IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 26195/06
DA TE: 22 NOVEMBER 2007

UNREPORTABLE

IN THE MATTER BETWEEN:

BONANG DOKU APPLICANT

AND

THE UNIVERSITY OF WITWATERSRAND 1ST RESPONDENT
HEALTH PROFESSIONS COUNCIL OF SA 2ND RESPONDENT

JUDGMENT

MILLS, AJ

[1] Four applications served before this Court on 9 November 2007.

[2] The particulars of these applications are the following:

2.1 The main application is a review application wherein the applicant, who was a final year dentistry student at the University of the Witwatersrand in 2005, seeks to review and set aside the decision of the University of the Witwatersrand (first respondent), to fail her in the course of Periodontology;

2.2 The second application is an application by first respondent for the condonation of the late filing of first respondent's answering affidavit in the main application;

2.3 The third application is an application brought by applicant wherein applicant seeks an extension, of the time period prescribed by the Promotion of Administrative Justice Act, No 3 of 2000, to bring her review application;

2.4 The fourth application is an application by the first respondent for leave to substitute an incorrect annexure attached to first respondent's answering affidavit in the main application.

[3] The Health Professions Council of South Africa, which was cited as second respondent in the main application, did not oppose applicant's application for review, and apparently chose to abide by the judgment of the Court.

[4] The respective opposing parties in the second and third applications referred to above did not persist with their opposition to the applications, and I accordingly hereby grant these applications for the relief set out in the respective notices of motion.

[5] It was accepted by both Counsel (correctly so) that educational institutions such as universities, are governed in their relationships with their students by contract and by administrative law. The decision of the first respondent to fail the applicant is thus subject to

administrative law review, and first respondent was always required to observe its own rules, and the requirements of any statutes or regulations. [1]Counsel were *ad idem* that the statutory provisions, and the regulations and university rules referred to in paragraphs 7.1 to 7.27 below, govern the applicant's relationship with first respondent.

[6] Counsel for the parties were further in agreement that the factual disputes, between the parties which appear from the affidavits, should be dealt with in terms of the so-called *Plascon-Evans Rule,* which entails that where in proceedings on notice of motion disputes of fact exist on the affidavits, a final order may be granted if those facts averred in the applicant's affidavits that have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. [2] (I should mention in passing that although applicant was invited by the Court at the commencement of the argument to consider asking for a referral of the disputed facts to oral evidence, applicant elected not to apply for such a referral.)

[7] The background facts, that are either common cause, or that should be adjudicated upon in terms of the *Plascon-Evans Rule,* are thus the following:

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1 Lunt v University of Cape Town, 1989 (2) SA 438 (C); Governing Body Tafelberg School v Head, Western Cape Education Department, 2000 (1) SA 1209 (C); Dendy v University of the Witwatersrand, 2005 (5) SA 357 (W): Dawnlaan Beleggings (Eiendoms) Beperk v Johannesburg Stock Exchange and Another, 1983 (3) SA 34 (W); Johannesburg Stock Exchange v Witwatersrand Nigel Limited, 1988 (3) SA 132 (A); Transnet Limited v Goodman Brothers (Pty) Limited, 2001 (1) SA 853 SCA

2 Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited 1984 (3) SA 623 (A) at 634H-1

7.1 The applicant was enrolled at the University of the Witwatersrand ("the first respondent") in the Faculty of Health Sciences, for a Bachelor's Degree in Dentistry. She was a final year student in 2005.

7.2 In order to obtain the Degree of Bachelor of Dental Science, the applicant had to comply with the requirements set by the first respondent, and to pass the prescribed courses, one of which was the course Periodontology.

7.3 In 2004-2005, the applicant enrolled *inter alia* for the course in Periodontology, which stretched over a period of two years.

7.4 At the commencement of the course in Periodontology, students, including the applicant, were informed of the due performance requirements of the course by means of a due performance requirements note issued by the Head of Periodontology and Oral Medicine, Professor J C Petit.

7.5 In terms of the due performance requirements, students are advised prior to the commencement of the course as to how the evaluation in the course will be made. Students were informed that:

"Formal continual evaluation in Periodontology will be made during the fourth, fifth and sixth year of *study. This evaluation will count 60% for the year mark. Continual evaluation may*

take any form and notice will be given of the intention to evaluate students and the form of evaluation ...

... The final marks will be calculated as *follows:*

1. *Test 1 [written] (end of 4th year) + test 2 [1,0 written +1,0 OSCE] (1st semester of 5th year) + [OSCE] (2nd semester of 5th year) + test 4 [1,0 written + 1,0 OSCE] (1st semester of 6th year) /4 = 60% of all the year mark*

2. *The remaining 40% of the year mark will be calculated as follows: the minimum requirement of 212 clinical credits will count for 70% of the remaining 40%, i.e., 28% of the year mark. Any credit obtained above 212 clinical credits wi!! be added in percent value to the 70%. For instance, a student who obtained 233 clinical credits (212 + 10%) would get 77% of 40% or 31%, instead of 28%.*

   The above system should encourage students to do more clinical work than the required minimum quota.

3. *(year mark x 0.5) + (written examination x 0.25) + (OSCE examination x 0.25) = final mark*

4. *If viva voce examination (optional): final mark + maximum* 3%.

The combined marks for OSCEs must be 50% *minimum. ....*

In terms of the Health Professions Council of South Africa Rules, and in terms of University Rules, a *candidate must obtain a minimum of 50% in the clinical section of the course, i. e., 50% for the OSCE tests and examination. Failure to do so will result in the student's failing the examination regardless of the total marks achieved."* (My underlining)

7.6.4	Test 4 (Written)	29/03/2004	50	35
	Test 4 (Clinical-OSCE)	29/03/2004	50	28.2
	[illegible]			43.58
	This result counted for 60% of the year mark: 60% x			

(Although the applicant denies having received the due performance requirements notice, I accept, in terms of the *Plascon-Evans* rule referred to above, that she indeed as alleged by first respondent received this notice in January 2004, and that she signed for this document, acknowledging receipt thereof.)

7.6 The applicant achieved the following results in the course of Periodontology:

	TEST NO.	DATE	MARK WEIGHTING	MARKS
7.6.1	Test 1 (Written)	8/10/2003	100	27
7.6.2	Test 2 (Written)	23/07/2004	100	41
7.6.3	Test 3 ([Clinical - Objective Structured Clinical Examination (OSCE)]	10/09/2004	100	43.1

7.6.5 Course credits 28 out of 40.

The balance of 40% of the year mark was made up of course credits.

7.7 Thus the applicant's year mark was calculated as follows:

Test credits:	26.15 (60);
Course credits:	28 (40);
Total:	54.15

7.8 The applicant achieved the following results in the final examination at the end of the course:

EXAMINATION	**DATE**	**MARK WEIGHTING**	**MARKS**
Written	18/05/2005	100	47.5
Clinical - OSCE Exam	18/05/2005	100	50
Final examination mark			48.75%

7.9 The final mark in the course was 51,4%, calculated as follows:

7.9.1	Year mark:	54,15%
7.9.2	Examination mark:	48,75%
7.9.3	Final mark:	51,4%

7.10 Although applicant thus obtained a final mark of 51,4%, the first respondent refused to award her a pass mark for the course, because, according to first respondent's calculations, and in terms of the requirements of the due performance notice, she did not pass the clinical section of the course as a whole. First respondent calculated the mark for the clinical section of the course as follows:

	DATE	**MARKS ACHIEVABLE**	**MARKS ACHIEVED**
Test 3 (Clinical –OSCE)	10/10/2004	100	43.10
Test 4 (Clinical – OSCE)	29/03/2004	50	28.2
Examination (Clinical – OSCE)	18/05/2005	100	50
Total		250	121.30

Average for clinical part of evaluation of course: 48.52%

[This is calculated taking the total marks achieved (121.30) divided by the total marks achievable (250).]

7.11 An average of the applicant's OSCE marks over the course (i.e. an average of the marks obtained by the applicant in the two OSCE tests and the OSCE examination) shows that the applicant only obtained 48.52% and thus failed the clinical evaluation of the course.

7.12 The University of the Witwatersrand functions as such in terms of the Higher Education Act, Act 101 of 1977 (hereinafter referred to as *"the Act').*

7.13 With effect from 14 May 2004 the University functions in terms of a statute promulgated in terms of the Act, in Government Gazette 23132 of that date *("the Statute').*

7.14 In terms of section 20(1)(a) of the Statute the University is governed by the Council pursuant to section 27 of the Act.

7.15 In terms of section 30(1) of the Act the Senate of the University is the body who is subject to the Act accountable to the Council for *"regulating* all *teaching, learning, research and academic functions"* of the University.

7.16 More particularly the Senate in terms of section 30(2)(c) *"determines what standard of proficiency is required to be attained in any mode of assessment that may be used in order to satisfy the requirements for the obtaining of any degree ... or other qualification".*

7.17 The University annually publishes a document containing rules and syllabuses applicable to students in respect of their various courses called *"Rules and Syllabuses".* These rules are published by or under the auspices of the Council and the Senate and forms the contractual basis of engagement in studies between students and the University[3] for that year *("the Rules").*

7.18 The Rules are divided between *"general rules"* and *"syllabus rules".*

7.19 In terms of General Rule 3.1 the rules apply to all students who were registered before 2005 (and continued their studies in 2005).

7.20 Curricula are, in terms of general rule 7.1 approved by the Senate and approved *curricula* may only be amended with the consent of the Senate prior to the commencement of the academic year.

[3] Lunt v University of Cape Town, 1989 (2) SA 438 (C)

7.21 General Rule 7.5 which deals with changes to the rules during a student's registration provides as follows:

> *"If the rules governing* a *qualification are changed* a *student who is registered under the old rules and who has obtained sufficient credits to enable him/her to proceed to the next year* of *study in terms* of *those rules may proceed on the old curriculum unless s/he elects to proceed on the new curriculum. However, where there are, in the opinion* of *the Senate compelling reasons for doing so, which may include failure in one or more courses, or where* a *student does not register for the next year* of *study in the ensuing academic year or where at his/her request* a *student is permitted by the Senate to register in the ensuing year on* a *special curriculum that student may be required by the Senate to proceed on new rules or on interim rules or on* a *special curriculum laid down for him/her by the Senate."*

7.22 In addition to the general rules each faculty is governed by a set of Faculty Rules which, in terms of the preamble thereto, are subject to the General Rules and may be amended prior to the commencement of the 2005 academic year only.

7.23 Rule M9.2 of the curriculum rules for the Faculty of Health Sciences provides as follows:

"Clinical and practical requirements: BDS and MBBCh

(a) *A student shall to the satisfaction* of *the Senate comply with such clinical and practical requirements* as *may be determined by the Senate for each year* of *study failing which s/he may be refused in terms* of G 15. 4, *permission to present himself/herself for examination.*

(b) *A student who fails the clinical component* of *the examination in any course shall be deemed to have failed the examination in the course* as a *whole."*

7.24 An *"examination"* is defined in the General Rules (Rule G 1. 8) as follows:

"Examination means an assessment of a *student's performance in* a *course made by one internal and one external examiner'.*

7.25 In terms of the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act No. 56 of 1974), the Minister of Health has, on the recommendation of the South African Medical and Dental Council, made regulations relating to the registration of students, minimum curricula and

professional examinations in medicine and dentistry. ("the Regulations").

7.26 Part IV of the Regulations deals with the registration of dental students, Part V deals with the minimum curriculum for dentistry and Part VI deals with the Professional Examination for Dentists.

7.27 In terms of the Regulations, the curriculum for dentistry shall include tuition in oral medicine and periodontics.

7.28 Regulation 45 provides that:

> *"No candidate who fails the clinical part* of *the evaluation shall be allowed to pass the final academic examinations.* "

7.29 Regulation 45 prescribes that a student is not permitted to fail the clinical part of the evaluation of the course. Any student who fails the clinical part of the evaluation of the course shall not be permitted to pass the final academic examinations. The use of the word "shall" is peremptory. Regulation 45 prescribes that no candidate who fails the clinical part of the evaluation of a course shall be allowed to pass the final academic examinations. In this context, the reference to being allowed to pass the final academic examinations means and is intended to convey the passing of the course.

[8] Applicant contended the following during the application:

8.1 That she achieved in terms of the Senate Policy a final mark of at least 50% in the subject of periodontology, i.e. 51.4%;

(See paragraph 7.9 above for the computation of this mark)

8.2 That she achieved, in terms of Rule M9.2.1 (b) a pass mark of at least 50% in the clinical component of the examination in the course of periodontology, i.e. 50%;

8.3 That the threshold of 50% in the clinical tests counting towards the final mark applied by the first respondent was unlawful and not authorised by the Statute, the Rules or Policy documents published by the first respondent and was unilaterally and unlawfully imposed by Prof Petit, the Head of the Department of Periodontology, who was not authorised to do so and in any event did not duly communicate such amendments to the students.

8.4 That the conduct of the University falls foul of sections 6(2)(a)(i), (ii), (c), (d), (e)(i), (ii), (iii), (iv), (vi), (f)(i), (ii), (h) and (i) of the Promotion of Administrative Justice Act, 3 of 2000 *("PAJA').*

[9] First respondent contended the following during the application:

9.1 That in addition to the calculations referred to in paragraph 7.9, in order for the applicant to pass the course in Periodontology, she was required to pass the clinical part of the evaluation of the course. The clinical part of the evaluation of the course was calculated by taking the applicant's results from the clinical part of the course into account as stated in paragraph 7.10 above, and was 48,52% and not the required pass mark of 50%.

9.2 On 1 June 2005, the applicant was offered an opportunity to improve her marks by a maximum of 3% through a mandatory oral examination. This examination, which had a clinical emphasis, was conducted both by internal invigilators and an external examiner, and was failed by the applicant as a result of her poor performance during the oral examination.

9.3 That the applicant failed the clinical section of the course in Periodontology and hence failed the course in Periodontology.

9.4 That it was entitled and obliged to require the applicant to pass the clinical section of the course in Periodontology in order for the applicant to pass the course in Periodontology.

9.5 That there is no basis upon which the first respondent's decision to fail the applicant is subject to review.

[10] It was common cause between the parties during the argument that the dispute between the parties boils down to the following:

10.1 Whether the due performance notice issued by Prof. Petit in January 2004 constituted an amendment of the threshold requirements set out by the Senate of the University in the Rules, and particularly the requirements stated in Rule M9.2, which reads as follows:

"9.2 ***Clinical and practical requirements: BDS and MBBCh***

9.2. 1 *A student shall, to the satisfaction* of *the Senate comply with such clinical and practical requirements* as *may be* <u>*determined by the Senate for each year*</u> of *study, failing which he/she may be refused in terms* of G15.4, *permission to present himself/herself for examination.*

9.2.2 *A student who fails the clinical component* <u>of *the examination*</u> *in any course, shall deemed to have failed the examination in the course* as a *whole.* "

10.2 If it is so that the due performance notice issued by Prof. Petit did in fact amend the threshold requirements stated in Rule M9.2, whether Petit had the power to do so, and whether the correct procedure was followed in doing so.

[11] It is trite law that stipulations in a document should not be read and interpreted in isolation, but in the context of the document as a whole. [4] This rule also applies when the word *"examination"* in Rule M9.2 is to be interpreted.

[12] It is contended by applicant that the term *"examination"* is defined in the General Rules of first respondent to mean only the final exam at the end of the course, which according to applicant is the only *"examination"* which is conducted by at lease one internal and *"one external examiner."*

[13] I believe that applicant's interpretation of the word *"examination",* which in effect, according to applicant only refers to the final exam at the end of the year, is too narrow, for the following reasons:

13.1 The term "examination" is defined in the General Rules of the first respondent to mean an assessment of a student's performance in a course made by at least one internal and one external examiner. (See General Rule 1.8)

[4] Coopers & Lybrand v Bryant, 1995 (3) SA 761 (A) at 767E-768E

13.2 The term "examination" must be read in context with Rule M9.2.1 (b), which reads:

> *"A student who fails the clinical component* of *the examination in any course, shall be deemed to have failed the examination in the course* as a *whole."*

13.3 The explanatory note to Rule M9.2.1 (b) indicates that Rule M9.2.1 (b) is a requirement of the Health Professions Council of South Africa. The requirement of the Health Professionals Council of South Africa (the successor to the South African Medical and Dental Council) contained in the Regulations, 40, 42, 43 and 45 referred to below, require a student to pass the clinical part of the evaluation of a student by a University such as first respondent. (My underlining)

13.4 Regulation 40, 42 and 43(2) of the Regulations issued by the Minister of Health relating to the registration of students, minimum curricula and professional examinations in medicine and dentistry (Government Notice No R.652 dated 5 May 1995) clearly connotes a *"continual assessment* or *"evaluation"* of a student throughout the course, and not only in a final exam at the end of the year.

13.5 Regulation 40, for instance, reads as follows:

" *While the following Regulations concerning examinations must be complied with, it is necessary to retain the integrated approach* as *set out in Part* 5. *The examinations stipulated herein are regarded* as *essential, but should not be permitted to interfere with the integration* of *pre-clinical and clinical subjects, and may be conducted partly by means* of *continual evaluation.* "

13.6 Regulation 42 reads as follows:

"At least two examiners, one of *whom (the external examiner) was not involved in the teaching* of *the candidate shall take part in the final evaluation. The external examiner need not be present during the entire period* of *the examination, and need not mark every examination paper."*

13.7 Regulation 43(2) reads as follows:

"(2) *In order to ensure continual evaluation, examiners shall take into account the documented records* of *work done by* a *candidate throughout the course* of *study, inter alia in optional subjects.* "

13.8 Regulation 45 reads as follows:

"No candidate who fails the clinical part of *the evaluation shall be allowed to pass the final academic examinations."*

13.9 The definition of *"examination"* in Rule 61.8 should also be read in conjunction with the Senate Policy of first respondent, on assessment of Students' academic performance, which defines *"examination"* as follows:

"In terms of *the General Regulations for degrees, diplomas, licentiates and certificates, there has to be an examination in each qualifying course or portion* of *it, but examining may take* a *number* of *forms.*

An examination as *defined* as *an assessment* of a *student's performance in* a *course, made by at least one internal and one external examiner who have been appointed in terms of General Rule G15.2 and these standing orders, and is not limited to an assessment conducted under the supervision* of *an invigilator. It may be written, written and oral, practical or clinical or be any other piece* of *work or combination* of *these* or, *where the Senate expressly* so *determines in respect* of *any particular examination or type* of *examination, oral only. In all cases, the*

examination must be in a *form that is suitable for objective assessment by the internal examiner."*

13.10 It is the evidence (which should be accepted by me for purposes hereof) that a certain Prof. Lohse of the University of Pretoria was appointed as external examiner in the course. It was confirmed by Prof. Lohse that:

13.10.1 He was the appointed external examiner for the course;

13.10.2 He considered the questions and model answers and determined them to be fair and reasonable;

13.10.3 He moderated a sample of the scripts, particularly those scripts that were on the borderline between passing and failing and considered the marking to be fair, accurate and consistent;

13.10.4 He assessed the performance of a sample of students in the course of a two-year period;

13.10.5 The clinical knowledge of the applicant as further demonstrated by her at the oral

examination was noticeably short of the requisite standard set by first respondent;

13.10.6 The assessment and mark awarded to the applicant was fair, reasonable and correct in the circumstances.

[14] In my view applicant was assessed objectively, and within the wider meaning of the word *"examination"* as defined in the Rules. The due performance notice issued by Prof. Petit did in my view not amend the threshold requirements set by the Senate or the Rules of the first respondent.

[15] Should I be wrong in deciding that the due performance notice did not amend the threshold requirement stated in the Rules, and it is assumed for the sake of argument that the due performance notice did in fact amend the Rule, it might be prudent to consider whether Prof. Petit was authorised to issue the due performance notice, or not.

[16] First respondent's contentions in this regard are the following:

16.1 First respondent is a public higher education institution as defined in the Higher Education Act 101 of 1997. ("the Higher Education Act"). In terms of Section 26 of the Higher Education Act, the first respondent was obliged to establish the following structures and offices:

16.1.1 A council;

16.1.2 A senate;

16.1.3 A principal;

16.1.4 A vice-principal;

16.1.5 A students' representative council;

16.1.6 An institutional forum;

16.1.7 Such other structures and offices as may be determined by the institutional statute.

16.2 The Senate is, in terms of Section 28 of the Higher Education Act, accountable to the Council for the academic and research functions of the first respondent.

16.3 In terms of Section 32 of the Higher Education Act, the first respondent's Council was entitled to make an institutional statute and institutional rules to give effect to such statute.

16.4 In terms of Section 658(2) of the Higher Education Act, no degree may be conferred by the first respondent upon any person who has not completed the work and attained the standard of proficiency determined through assessment as required by the first respondent's Senate.

16.5 Acting in accordance with the Higher Education Act, the first respondent published an institutional statute with the approval of the Minister of Education on 15 February 2002. This was amended on 14 May 2004.

16.6 The first respondent also promulgated rules as contemplated by Section 32 of the Higher Education Act. A copy of the first respondent's rules for the 2004 academic year is attached to the applicant's affidavit as annexure B04 and for the 2005 academic year as annexure B05 (including the rules and syllabi for the Faculty of Health Sciences.)

16.7 The deponent to the Answering Affidavit, Mr Evans, was the Head of the School of Oral Health Sciences of the Faculty of Health Sciences of the first respondent during the 2005 academic year. According to Evans:

16.7.1 The Head of a School is empowered by the Senate to determine the due performance requirements for that School.

16.7.2 This has been the position since time immemorial. This is confirmed by Dr Swemmer, the Registrar of Academic Affairs of the first respondent and a member of the first respondent's Senate.

16.8 Although there is no evidence in the papers of a formal resolution of the Senate having done so, there is additional evidence corroborating Dr Swemmer's testimony in the form of the explanatory note in the rules of the first respondent that, in many cases, the powers of Senate are, for practical purposes, delegated and exercised by the Deans of the Faculties.

16.9 This has been the practice since time immemorial, and it is not startling that there is no formal resolution of the Senate, which can be located.

16.10 Evans confirms that Professor Petit was empowered by him to issue a due performance requirement note in relation to the Department of Periodontology and Oral Medicine of which Professor Petit was the Head.

16.11 While there is no formal evidence of the delegation of the power of the Senate, it is contended by first respondent that clear effect of the evidence of Evans and Swemmer is of a delegation of power by the Senate to formulate and issue due performance requirements to the Head of the School of Oral Health Sciences, with the power of the Head of the School of Oral Health Sciences having a power of sub-delegation.

16.12 Rule G1.16 provides that the Senate is defined in Section 1 as read with Section 28 of the Higher Education Act and is the

body, which governs the policies and procedures in respect of the teaching, learning, research and academic functions of the University. It is further provided in Rule G1.16 that the Senate may delegate its powers except where expressly prohibited from doing so by the University Statute.

16.13 Furthermore, it was contended that, in terms of Section 30 of the University Statute, the power of the Senate to determine the standards of proficiency required to be attained in any mode of assessment that may be used in order to satisfy the requirements for the obtaining of each degree is an original power of the Senate.

[17] Applicant's contentions in this regard were the following:

17.1 The only paragraph in the Senate policy, which may remotely give authorisation to Prof. Petit to issue the due performance notice, is clause 4.1 of the Policy. It reads as follows:

"4.1 *A Head* of *School is,* as a *minimum, required to make available to students by the end* of *the first week* of *each term, by means* of a *hand out to students and* a *notice on the school or discipline notice board the following information for each course:*

4. 1. 1 A *course outline which should contain the aims and objectives or conceptual framework* of *the course, the content* of *the content, the format and timing* of *examinations and tests, the number* of *assignments and the dates by which they are to be submitted and all other formal requirements* of *the course (Dates for examinations and formal tests held outside the formal examination cession should be published at the start* of *the academic year. Where this is not possible, the Head* of *School must. ensure that students are given reasonable notice by displaying the dates on the school notice board.) See also* 5.5.3;

4.1.2 A *detailed breakdown* of *the composition* of *the final mark indicating percentage contribution* of *the individual components* of *the class mark and the examination mark.*

4.1.3 *The satisfactory participation require ments in regard to attendance, performance and participation.*

4. 1.4 *Where appropriate rules for the use* of *calculators in examinations and tests (sic).*

4.1.5 *Where appropriate the rules for the use* of *reference materials in examinations and tests.* "

17.2 It was submitted by applicant's counsel that a careful reading of this clause compels the conclusion that it does not authorise the Head of the School to vary the threshold requirements set by the Senate in the Rules.

17.3 It was submitted by applicant's counsel that one only has to read the policy document three paragraphs further to realize that the threshold requirement contended for by the applicant is expressly entrenched therein: clause 7.1 reads as follows:

"7.1 *The final mark is used to determine whether* a *student has met the requirements* of a *course. It is made up* of *the examination mark and the*

class mark (see 3.3). *The examination or examination equivalent mark must comprise at least 50% of the final mark. A breakdown of the composition of the final mark shall be approved by the faculty executive committee in time to be given to students by the end of the first week of each term. Senate Policy requires that, except by permission of the Senate, there must during each course be at least one assignment or test that will count towards the final mark. Attention must also be drawn to any sub-minimum components of the course or examination* as *set out in the rules or the syllabuses of the course...* ".

17.4 It was submitted that the first respondent does not rely on any resolution by the faculty executive committee nor do the rules or syllabuses of the course published in the *"Rules and Syllabuses"* contain the threshold requirement contended for by the first respondent.

17.5 It was submitted that, on the contrary, those *"Rules and Syllabuses"* sanctioned by the Senate support the applicant's contention, and not the first respondent's contention, where Rule M9.2.1 (b) states:

"A student who fails the clinical component of *the examination in any course shall be deemed to have failed the examination in the course* as a *whole."*

17.6 It was submitted that first respondent's reliance on *"Rule* 1.16" is ill founded. This so-called *"Rule"* which reads:

"In many cases the powers of *the Senate are for practical purposes delegated to and exercised by the deans* of *the faculties",*

according to applicant's counsel's reasoning:

(a) Does not form part of the rules, but is at most an editorial side note;

(b) Does not state what functions had been delegated to whom;

(c) Does not take into account section 30(2)(a) of the University Statute which authorises the Senate only after consulting the relevant faculty board to amend a rule relating to the curriculum or the obtaining of any degree or qualification.

17.7 Counsel for applicant submitted that:

(a) Section 30(2)(a) of the Statute requires a specific delegation by the Council to the Senate and the first respondent does not rely on such a delegation;

(b) In terms of that section the Senate is the delegatus of the Council: in terms of the principle *"delegatus delegare non potest"* (a person to whom any function is delegated may not further delegate that function), the Senate itself must consider and resolve to effect such amendment, unless the Statute itself vests the Senate with the power of sub-delegation;

(c) In any event, even if the Head of the School (not the dean) has been so delegated, he in turn cannot sub delegate that function for the same reasons as stated above;

(d) That as a matter of law, Prof Petit was not entitled to issue a *"due performance notice"* in terms of which any existing rule relating to the curriculum determining the qualification threshold be amended.

[18] I am of the view that first respondent's submissions in this regard are correct, and the submissions by applicant incorrect. The evidence is that since time immemorial the Senate delegated some of its functions to the deans of faculties, and that these deans acted through its heads of department, who followed the instructions of the deans.

[19] The due performance notice issued by Prof. Petit was clearly done with the full consent of the Dean of the Faculty, and the Senate. It is in this regard important to note that the Registrar of the first respondent, Dr Swemmer, who is a member of the Senate confirms the following statement by Dr Evans, who was the head of the School of Oral Sciences of the Faculty of Health Sciences of first respondent during the 2005 academic year:

> *"30. Simply put, the Head* of *School is empowered by the Senate to determine the due performance requirements for that school. That this has been the position since time immemorial is confirmed by Or Swemmer, the Registrar* of *Academic Affairs* of *the first respondent, and more importantly,* a *member of the first respondent's Senate. His confirmatory affidavit is attached hereto marked "WE5".*

[20] Although it is stated in the affidavit of Evans that a *"delegation"* took place to the Head of the relevant school, it appears to me that what in practice happened is simply that since time immemorial powers were delegated to the Deans, who acted through their Heads of Departments, and nothing more.

[21] I therefore find that the Dean as represented by Prof. Petit acted correctly when issuing the due performance notice, and within the Dean's powers, as delegated to the Dean. Counsel did not refer me to any authority, and I am not aware of any authority, that a delegation of powers should be done only in writing, or couched in a specific form.

[22] A side issue between the parties during the arguing of the matter was the first respondent's application to replace an incorrect annexure to its answering affidavits with the correct annexure.

[23] Annexure "WE16" as referred to in the first respondent's answering affidavit is a signature sheet on which the signatures of various students of the first respondent are reflected, in proof of their receipt of, *inter alia,* the relevant *"due performance requirements".* The document the first respondent initially attached to the answering affidavit did not contain the name or purported signature of the applicant, but it is explained by the first respondent in the application for leave to replace the incorrect annexure with the correct one, that

the incorrect annexure was annexed to the answering affidavit in error and this error must have occurred when all the annexures were collated at the time that the affidavit was signed.

[24] Upon discovery of the error a letter was addressed to the applicant's attorney on 9 October 2007, advising him of the error and a copy of the correct annexure was furnished. Nothing was further heard from applicant's attorney in this regard, but upon receipt and review of the applicant's heads of argument on 16 October 2007 it was clear that the applicant was persisting with her reliance on the incorrect annexure through her contentions that such annexure did not reference her. Some correspondence followed between the parties, and applicant's attorney subsequently advised that the incorrect annexure could not be replaced with the correct annexure, without a formal application to the Court.

[25] The first respondent was thus forced to bring an application to substitute the incorrect annexure with the correct one, and when the correct annexure was presented, the applicant filed an opposing affidavit wherein she denied that the documents referred to in annexure "WE16" were made available to her during the course of her studies, and she also denied that the said document contained her signature.

[26] The first respondent then filed a replying affidavit, and attached to the replying affidavit the report of the handwriting expert, Cecil Greenfield, in which the opinion was expressed that the signature on the correct "WE16" was indeed the applicant's signature. [I am well aware of the rule in the Law of Evidence to the effect that the evidence of a hand writing expert should be treated with caution[5], and I am also well aware of the fact that an applicant is not permitted to introduce new matter in an application, except within a very narrow ambit.] Although it may be argued by first respondent (applicant in this specific application) that an important consideration is whether applicant was in possession of the *"new"* facts when the founding affidavit was prepared, or whether the answering affidavit broadened the issues between the parties, I do not intend deciding this matter with reference to the report of the handwriting expert. i thus for purposes of my judgment ignore the report of the expert, Cecil Greenfield.

[27] I have (as indicated above), already accepted in terms of the *Plascon Evans Rule* (and without reference to Greenfield's report) that the applicant did in fact in January 2004 receive the due performance notice, and that she had been aware since January 2004 of the minimum requirements as prescribed in the due performance notice.

[28] I have therefore come to the conclusion that the applicant's application for review should be dismissed.

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[5] CWH Schmidt, The Law of Evidence, Issue 4, page 4-18

[29] Applicant's counsel argued on behalf of the applicant that at least the costs of the application for the substituting of the incorrect annexure to the answering affidavit brought by first respondent, should be paid by the first respondent. I do not agree with this contention, in view of the various letters written by the first respondent's attorneys to the applicant's attorneys, requesting them to allow a substitution of the incorrect annexure. It was the applicant who unreasonably refused to allow such a substitution, and thus forced first respondent to bring a formal application to Court.

HEARD ON:	9 NOVEMBER 2007
FOR THE APPLICANT:	ADV P ELLIS SC
INSTRUCTED BY:	VAN ZYL LE ROUX & HURTER INC, PRETORIA
FOR THE RESPONDENTS:	ADV LN HARRISWEBBER
INSTRUCTED BY:	WENTZEL BOWENS JOHANNESBURG

[30] The following order is thus made by me:

1. The applicant's application to review and set aside the first respondent's decision to fail the applicant in the course of Periodontology is dismissed with costs;

2. The first respondent's application for leave to replace the incorrect annexure to its answering affidavit is granted with costs.

ACTING JUDGE OF THE HIGH COURT