied. Third, the Constitutional Court has warned of the separation of powers harm in the OUTA judgment because a restraining order will intrude on the powers of the other statutory bodies well ahead of the applicant's case. Fourth, the Constitutional Court has

⁴ Moran v Lloyd's (A statutory Body) [1981] 1 Lloyd's Reports 423 (CA) at 427

⁵⁵ National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC) at para 50

warned that an interdict in these circumstances must only be granted in the clearest of cases. He submitted that not one of the requirements are present in the present case.

[28] He further submitted that even if the applicant had met all the requirements for an interdict this court still has the power to refuse to grant it. If the applicant fails on any of the requirements, the court still retains a discretion. He argued that the applicant has subjected the parties to an abusive process where there was an urgent time table and a supplementary case made an hour before the answering affidavits were to be delivered. There were unsubstantiated allegations of bad faith.

[29] On the issue of complaint by the applicant that there is private residence that was going to be subjected to a search. He submitted that the SIU has those powers, it is part and parcel of the powers that had been granted to it as one of the means with which they can achieve what is sought to be achieved in an investigation. However, the search warrants are always subject to judicial oversight and in this case although it was sought, it was refused. When it sought the warrant, the SIU out of respect for the process that was pending had undertaken that it would place everything that it had recovered under seal, pending the outcome of this application. In any event, he submitted that, this case is not about the validity of the search warrant.

[30] He submitted that new argument was advanced on behalf of the applicant which was based on irrational conduct on the part of the SIU in pursuing the applicant. He submitted that this was a case where the investigation was crucial and that the applicant had no right to be heard before the investigation was commenced

with. In answer to the submissions relating to the exclusion of the Master's programme from the Proclamation, he submitted that the Proclamation specifically includes matters that are relevant to, connected to, ancillary to matters mentioned in the schedule. He submitted that the allegations of impropriety do not simply relate to the applicant alone, they involve more people and it would be impossible for the registrar or the Head of Department to be able to investigate without the assistance of the SIU.

[31] In this case, because the applicant claims innocence there is nothing to fear, he argued. He submitted that what the applicant is trying to do is to stop the investigation at all costs. The documents that were requested from the applicant were not intrusive documents and although he had undertaken to produce them, he failed to do so. He even failed to attach them to this application except attaching some documents in reply. He further submitted that applicant seems to believe that if he has a right to a review that right then entitled him to an interdict. He submitted that is not a *prima facie* right. He has to show an injury that has occurred that is outside the review process. In this regard he relied on *Simelane NO v Seven- Eleven Corporation SA (Pty) Ltd*.⁶

[32] He submitted that maladministration extended beyond just the management of funds but extended to the awarding of degrees and the Proclamation had made it clear that all other matters that are relevant to those contained in the schedule would be applicable. In this regard he relied on the *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro – Tech Systems (Pty) Ltd*⁷. The

⁶ [2003] 1 All SA 82 (SCA) paras 54 and 55

⁷ [2010] ZACC 21

applicant has not been questioned at all and none of his rights have been infringed and he is fully protected and on this basis no *prima facie* right has been established.

- [33] In dealing with balance of convenience he submitted that for as long as the applicant's case is immunized from the investigation, there will always be suspicion and reputational risk to the university and that prejudice is ongoing. In addressing the alternative remedies he relied on the *Simelane decision*, *supra*, that prejudice can be fully cured at the tribunal. He submitted that a legality review may be raised at the special tribunal because it is capable of entertaining a legality review and on this basis he submitted that an interdict must fail because there are available remedies to the applicant.

University's legal submissions

- [34] Mr Swartbooi SC appeared on behalf of the university. He submitted that the very scope of the Proclamation is fairly wide. Although the submissions made by the applicant suggest that the investigation is aimed at him, that is not so because clearly from the reports that have been filed, there are numerous people that are involved who are being investigated. In addressing the contents of the affidavit deposed to by Professor Ijeoma, he submitted that Professor Ijeoma puts certain matters raised by the university in dispute. However, the court should bear in mind that Professor Ijeoma is a subject of the investigation. He submitted that there are massive disputes of fact that had been raised by the respondents and that the court must apply the *Plascon Evans* rule in favour of the respondents.

- [35] In addressing the balance of convenience he submitted that the applicant does not deal with the prejudice that the university suffers and continues to suffer. The university is in a desperate struggle to curb corruption and to have those who are involved in it prosecuted as soon as possible. It relies on the SIU because of its extra ordinary powers of investigation. It preferred that these matters be investigated by the SIU as the university does not have capacity to do so on its own. He submitted that after the forensic report was obtained by the university it became clear that there were series of emails that indicated complicity of the applicant in maladministration. In this regard the applicant does not deal with those but simply denies them.
- [36] The university also contends that to the extent that the applicant has been complicit in the maladministration in the university's department of Public Administration, the scope of the Proclamation permits the SIU to investigate him and that cannot constitute abuse of power or be unconstitutional. It also contends that the fact that the investigation may reveal that the applicant is also implicated in a fraudulent process that ended up with him being admitted as a Master's student follows from the investigation into the maladministration of the university. In this regard it contends that the balance of convenience favours the university. It also contends that the scope of the investigation authorized by the Proclamation is to investigate maladministration on the part of the university and any unlawful and improper conduct by any person which caused or may cause serious harm to the interests of the public , falls within the ambit of the Proclamation.
- [37] It contends that there is email exchange which involves Professor Ijeoma, his assistant Ms Candyce Dawes and the post graduate students who assisted the

applicant in providing him with research topics to consider and prepare and finalize drafts of his research proposals with no meaningful input from the applicant. This according to the university constitutes unethical conduct which is unlawful. It also contends that the fact that the applicant was complicit in this email exchange falls within the general scope of the Proclamation, namely, to investigate unlawful or improper conduct of any person or entity in relation to the maladministration in the affairs of the university's faculty of Public Administration.

[38] In reply, Mr Ngcukaitobi distinguished the Simelane judgment from the facts of this case. He submitted that this matter is not about separation of powers at all. The question is whether the Proclamation authorizes this particular investigation and whether the applicant's rights have been violated. He referred to the decision of *Eskom v Vaal River*⁸ which judgment also deals with OUTA. He submitted that the Proclamation triggers the right to privacy which is about whether or not the Proclamation entitled the SIU to look at how the applicant obtained his Master's degree. He submitted that the SIU is not entitled to investigate. He also referred the court to a judgment of Dodson J in *Hlatshwayo & Another v Hein*⁹ where the court dealt with functions that were expressly conferred.

[39] In reply to the submissions made by the university he submitted that the President was aware of the request from the university but it was intentional that in the ultimate product, he excluded the Master's programme. He submitted that there is no real defence to that argument from the respondents.

⁸ 2023 (5) BCLR 527 at paras 299 – 304.

⁹ 1998 (1) BCLR 123 at para 5.

He submitted that there are other arms of government that can investigate the applicant. He may be referred to the National Director of Public Prosecutions or the Public Protector's office for investigations. He submitted that the pursuit of the higher goal must be lawful.

- [40] He submitted that although it was submitted on behalf of the SIU that interdicts are about interdicting future conduct, the fact that there were search warrants and other search warrants on the way and therefore that, too, should be interdicted. That is the reason for the interdict. He submitted that if the court is not inclined to give the applicant the benefit of the Biowatch rule, this is a case where each party is to bear its own costs or simply no order as to costs should be made.

Discussion

Urgency

- [41] The facts advanced by the applicant that render the matter urgent can be summarized as follows: He alleged that he found out about his inclusion in the ambit of the investigation on 9 May 2023 when he received a letter from the SIU. He then raised the issue about being heard by the SIU before the investigation went forward. He was informed that he would be afforded an opportunity to meet the officials of the SIU on 7 June 2023.
- [42] On 22 May 2023 his attorneys wrote to the SIU and informed it that he considered the Proclamation to be unlawful. His attorneys also requested that the SIU provide him with information about certain matters, namely ,copies of the source documents, which served before the President before he issued the Proclamation, a copy of a motivation for the Proclamation, a copy of any SIU

reports which include the applicant's name that the SIU may have sent to the President's office in relation to the investigation, any other information that in the SIU's view would be relevant to the allegations and investigations undertaken by it against the applicant.

- [43] The SIU was given until 26 May 2023 to respond to the letter failing which legal proceedings would be instituted where the Proclamation would be challenged including the SIU's unlawful and unconstitutional investigations.
- [44] On 30 May 2023, the SIU responded and it, amongst others, disputed the issues raised about the legality of the Proclamation. It indicated its attitude that it would persist in the investigation. On the same day, 30 May 2023, the SIU sent a notice requesting the applicant to appear before it at its offices. The applicant contends that it is that letter that confirmed that he was part of the investigation which was being conducted in terms of the Proclamation. He then brought this application.
- [45] He contends that he has not delayed in bringing the application. He acted speedily as soon as it appeared to him that his rights were under threat. He contends that he afforded the respondents sufficient time to respond to the application.
- [46] All the respondents objected to the urgent time frames that were imposed on them by the applicant where the challenge related, *inter alia*, to a Proclamation that has been in existence since 2022. They contend that the urgency was self-created. However, it is common cause that the correspondence and interactions between the SIU and the applicant took place on the dates stated by both parties. It is also not in dispute that prior to the issuing of the notice the

applicant co- operated with the investigation. In fact the university confirmed that at the beginning of the investigation the applicant was a witness.

[47] Urgency is provided for in rule 6 (12) of the Uniform Rules of Court. An applicant is expected to set out facts which render the matter urgent. In our courts urgency leads to truncation of the time period allowed in terms of the rules for filing of papers. It may be inconvenient to a respondent party because of the shorter time frames. However, the overall consideration is whether or not an applicant has shown that the matter is so urgent that he will not otherwise be afforded substantial redress at a hearing in due course.¹⁰ The applicant alleged in the founding affidavit that the notice issued by the SIU bore a threat of criminal consequences. The attempt to obtain a search and seizure warrant , on its own, is a matter that calls for urgent attention. Most importantly, where an allegation of an investigation that is allegedly carried out without authority, is made, it is in the interests of justice to entertain such a matter on an urgent basis.

[48] The argument about the Proclamation having been in existence since 2022 loses sight of the fact that the interaction that the applicant had with the SIU revealed only on 30 May 2023 that his registration into the Master's programme was under investigation. I am satisfied that the urgency was not self – created as the applicant explained the steps he took as soon as he realized that the investigation was directed at him.

Prima facie right

¹⁰ Luna Meubel Vervaardigers(Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers) 1977 (4) SA 135 (W) at 137 F

[49] Applicant contends that his right to privacy is under threat due to the attempt by the SIU to search his home. The SIU admits the attempt to obtain a search warrant but denies that the search was going to be at the applicant's home. It doesn't indicate where it was going to be . In this case the applicant brought the review application and seeks an interdict pending finalization of that review. He has demonstrated that he has good prospects of success on review¹¹. The SIU and the university contend that he has no right to be immunized from an investigation. In this case the applicant contends that the SIU is acting outside the powers conferred on it by the Proclamation. I am satisfied that the applicant has shown that he has a right worth protecting pending the finalization of the review.

Irreparable Harm

[50] The respondents are of the view that there is no need for an interdict . The investigation must be allowed to continue without any hindrance. To the extent that there is a suggestion that the actions of the SIU are ultra vires, therein lies the harm. As we all know , harm in this sense doesn't have to be physical. Emotional or reputational harm deserve protection as well. Similarly, potential harm to ones dignity and privacy would also deserve protection. The university contends that it will suffer greater harm if the investigation is halted. The university , as an entity, is not going to be subjected to , for example, the section 5 notice and its criminal sanction because the investigation is primarily for its benefit and the public.

¹¹ South African Informal Traders Forum v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg 2014 (4) SA 371 (CC) ; 2014 (6) BCLR 726 (CC)

[51] On the issue of balance of convenience an infringement of a person's right to privacy , to a fair and lawful investigative process, will always be upper most and that those rights cannot be sacrificed in circumstances where it is apparent that the authority of the investigation itself is non-existent. The balance of convenience favours the applicant .To allow the continuation of the investigation and disregard the legitimate concerns raised in the application would be unfair.

Is the investigation ultra vires?

[52] In his article dated 16 January 2021 entitled "*Constitutional Interpretation of Statutes in the Republic of South Africa*", Clive Brian Jaars in its summary stated "*the interpretation of statutes or to be more precise, the judicial understanding of the legal rules, deals with those rules and principles which are employed to construct the correct meaning of the legislative text to be applied in legal disputes. In laymen terms interpretation is about making sense of the total relevant legislative scheme applicable to the situation at hand..*"

[53] The question is whether the Proclamation excluded a Master's programme as part of the matters to be investigated in relation to the university. In ***The Western Cape Provincial Government & Others v North West Provincial Government***¹² Ngcobo J (as he then was), when interpreting a Proclamation listed in Schedule 6 of the Constitution at paragraph 36 he stated:

"[36] *The inquiry into whether the Proclamation dealt with a matter listed in schedule 6 involves the determination of the subject matter or the substance of the legislation, its essence, or true purpose and effect, that is what the Proclamation is about. In determining the subject matter of the Proclamation it is necessary to have regard to its purpose and effect. The inquiry should focus on beyond the direct legal effect of the Proclamation and be directed at the purpose for which the Proclamation was enacted to achieve. In this inquiry the preamble to the Proclamation and its legislative history*

¹² CCT 22/99, heard 7 September 1999 Decided 2 March 2000.

are relevant considerations, as they serve to illuminate its subject matter. They place the Proclamation in context, provide an explanation for its provisions and articulate the policy behind them."

[54] There is a rule commonly known as *expressio unis est exclusio alterius* which means that the express mention of one thing is the exclusion of the other. Where things are specifically included in a list and others have been excluded, that means that all others have been excluded except where certain words are used, namely, 'including' or 'such as'.

[55] Section 101 of the Constitution deals with decisions made by members of the executive arm of government:

"Executive decisions

101. (1) *A decision by the President must be in writing if it—*
- (a) is taken in terms of legislation; or*
 - (b) has legal consequences.*
- (2) *A written decision by the President must be countersigned by another Cabinet member if that decision concerns a function assigned to that other Cabinet member.*
- (3) *Proclamations, regulations and other instruments of subordinate legislation must be accessible to the public.*
- (4) *....."*

[56] In *Kruger v President of the Republic of South Africa & Others*¹³ Skweyiya J stated:

"[6] The publishing of proclamations in the Government Gazette facilitates easy and quick access by the public to formal orders and decisions by legal authorities. In the present matter such authority is the President who is the head of State and head of the National Executive. The authority is vested in him and he exercises such authority with other members of Cabinet."

[57] In that case the Constitutional Court declared invalid the President's action of issuing a Proclamation purporting to correct an obvious error in an earlier Proclamation. Although the Constitutional Court found that the President had

¹³ 2009 (1) SA 417 CC at 422.

made a genuine and *bona fide* mistake, because the first Proclamation was objectively irrational, in that the provisions of the Amendment Act, which it purported to put into operation were an arbitrary selection. Under the doctrine of objective invalidity, the first Proclamation was declared as having been a nullity from the outset.

[58] That decision is indicative of how the Constitutional Court preferred an interpretation that upholds constitutional rights to the one that sought to interfere with them. It adopted a strict approach even though the error made was *bona fide*. The complaint is that the SIU has no authority to investigate a Master's degree because that programme has been expressly excluded in the Schedule of matters to be investigated.

[59] I am mindful of the fact that one may have regard to what served before the President , restrictively. I do not seek to call into aid those documents for the purpose of interpreting the Proclamation but simply to show that the SIU has misconstrued its authority. If one has regard to annexure "B" to the President's answering affidavit, being the motivation from the Head of the Special Investigating Unit dated 30 March 2021, Advocate JL Mothibi, in the relevant part it is recorded:

"8.1 *The procurement of or constructing for goods and services by or on behalf of the University of Fort Hare and payments made in respect of payments thereof in a manner that was –*

- (a) not fair, competitive, transparent, equitable or cost-effective; or*
- (b)"*

"8.2 *Maladministration in the affairs of the University of Fort Hare Faculty of Public Administration in relation to the:*

- (a) Awarding of Honours degrees;*
- (b) Management of funds;*
- (c) Sourcing of public servants for study into various Faculty programmes by an individual for personal gain;*

8.3 *Any improper or unlawful conduct by officials or employees of the University of Fort Hare or the applicable service providers or any other person or entity, in relation to the allegations set out in 8.1 and 8.2 above." (my emphasis)*

[60] In paragraph 9.30 of the motivation it is recorded by the SIU:

"9.30 *Horizon Forensics recommended further investigation into this matter. Ad maladministration in the affairs of the Faculty of Public Administration (the Faculty) in relation to the awarding of Honours degrees, the management of funds and the sourcing of public servants for study in the Faculty (HF report).*

9.31 *Honours degrees (HF report)*

Horizon Forensics received allegations that students at the UFH were admitted into the Public Administration Honours programme without having met the minimum admission requirements. It was further alleged that these students had however subsequently graduated despite this material shortcoming."

[61] Although there is mention of Masters and Doctoral qualifications somewhere in the motivation , the SIU did not place those as matters that needed to be investigated as it did with paragraphs 8.1 and 8.2 , and the specific mention of the Honours degree, above.

[62] The motivation made by the SIU to the President was very specific and it excluded the Master's programme. The motivation for the Proclamation by the Minister of Justice and Correctional Services deals specifically with matters that fall under section 2(2) of the SIU Act which provide that the President may exercise the powers on the grounds of, inter alia, any alleged serious maladministration in connection with the affairs of any state institution, improper or unlawful conduct by employees of any State institution, unlawful appropriation or expenditure of public money or property, unlawful irregular or unapproved acquisitive act or transaction, measure or practice having a bearing upon State property, intentional or negligent loss of public money or damage to public property, offences referred to in terms of amongst others Prevention of Combating or of Corrupt Activities Act 2004, and unlawful or improper conduct

by any person which has caused or may cause serious harm to the interests of the public or any category thereof.

- [63] Having looked at the purpose and context of the Proclamation , the interpretation that the university and the SIU seek to accord to it , is with respect, not consistent with what is expressly stated therein. Paragraph 1 and 2 of the Schedule clearly limit the powers of anyone who is to implement the Proclamation . Any act must be relevant to , incidental to , matters listed in paragraphs 1 and 2 of the Schedule.
- [64] The Proclamation in paragraph 2 has not employed the terms “such as” or ‘including’ in which case one would find that the extended meaning accorded to the Proclamation would be justified .The Proclamation clearly specified that it would apply to the awarding of Honours degrees only.
- [65] I accordingly find that the complaint by the applicant in this regard is justified. In as much as the applicant was aware of the Proclamation as early as 2022, his allegation that he became aware of the fact that the investigation was directed at him when he received a notice from the SIU, is supported by the letters he relied upon. This explanation is reasonable because up until that time there was no indication that he was a subject of the investigation and it is not denied that he does not possess an Honours degree. He has stated under oath that he does not have an Honours degree. In the answering affidavits of both the University and the SIU there is no allegation that he does in fact have one in which event that would bring him within the ambit of the Proclamation.
- [66] The President has stated clearly in his answering affidavit that in terms of section 4 of the SIU Act he has powers to amend the Proclamation. To the

extent that there is evidence that implicates unlawful conduct in so far as the Masters degree is concerned, there is nothing stopping the SIU from preparing a motivation as it did with the earlier Proclamation and request the President to proclaim that the registration for Masters degree, too, should be investigated. The SIU issued the notice calling upon the applicant to furnish certain information which clearly demonstrates that the enquiry was directed at the investigation of the Masters degree and / or registration in respect of that programme.

[67] The SIU and the university have raised a complaint about the separation of powers harm as the Constitutional Court warned in the OUTA decision. A Proclamation has the force of law. It is legislation. The reason why it is made easily accessible to the public is to ensure that no one defies compliance therewith. The same applies where the Proclamation does not expressly provide for any conduct or act. It is not up to the SIU or any law enforcement agent to extend its territory so as to ensure that it continues with its investigations. To do so, goes against the purpose for which the Proclamation was enacted.

[68] I have demonstrated above that even the SIU in its motivation did not seek an investigation into the Masters programme. It may have inadvertently omitted that but the end result is very clear that the Masters programme was not included.

[69] In defence of its actions the SIU contends that the Proclamation refers to 'incidental', 'relevant to', 'connected with'. Mr Marcus argued that the applicant accords a narrow interpretation and yet these words lawfully extend to the

investigation into the Master's programme. This submission, with respect, omits the qualification that follows immediately after those words '*but is relevant to, connected with, incidental or ancillary to the matters mentioned in the Schedule or involve the same persons, entities or contracts investigated under authority of this Proclamation*'"

- [70] The words: 'mentioned in the Schedule' and 'under authority of this Proclamation' are the limiting words. Any matter that is not 'under authority of the Proclamation' is excluded. Those four words (connected with, ancillary to or relevant to or incidental to) are directly linked to matters mentioned in the Schedule. No other plausible interpretation could be given to those words . To extend their relevance to matters that are not on the Schedule, would be to usurp the President's powers. The SIU relied on *R v Levy & Another*¹⁴ for its contention that *where a legislative or administrative provision is susceptible of more than one meaning, the Court should lean towards an interpretation . . . which renders it valid, rather than giving it meaning which is so extravagant or wide as to render it invalid.*

- [71] At page 468 para G to H of that decision, the Court stated:

"While, as stated in Union Government v Mack¹⁵ the court will in the interpretation of statutes depart from the ordinary meaning of the language used to remove an absurdity, this principle is not applicable to statutory regulations or bye-laws, which must be positive and certain in their terms. If the provisions of the regulation are circuitous, so that their intention has been defeated, this is a matters for amendment by the governor-general not legislation by the court . . ." (my underlining)

¹⁴ 1953 (3) AD.

¹⁵ 1917 AD at page 739.

[72] In *Port Elizabeth Municipality v Uitenhage Municipality*¹⁶, the court dealt with increases of tariffs scale by ten percent where there were increases in the costs of fuel. The court in interpreting the applicable agreements stated:

"The increase of five percent has not received the approval of the administrator, and is therefore unenforceable. . . A power given to a public body for a particular purpose cannot be used for obtaining any other object, however laudable. A statutory power may not be used for a 'collateral or outside purpose.'" (my emphasis)

[73] On this issue of interpretation the SIU also relied on *Mpumalanga Tourism v Barberton Mines*¹⁷. In that matter the Supreme Court of Appeal found that the area concerned was properly indicated with sufficient certainty to meet the challenge that the 1996 Proclamation was void for vagueness. The issue before the Supreme Court of Appeal in the Mpumalanga matter was whether a certain area formed part of a nature reserve or protected environment. That was a distinct and different issue to the one before this Court.

[74] Mr Swartbooi submitted that the Proclamation must clearly extend to any person involved in the maladministration of the university. He submitted that limiting the scope to employees would mean that any other person implicated or complicit in the maladministration would be free to go. In this regard, the university associated itself with the submissions made by the SIU that 'relevant to', 'connected to' and 'incidental' would include an investigation into the complicit conduct of the applicant.

[75] The university relied on *Economic Freedom Fighters v Gordhan & Others*¹⁸ for the submission that the applicant has failed to establish that he has a *prima*

¹⁶ 1971 (1) AD at page 727 para H.

¹⁷ 2017 (5) SA 62 SCA paras 15 & 16.

¹⁸ 2020 (6) SA 325 (CC) at para 42.

facie right that has been infringed. It further relied on the *National Treasury v Opposition to Urban Tolling Alliance*¹⁹ for the submission that “the right to review the impugned decisions did not require any preservation *pendente lite*.”

[76] Mr Swaartbooi also relied on *Bernstein v Bester*²⁰ for the submission that an investigation ‘as opposed to any subsequent decision’ carries no serious or final consequences for a person investigated. In the *Bernstein* case the Constitutional Court was dealing with issues relating to enquiries in terms of section 417 and 418 of the Companies Act 61 of 1973 which related to summoning and examination of persons in relation to the affairs of the company which has been liquidated. In those instances, as found by the Constitutional Court, there was already an order of court and creditors clearly had an interest in those proceedings.

[77] E. A . Kellaway in his work entitled : **Principles of Legal Interpretation; Statutes, Contracts & Wills**, deals with extending the meaning of a statute as follows:

*“A statute has no elasticity; that is to say it may not be stretched to meet a case for which provision has clearly not been made. In other words a casus omissus cannot be remedied by a court.”*²¹ These remarks apply equally herein.

[78] Looking at the Proclamation, objectively, there are prospects that the review court may set aside the decision of the SIU to include the Master’s programme in its investigations without authority from the President. It follows that such investigation may be set aside on review. The threats posed by the notice

¹⁹ 2012 (6) SA 223 (CC) at para 50.

²⁰ 1996 (2) SA 751 (CC) at para 97.

²¹ Page 140 para 18 : “ Extending the meaning of a statute”

issued by the SIU ,for non-compliance therewith, was never retracted. The applicant had accordingly succeeded in establishing a *prima facie* right deserving of protection from harm that may befall him if the investigation continues in circumstances where such investigation falls outside the ambit of the Proclamation.

- [79] The interim interdict itself is not permanent in nature as it will only endure up to the time when the review application is determined. The interdict is not sought against the university, it is only sought against the SIU. Nothing stops the university from conducting or continuing with its investigations until such time as the matter is finalized on review. The applicant would suffer irreparable harm if he continues to be subjected to an investigation that may be found to be unlawful on review. The integrity of any investigation is in its lawfulness. It can never be in the public interest to allow an investigation to be continued where it appears to fall outside the authority of the Proclamation.
- [80] There are suggestions that the applicant does have alternative remedies. The issue of alternative remedies cannot arise where the authority upon which the investigation is purportedly based is non-existent. To allow the investigation to continue when the issue being investigated does not appear on the Proclamation itself would be to allow unlawful conduct to continue. It is so that the matter is of public importance in the sense that people would want to see perpetrators who are involved in the unlawful conduct being brought to book as soon as possible and that the investigations be done as soon as possible. It is in the interests of justice that investigations must be conducted in accordance with the law, otherwise they would be tarnished.

[81] In this case the SIU does not have the original authority to investigate university affairs and it is for that reason that extending the operation of the Proclamation to matters that are not expressly stated therein , may be found to be unjust by the review court. For all the reasons I find that a case is made out for an interdict pending finalization of Part B.

Costs

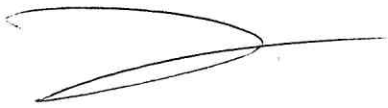
[82] The SIU and the university asked for costs on a punitive scale. They complained about the late filing of the supplementary affidavit by the applicant. They both failed to file a notice to have the supplementary affidavit struck out. The supplementary affidavit was intended to limit the issues. That, in my view, was a concession well made by the applicant. As a result of that concession the validity of the Proclamation is no longer impugned. I do not find reason to punish the applicant with a punitive cost order for narrowing down issues.

[83]. Although the applicant contends that the SIU was malicious, there is no evidence of such malice. The matter involved interpretation of the Proclamation and whether the investigation against the applicant should be restrained at this point. To the extent that the SIU extended the investigation to a Master's programme, a degree that is offered by the university, may only demonstrate overzealousness but not malice. This is a matter that was of great importance to all the parties and they each sought to protect their interests. There is still Part B that will determine with certainty the rights of the parties. That court will be armed with a full record which will indicate whether the actions of the SIU were malicious or not. I am of the view that this is a matter where each party is to bear its own costs.

ORDER

[83] In the circumstances I grant the following Order:

1. The Special Investigating Unit is interdicted from enforcing Proclamation 84 of 2022, published in the Government Gazette No. 47199 on 5 August 2022 in so far as the SIU has taken steps or intends to take steps that are directed at the applicant, pending the determination of Part B.
2. Each party is to bear its own costs.



T.V NORMAN

JUDGE OF THE HIGH COURT

Matter heard on 13 June 2023

Judgment Delivered on 20 June 2023

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