THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 493/2016

In the matter between:

NIEKARA HARRIELALL **APPELLANT**

and

UNIVERSITY OF KWAZULU-NATAL **RESPONDENT**

Neutral citation: *Harrielall v University of KwaZulu-Natal* (493/2016) [2017] ZASCA 25 (27 March 2017)

Coram: Cachalia and Swain JJA, and Molemela, Gorven and Mbatha AJJA

Heard: 16 February 2017

Delivered: 27 March 2017

Summary: Promotion of Administrative Justice Act 3 of 2000 : refusal of application for admission to course of study leading to MBChB degree : application for review of decision : new challenge on appeal : not raised in founding affidavit : appeal dismissed.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Moodley J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Swain JA and Mbatha AJA (Cachalia JA and Gorven AJA concurring)

[1] The appellant, Ms Niekara Harrielall, aspires to be a medical doctor and in pursuit of this objective unsuccessfully applied to the respondent, the University of KwaZulu-Natal for admission to study for an MBChB degree in 2015. Undaunted by this rejection the appellant registered and pursued a course of study for the degree of Bachelor of Medical Science (Anatomy), with the respondent during 2015. She did so in order to enhance her prospects for admission to the MBChB degree in 2016, within the category described as 'Mature Students' forming part of the respondent's admissions policy.

[2] Regrettably the appellant's application as a 'mature student' for the 2016 academic year was also unsuccessful. Aggrieved at the outcome the appellant launched an application before the KwaZulu-Natal Division of the High Court, Pietermaritzburg (Moodley J) seeking orders reviewing and setting aside the decision of the respondent on the grounds that it had failed to consider, alternatively apply, its own admissions policy in refusing the appellant's application. In further alternative relief, the appellant sought an order reviewing and setting aside the refusal of her application to be admitted to the first-year of study for the MBChB degree for the 2016 academic year.

[3] The court a quo dismissed the application with costs, concluding that the appellant had failed to discharge the onus of proving that the respondent had not considered her application properly, alternatively had acted capriciously and arbitrarily in deviating from its admissions policy in refusing to admit the appellant to the 2016 academic year, for the MBChB degree.

[4] Section 37(3) of the Higher Education Act 101 of 1997 provides that:

'The admission policy of a public higher education institution must provide appropriate measures for the redress of past inequalities . . .'

This requirement is reflected in the admissions policy of the respondent contained in a document described as 'Undergraduate Selection Process'. The 'mature student' category is described as follows:

'3. MATURE STUDENTS

Mature students will comprise 20% (40 students) of the class. Mature students are categorized as follows:

a. Candidates who have completed the Matriculation/Grade 12 examination and exceeding the minimum standards for entry into the MBChB programme as defined above; and have done a year or more of a degree course at a recognised university in South Africa; and achieved outstanding results (Open). Twenty five percent (10 students) will be from this open competitive category.

b. BSc and BMedSc access programmes (reflecting Quintile 1 and 2 students) - racial groups do not apply for the selection of Quintile 1 and 2 students (BSc/BMedSc Access). Fifty percent of the mature students (20 students) will be from the BSc and BMedSc access programmes (reflecting Quintile 1 and 2 students).

c. Twenty-five percent (10 students) will be from BSc/BMedSc graduates from Health Science related degrees, (Health Sciences Open).'

[5] The complaint raised by the appellant in her founding affidavit was that the respondent in awarding places within the 'mature student' category, had only considered for selection students who had completed their degrees. As a result it was alleged that the appellant's application had not been considered by the respondent. It was on this basis that the appellant alleged that the

respondent's failure to consider her application, alternatively apply its own admissions policy, contravened the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[6] In the appellant's heads of argument before this Court the challenge to the respondent's decision was however no longer based upon a failure of the respondent to consider her application at all, but rather a failure of the respondent to properly differentiate between the three categories which comprise 'mature students'. The argument advanced was that the appellant should only have competed against applicants that fell within category 3a, which the appellant described as 'degree incomplete students' and not against 'degree complete students'. It was alleged that 'the respondent on its own version ignored these categories and pitted "degree incomplete students" against those with degrees and ranked all mature applicants according to completed degrees (Masters, Honours, undergraduate) and then year of study in postgraduate degree'. It was alleged that this was a new criterion which referenced a ranking system in respect of 'mature students', which was entirely absent from the respondent's admissions policy and had been disclosed by the respondent for the first time in its answering affidavit.

[7] On appeal the challenge of the appellant was again altered. Appellant's counsel expressly disavowed any reliance upon this argument and conceded that so-called 'degree complete students' could compete within category 3a, with 'degree incomplete students'. The argument now advanced was that the respondent had failed to explain its preferential admissions policy in respect of the various degrees that could be considered in terms of category 3a. It was submitted that the respondent should have set out in its admissions policy the points that would be allocated for each type of degree within the category, as well as the points to be allocated to each of the subjects making up the degree under consideration.

[8] When counsel for the appellant was asked to identify the passages in the founding affidavit where this new challenge was raised, he requested an

opportunity to examine the founding affidavit. When court resumed he referred to certain paragraphs in the founding affidavit in support of the argument. However an examination of these paragraphs does not support his contention that the argument was properly raised. The only reference by the appellant to the ranking system of the respondent was in reply where the following was stated: 'However the respondent has made it clear that it has, independently of its own policy, applied a ranking system to these applications,' because it chose completed degree applicants ahead of the appellant's application. In addition it was alleged that 'There is no such ranking provision provided for in the policy and therefore whomever applied this criteria was not consistent with the policy.' The appellant did not however persist with this argument that the ranking system applied by the respondent, did not form part of its admissions policy. A complaint that the respondent had failed to disclose in advance how it applied this ranking policy was never raised. Counsel conceded that if this new challenge was not raised in the appellant's founding affidavit the appeal could not succeed. This concession was correctly made. It was incumbent upon the appellant to make out her case in the founding affidavit.[1]

[9] We turn to the costs of the appeal. In argument, the decision in *Biowatch Trust v Registrar, Genetic Resources, & Others* [2009] ZACC 14; 2009 (6) SA 232 (CC), was referred to, but is not applicable on the facts of this case. No constitutional issues were implicated. This case is simply a review under PAJA of an administrative decision by the respondent, not to admit the appellant to the course of study leading to the MBChB degree. Of importance in a consideration of this issue is that the appellant altered the basis for her challenge to the respondent's decision several times during the litigation. In addition, the final challenge advanced on appeal was not contained in the appellant's founding affidavit. These shortcomings could have been avoided if the appellant had utilised the provisions of rule 53 of the Uniform rules of court at the outset, to obtain the respondent's reasons for

[1] *Swissborough Diamond Mines (Pty) Ltd & others v Government of the Republic of South Africa & others* 1999 (2) SA 279 (T) at 323 F-J and 324A.

rejecting her application, as well as any documentation forming part of the record of the admissions process. Because of the urgency of the matter, the court hearing the application could have been asked to direct that the respondent furnish its reasons and any relevant documentation sooner than the period of 15 days specified in rule 53(1)*(b)*. Interim relief restraining the respondent from finalising the list of successful applicants pending the outcome of the review proceedings, could have been sought. In this manner the appellant would have been informed in advance of the respondent's reasons for the decision and enabled to properly formulate her challenge to the rejection of her application. The need for changes to be made to the appellant's challenge to the respondent's decision during the course of the litigation, could have been avoided.

[10] For these reasons the appellant should be ordered to pay the respondent's costs. The issues raised were not complex and did not justify the employment of two counsel.

[11] In the result the following order is made:

The appeal is dismissed with costs.

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K G B Swain

Judge of Appeal

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Y T Mbatha

Acting Judge of Appeal

Molemela AJA

[12] I have had the benefit of reading the majority judgment of my colleagues Swain JA and Mbatha, AJA. I agree that the appeal must fail. I also agree, on the same reasoning adopted by the majority judgment, that the *Biowatch* principle is not applicable in this matter. I, however, disagree with the majority judgment's reasoning and order relating to the costs of the appeal. It is appropriate to preface my reasoning with the reiteration of the applicable legal principles to cost awards.

[13] It is well established that a court has a discretion in relation to the award of costs. In *Ferreira v Levin NO & others,*[2] Ackerman J said:

'The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule , have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. *Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings . . . If the need arises the rules may have to be substantially adapted; this should however be done on a case by case basis*.' (My emphasis.)

Indeed, even a court of Appeal has a wide discretion on the question whether a successful appellant should be awarded costs.[3]

[14] As I will demonstrate hereunder, this case is a perfect illustration of how the facts of a particular case, cumulatively considered, may justify a deviation from the general rule that costs must follow the result.

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[2] *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others* 1996 (2) SA 621 (CC) para 3.

[3] *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 2003 (1) SA 204 (T) at 215-216.

[15] It is necessary to give a brief background about the respondent's admission policy. It is common cause that 'Annexure D' constitutes the respondent's published policy. It is evident from Annexure D that clause 3 thereof outlines three categories of 'mature students' who qualify for admission under categories 3a, 3b and 3c. It is common cause that the category applicable to the appellant is Clause 3a of Annexure D. This clause describes mature students as follows:

'Candidates who have completed the Matriculation/Grade 12 examination and exceeding the minimum standards for entry into the MBChB programme as defined above; and have done a year or more of a degree course at a recognised university in South Africa; and achieved outstanding results (Open). Twenty five percent (10 students) *will be* from this open competitive category'. (My emphasis.)

[16] In its answering affidavit, the respondent averred that the selection policy and criteria it applied to the appellant's application were, as specified in clause 3 of Annexure SC3. That clause reads as follows:

'Mature students are candidates who have completed the Matriculation/Grade 12 examination and exceeding the minimum standards for entry into the MBChB programme as defined above; and have done a year or more of a degree course, at a recognised university in South Africa; and achieved outstanding results; Mature students will comprise 20% (40 students) of the class; 50% of the mature students (20 students) will be from the BSc and BMedSc access programmes (reflecting Quintile 1 and 2 students) and selected in the different racial groups. Twenty five per cent (10 students) will be from BSc/BMedSc graduates and 25 per cent (10 students) will be from Health Science related degrees, open competitive category.'

[17] The respondent contended that there is no discrepancy between Annexures D and SC3. The High Court found that the discrepancies between the policy in Annexure D and the one in Annexure SC3 pertained only to the 'layout' of the policy. It also found that despite any variations in the wording of Annexure D and Annexure SC3, the qualification for the open category is the same. For the reasons discussed below, I disagree.

[18] A very brief discussion of the trite principles applicable to interpretation of documents is apposite. It is well-established that when interpreting a document, it is necessary to consider the language of the provision in the light of the ordinary rules of grammar and syntax. The words used must be read in the context of the document as a whole and in light of all relevant circumstances. Where the words in the documents are capable of more than one meaning, a sensible meaning should be preferred over one that undermines the apparent purpose of the document.[4]

[19] Having read the respondent's policy, it is rather self-evident that category 3a includes graduates and under-graduates of any degree, which means that students who are pursuing non-health-related degrees are also entitled to be considered. Importantly, category 3a stipulates that 25 per cent (10 students) of the students 'will be' selected from this 'open competitive category' and thus guarantees consideration of students from this category. Clauses 3b and 3c specifically mention the degrees from which prospective students will be selected, namely BSc and BMedSc access programmes (clause 3b); and BSc/BMedSc graduates from Health Science degrees (clause 3c). A purposive interpretation of clause 3 of Annexure D, which sets out three distinct categories, leads me to conclude that the provisions of that policy are intended to grant access to prospective medical students from a diverse educational background.[5]

[20] In my view, category 3a of 'mature students' embraces this diversity by accommodating students whose matric results exceeded the minimum standards for entry into the MBChB programme but are not registered for the degrees mentioned in clause 3b or 3c of Annexure D, for example, students who are registered for non-health-related degrees such as Engineering, Veterinary Science, Actuarial Science, and Commerce.

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[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para (18).

[5] Section 37(3) of the Higher Education Act 55 of 1999 states: 'The admission policy of a public higher education institution must provide appropriate measures for the redress of past inequalities and may not unfairly discriminate in any way.'

[21] Ironically, a sensible interpretation of clause 3 of Annexure D is eloquently articulated in the Respondent's heads of argument. I can do no better than to quote this interpretation *verbatim*:

'20. The category 3a includes all candidates that "have done a year or more of a degree course". That "includes" degree complete students not falling under categories 3b and 3c'. [The footnote to this paragraph reads: this is most easily understood when one considers a hypothetical commerce or engineering graduate who would undoubtedly not qualify under section 3c.]

21. The interpretation for which the appellant contends would necessarily exclude from access to the medical school under any circumstances, degree complete students not falling in categories 3(b) and 3(c).

22. That is not a sensible interpretation and should be rejected.'

[22] Although the respondent did not persist with nor disavow this argument during the hearing of the appeal, I am of the view that the interpretation postulated above is indeed the most sensible one in respect of clause 3 of Annexure D as it embraces students from a diverse educational background. Regrettably, this laudable inclusiveness is conspicuously absent from clause 3 of Annexure SC3 because the latter does not cater for undergraduates or graduates from non- health- related degrees. Furthermore, it also does not extend the same guarantees granted by Annexure D. In my view, clause 3 of Annexure SC3 is more exclusionary and cannot be a sensible interpretation of the respondent's published policy.[6]

[23] I am of the view that the interpretation attached by the respondent to its policy, as reflected in clause 3 of Annexure SC3, 'undermines the purpose'[7] of the inclusionary stipulations of clause 3a of Annexure D. The discrepancies between these two policies bear testimony to the ambiguity in the respondent's undergraduate selection criteria. Given these circumstances, the appellant's contention that the 'subtle alteration of the words' in clause 3 of Annexure SC3 has resulted in the policy leading to different consequences than clause 3a of Annexure D, is not misplaced. Similarly, her contention that

[6] See s 37(3) of the Higher Education Act above.
[7] See *Natal Joint Municipal Pension Fund* above para (18).

an ambiguity in the policy may be prejudicial to other students is not unfounded.

[24] Another important consideration in this matter is that in the exchange of correspondence that preceded the commencement of litigation, the respondent advised the appellant that the selection criteria it had applied to the appellant were in accordance with clause 3 of Annexure D. As correctly pointed out in the majority judgment, s 37(2) of the Higher Education Act enjoins the council of a university to publish its admission policy and to make it available on request. The appellant's founding affidavit was prepared on the acceptance that clause 3 of Annexure D was the applicable policy. It was only in its answering affidavit that the respondent unveiled Annexure SC3 to the appellant. It is therefore not difficult to understand why the appellant took issue with clause 3 of Annexure SC3 for the first time in her replying affidavit. It is for this reason that I hold the view that the majority judgment's criticism of the appellant for making new allegations concerning clause 3 of Annexure SC3 in the replying affidavit is, with respect, unjustified.[8]

[25] I have already alluded to the material discrepancies between Annexure D and Annexure SC3. Under such circumstances, it is not inconceivable that the appellant could have pleaded her case differently if Annexure SC3 had been disclosed to her before the commencement of the litigation. I am also of the view that the finding of the majority judgment that the appellant could have invoked the procedures laid down in Rule 53 of the Uniform Rules to obtain certain documents is, with respect, overly technical. For example, it would have been pointless for the appellant to invoke Rule 53 merely to obtain a policy that the respondent had already furnished to her by way of correspondence.

[26] Furthermore, the nature of the right the appellant was seeking to protect is another important consideration. Her litigation was not in pursuit of a

[8] *Lagoon Beach Hotel (Pty) Ltd v Lehane NO & others* 2016 (3) SA 143 (SCA) para 15-16; *Pretoria Portland Cements Co Ltd v Competition Commission & others* 2003 (2) SA 385 (SCA) para 63.

commercial interest; rather it was in a bona fide pursuit of admission to her preferred field of study. In the broader scheme of things, her litigation was about access to education. Moreover, it was not based on spurious grounds, as the respondent had previously admitted under-graduates on the strength of the provisions of clause 3a of Annexure D.

[27] Despite the fact that the outcome sought by the appellant in her application would have been for her sole benefit, her application served to highlight the flaws attendant on the interpretation of Annexure SC3, which have already been canvassed earlier in this judgment. The appellant's litigation exposed the potential prejudice that some prospective medical students who fall within the category of 'mature students' may suffer as a result of the ambiguity of the respondent's admission policy. This litigation therefore raised an important matter of broad concern.

[28] Furthermore, the appellant decided to litigate as a last resort, having personally engaged the respondent's officials before seeking the intervention of the Students Representative Council (SRC). Several consultations were held between the SRC delegation and the respondent's officials: correspondence was exchanged. Sight must not be lost of the fact that the appellant is a 19 year old fulltime student. She stated that her litigation was funded by her parents. She also disclosed that the reason she prefers to study at a medical school in Durban is because her parents are not wealthy and would thus not afford to pay for her accommodation if she were to study elsewhere. The fact that the appellant is evidently a person of modest financial means is not an irrelevant consideration, given all the circumstances of this case.[9]

[29] Having considered all the facts of this case, I am of the view that mulcting the appellant with costs may discourage those who may legitimately wish to challenge the respondent's policy on other grounds. This may have an

[9] *Tlale & Others v The University of the Witwatersrand & Another* (JHC) unreported case no 38337/2016 of 3 November 2016 para 53.

unintended chilling effect on access to justice. Such an order would militate against the 'just and equitable' remedy envisaged in Section 8(1)*(f)* of the Promotion of Administration Justice Act 3 of 2000, which dictates that costs be determined in a manner that is fair to both parties. For all the reasons alluded to above, I am of the view that there are special circumstances that justify a departure from the general rule that costs must follow the event. I would therefore make no order as to the costs of the appeal.

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M B Molemela
Acting Judge of Appeal

Swain JA

[30] I have had the benefit of reading the dissenting judgement of Molemela AJA on the issue of the award of costs in the appeal to the respondent. Central to the reasoning in the dissent is that because of the alleged ambiguity between annexures D and annexure SC3, in which the admissions policy of the respondent was set out, the appellant's application 'served to highlight the flaws attendant on the interpretation of annexure SC3 . . .' and 'exposed the potential prejudice that some prospective medical students who fall within the category of "mature students" may suffer as a result of the ambiguity of the respondent's admission policy.'

[31] As I understand the argument, it is that the alleged ambiguity in the respondent's admission policy was partially to blame for the institution by the appellant of these proceedings, was the cause of the appellant only taking issue with the provisions of annexure SC3 in her replying affidavit and if annexure SC3 had been disclosed to the appellant before the commencement of the litigation 'it is not inconceivable that the appellant could have pleaded her case differently'. For these and other reasons, it is concluded that the appellant should not be ordered to pay the costs of the appeal.

[32] On appeal both parties accepted that there was no material difference between annexure D and annexure EC3. This was made clear well in advance of the hearing. The appellant in her heads of argument submitted that, ‘As aforesaid, we contend that annexure D applied and that, in any event, there is no material difference between annexure D and annexure SC3.’ The same view was advanced in the respondent's heads of argument where the following submission was made, ‘In the circumstances of this matter, "SC3" appears to be a minor redrafting of annexure "D" with no material discrepancy between the two and only a slight reordering of language.’ In argument before this court, any alleged ambiguity between these annexures was not referred to, nor relied upon, by either counsel. It is therefore plain that the alleged ambiguity was not relied upon by the appellant as a ground of appeal and did not serve as a reason for challenging the decision on appeal. Although the alleged ambiguity may have served as an argument for altering the costs order made by the court a quo, it can have no bearing upon the costs of the appeal, which the dissent has as its objective.

[33] In addition the only argument advanced by the appellant as to why she should not be ordered to pay the costs of the appeal, was that the Biowatch principle was applicable. Molemela AJA agrees with the view of the majority that this is not so. None of the other grounds relied upon by Molemela AJA, to justify no order being granted as to the costs of appeal were relied upon by the appellant. The respondent was accordingly never afforded an opportunity to deal with any of these grounds.

[34] I disagree with the contention of Molemela AJA that ‘it would have been pointless for the appellant to invoke rule 53 merely to obtain a policy that the respondent had already furnished to her by way of correspondence.’ As pointed out in the judgement, rule 53 could have been used to obtain the respondent's reasons for rejecting her application, as well as any documentation forming part of the record of the admissions process. The

object of such a procedure would never have been the pointless exercise of using rule 53 to obtain a copy of the policy, which the appellant already had. In this manner the appellant would have been enabled to properly formulate her challenge to the rejection of her application.

[35] I also take issue with the conclusion of Molemela AJA that, 'It is for this reason that I hold the view that the majority judgement's criticism of the appellant for making new allegations concerning clause 3 of annexure SC3 in the replying affidavit is, with respect, unjustified.' The only reference to the replying affidavit of the appellant in the judgment was in the context of an allegation by the appellant, that the application of a ranking system by the respondent did not form part of the respondent's admissions policy. This was referred to in the judgement in order to highlight the distinction between this argument (which was abandoned) and the argument advanced on appeal by the appellant, namely that the respondent had failed to disclose in advance how it applied this ranking policy. As pointed out in the judgement, the latter argument was never raised in the application papers. No criticism was directed at the appellant in this context, for raising this argument in reply.

[36] The fact that the litigation was not in pursuit of a commercial interest but rather a bona fide pursuit of admission by the appellant to her preferred field of study, and was therefore about access to education, cannot on all of the evidence be regarded as a determining factor. Although it is true that the appellant is 19 years old and dependent upon her parents, (who she describes as 'not wealthy') to fund the litigation, what must also be considered is that the respondent is reliant upon and administers public funds to attain its objectives.

[37] I disagree with the conclusion that 'mulcting the appellant with costs may discourage those who may legitimately wish to challenge the respondent's policy on other grounds. This may have an unintended chilling effect on access to justice'. No other grounds were raised by the appellant as

a basis for challenging the respondent's policy. The concern raised is not based on any evidence and amounts to unjustified speculation.

[38] For these reasons I disagree with the conclusion of Molemela AJA that no order should be made as to the costs of the appeal.

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K G B Swain
Judge of Appeal

Appearances

For the Appellant:	G Marcus SC with A J Boulle
	Instructed by:
	Pather & Pather, Durban
	Claude Reid Inc., Bloemfontein
For the Respondent:	A J Dickson SC with P J Wallis
	Instructed by:
	Shepstone and Wylie, Durban
	Webbers, Bloemfontein