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

NOT REPORTABLE

CASE NO: 8569/2007

DATE: 16/1/2008

In the matter between:

Y PANDAY

APPLICANT

And

UNIVERSITY OF WITWATERSRAND

RESPONDENT

JUDGMENT

MOLOPA J

The Applicant has launched an application against the Respondent for an order in the following terms in the notice of motion:

- a) Reviewing and setting aside the decision of the Respondent to refuse the Applicant permission to register with the faculty of Health Sciences for the 2007 academic year;
- b) Directing the Respondent to afford the Applicant a supplementary, alternatively an oral examination based upon the integrated examination component of the MBBCH IV / GEMP II course;
- c) Alternatively to (b) above, directing the Respondent to reconsider the exclusion of the Applicant having regard to the alternatives

provided for in Rules 13.4, 13.5 13.7, 14.4 and 14.5 of the General Rules of the Respondent.

- d) Directing the Respondent to pay the costs of the Application, such costs to include the costs consequent upon the employment of two counsel.

In argument before court the Applicant has somewhat abandoned prayers (b) and (c) above and instead introduced a new prayer which reads as follows (as set out in Applicant's supplementary heads of argument):

- 2) An order directing the Respondent to enroll the Applicant for the MBBCH IV /GEMP II offered by the faculty of Health Science for the 2007 academic year.

The Application is opposed by the Respondent

This Application is for Review in terms of the Provisions of the Promotion of access to Justice Act 3 of 2000 ("PAJA"), although this is somewhat blurred and or not clear in the papers, to the extent that the Respondent took issue therewith. However, in Applicant's heads of argument Counsel reiterated, even verbally, that the Review was actually in terms of Section 33(1) of the Constitution Act 106 of 1996 read with the provisions of PAJA more specifically Section 6(2)(a)(iii), (e) (iii), f (ii), (h) and (i).

The Applicant was registered at the University of the Witwatersrand (WITS), the Respondent in 2001 for a degree of MBBCH, a six year course.

In 2005 he reached his fourth year of studies of the MBBCH and he failed it. In 2006 he repeated the fourth year of studies, he again failed it. In terms of the Rules of the University, Rule 4.1 of the Standing Orders of the Respondent he was excluded from registering again for MBBCH IV /GEMP II. Prior to his exclusion aforesaid the Faculty Readmissions Committee (FRC) considered whether he should or should not be re-admitted. After consideration, and on 10 January 2007 the FRC took the decision not to re-admit the Applicant, thereby excluding him. The Applicant appealed to the Council Readmission Council ("CRC") against the decision of the FRC to exclude him. The appeal (to the CRC) was refused/failed. The Applicant obviously has a gripe/ problem with his exclusion from Respondent and/or the decision of the FRC and CRC aforesaid, hence this application.

Rule 4.1 of the Standing Orders of the Respondent reads as follows:

"4.1 A student shall not be allowed to register for a year of study more than twice".

It is common cause that the Applicant failed the fourth year of MBBCH twice, i.e. 2005 and 2006. Since he falls squarely within the parameters of the Rule 4.1 aforesaid, he has been excluded from registering for MBBCH IV / GEMP II in 2007. The use of . . . **shall...** in the Rule indicates that application of the clause is peremptory (except where exceptional circumstances are shown by an Applicant).

The case the Applicant makes in his founding papers is that Applicant seeks to blame his failure of the MBBCH IV on the fact that the Respondent introduced a new syllabus in 2003, known as the

Graduate Entry Medical Programme (GEMP) system. That the GEMP system actually, due to its constantly changing nature led to much confusion and anxiety on the part of students especially with regard to their preparation for the examination and that for that reason in his opinion, since the GEMP II (MBBCH IV) integrated exam intended to prepare students for GEMP III (MBBCH V) in preparing for his examinations he, in his own words focused on the clinical aspect of the work rather than the theoretical aspect. **In** my view the Applicant seems to have 'spotted' the exam, not focusing on all aspects of the syllabus i.e. both theoretical and clinical aspects in his preparation as is required of all diligent students I suppose. According to the Respondent, with the new curriculum the theory and the practice are integrated to make learning more meaningful, as opposed to the old curriculum which was more teacher based. **In** any event, the examination apparently included theoretical aspects as well, of which, on his own version, the Applicant had apparently not prepared for since he allegedly focused more on the clinical aspect in his preparation.

Further, apparently, the Applicant, amongst others, had to submit portfolios in 2006 as part of his fourth year end marks. These portfolios constituted 20% of the total year mark. The Applicant apparently never submitted these portfolios, hence lost marks which could have been allocated for these portfolios. Apparently only when he saw that he had failed did he seek to submit the portfolios, out of time (after the due date) and these were rejected/ refused. The portfolios were supposed to have been submitted on 10 February 2006, 17 March 2006, 19 May 2006, 21 July 2006 and 01 September 2006. However, only after the academic year, when he saw already

that he had failed, and when he lodged his application for readmission with the FRC, did the Applicant also submit four of the previously required portfolios aforesaid. It is clear from his own conduct, in my view, that the Applicant did not take his studies seriously, nor was he following the instructions of the Respondent.

His academic report is annexed to the papers, it speaks for itself, I do not deem it necessary to repeat and/or reiterate what has been stated in the Answering Affidavit relating to the Applicant's academic performance since his registration at WITS in 2001, it speaks for itself. Even in his representations to the FRC, Annexure "AA 24" to the Answering Affidavit he states that he "did not complete all his portfolios, which would have eased the pressure a bit", and that despite having offered the faculty "to make up the work in anyway possible". .. he did not complete the portfolios. In my view he simply took a chance.

Despite having been at the University for at least six (6) years, 2001-2006, he states in his representations to the FRC, that he "now realises the importance of every assignment and mark, and will not make the same mistakes again...". Clearly in my view, the Applicant has not shown any seriousness towards his studies, and it cannot be said that his exclusion in 2007 was unfounded, having considered all factors around him.

It is trite that the courts would not lightly interfere with the administration and policies of institutions nor would it be for the courts to interfere and/or to dictate on how the institutions should run their curriculum in so far as their Syllabi is concerned. In my view it

is for the students, including the Applicant, to adjust to the curriculum/structure of the institution. There is undisputed evidence that in 2006 in the class of the Applicant there was more than 90% pass rate of the MBBCH IV students. The fact that the Applicant obtained 57% instead of the required 60% pass mark does not take the matter any further, the fact remains that he did not make the grade, and this, taken together with his entire academic performance from 2001-2006 as well as other factor considered by the FRC and/or CRC cannot fault the FRC and/or CRC for refusing him to register. I cannot find any reviewable ground in Applicant's papers for such decision.

It was submitted in argument by counsel for the Applicant that the Applicant should at least be afforded the opportunity to submit his portfolios to uplift his 57% mark to at least above 60% which would then push the Applicant's marks to a pass mark. Obviously the Applicant had all the opportunity in 2006 to do his work diligently, and that would include submitting his portfolios timeously, but he did not see it fit to do so when the time allowed it. This court cannot condone the Applicant's irresponsible behaviour by ordering the Respondent to accept the Applicant's late portfolios. What message will this court send to other students, and the Applicant self? The court will definitely be setting a very bad precedent for all institutions for that matter if it were to do that. There are Rules governing all institutions and every and/or any person enrolling with such institutions should be bound by such rules, without exception. This applies to the Applicant herein as well.

It is clear that the FRC and CRC have considered the Applicant's representations and found no exceptional circumstances. Applicant states his parents' marital problems and some law suits against him, as well as stress as, amongst others exceptional circumstances. The FRC and/or CRC cannot be faulted for not finding these to be exceptional circumstances. According to the Respondent any person who expects to practice as a doctor, is expected and/or supposed to have the resilience to deal and cope with problems such as the ones raised by the Applicant as exceptional circumstances. It cannot be said that the Respondent's officials (FRC/CRC) did not apply their mind to the matter, prior to deciding to exclude the Applicant from registering for MBBCH IV /GEMP II in 2007, nor that they were unreasonable in this regard.

The Applicant in his Replying affidavit for the first time raises BIAS as his basis of attack on the decision of the FRC/CRC. This is a new cause of action although it is trite that the Applicant makes out his case in the Founding Affidavit. Anyway the Respondent did not raise objections to this hence this court looked at all complaints raised by the Applicant. He alleges that the decision of the FRC was influenced by the prejudice which the deponent Ahmed Abdullah Wadee ("Wadee") has against him Applicant. Much was argued by Applicant's counsel on Wadee's alleged bias, and that Wadee allegedly influenced the members of the FRC to come to the conclusion they did in refusing to allow the Applicant to register for 2007. The argument is amongst others based on Wadee's statement that the Applicant stayed in a private flat and that he drove a Mercedes Benz CLK with personalised registration numbers. Wadee clarifies this by stating that he mentioned this aspect in response to

Applicant's Attorney's letter dated 12 March 2007, Annexure AA 31 (p321) referring to Applicant as being from a disadvantaged background. Wadee was merely putting things into perspective that the lifestyle of the Applicant cannot be said to be that of a disadvantaged student. Wadee may have been expressing an opinion, and in my view I cannot find any basis for bias and/or prejudice from what Wadee stated.

It is inconceivable to assume that Wadee would have such influence over the eighteen (18) members of the FRC (including the student representatives) that they would merely rubber stamp his decision without applying their minds to the issues before them. These are people of the highest calibre with integrity amongst them eleven (11) professors and a doctor. They surely have a duty to protect their own integrity, what would they stand to gain really in just rubber stamping Wadee's decision without they themselves applying their minds to the issue? I find Applicant's attack in this regard very baseless. Even the CRC, made up of six (6) members of the highest calibre, with integrity as well considered Applicant's matter on appeal and dismissed such appeal. Can it be said that the CRC also merely rubber stamped Wadee's and/or the FRC decision without they themselves applying their minds? This is mind boggling and I cannot find any basis for such attack and/or allegations by the Applicant.

Applicant also seeks to compare his position with the positions of other students who he alleges were treated by Respondent more favourably than himself, as for example Aaron Govindasammy and Avinash Ramkissoon. The explanation given by the Respondent on the positions/situations of these two students clearly shows that the

Applicant's position situation is incomparable with that of the two students he cited. The Applicant seems to be clutching at all straws to make out a case, this is misleading to this court surely the Applicant first verify facts before throwing accusations at the Respondent.

The Applicant basically attacks the decision of the FRC as formulated in its letter dated 10 January 2007, Annexure 'YP5' to the founding affidavit on the basis that it is not clear and/or "there is no objective evidence to establish that all the details which Wadee has placed before court were taken into account by the FRC" and that "there is nothing in the papers to demonstrate that either the FRC or the CRC applied their mind to the reasons advanced by the Applicant for his failure to perform in the integrated examinations". These aspects are clearly and fully dealt with by the Respondent in its answering affidavits and I do not see how it can be said that the FRC and/or the CRC did not apply their mind and/or that they took irrelevant considerations into account. In my view, as already stated above, any student's academic record is relevant and necessary when dealing with his/her academic matters. Even when results are sent to students the statement of results includes all courses/results since registration as appears from Annexure "AA7" (p238-240). It cannot be correct that only his 2005 and 2006, i.e. MBBCH IV record should be looked at and not his entire record since his registration in 2001. The rules of the University, which are guidelines in this regard, apply, and these bind all students, including the Applicant.

On the alleged confusion about Applicant's failure in 2005, even if one were to accept that the Respondent had made a mistake in 2005 by initially excluding the Applicant since he had not obtained a mark

below 45%, the fact remains that still, with the 56% which he got in 2005, he had failed to meet the requirements of a pass, which is 60% and thus, he had failed and he repeated the fourth year in 2006. Nowhere does it appear that he disputed that he had failed his fourth year of study in 2005. Having failed in 2005, he repeated fourth year in 2006 and again failed for the second time. Rule 4.1 clearly states, as already mentioned above that "A student shall not be allowed to register for a year of study more than twice". Applicant clearly falls squarely within the ambit of Rule 4.1 by virtue of having failed fourth year twice in 2005 and 2006.

It is clearly stated in 'YP5' that "The committee (FRC) noted that this was the second time that Mr Panday (The Applicant) had attempted the fourth year of study. His result in 2005 was 56% and his result in 2006 was 57% (the pass mark being 60%)..." The issue taken upon Annexure' YP5' do not, in my view assist the Applicant. It is clearly

stated in 'YP5' that the FRC "has considered carefully the circumstances surrounding your failure. . ." Is it expected that the FRC should have tabulated in this letter-'YP5' every aspect/issue considered and how it was considered and the debates around such.

The Respondent states that all issues placed before the FRC were considered and Applicant merely denies and suggests that all should have been recorded on 'YP5'.

'YP5' is clearly a letter informing the Applicant of the final decision of the FRC and also outlining his academic record in so far as his fourth year of studies of the MBBCH course is concerned, which is the crux of the matter. The Applicant does not seem to take responsibility for his failure. At some stage in his supplementary

Replying Affidavit he sought to raise yet another new cause of action on GEMP as opposed to other formats in other Universities. There is in any event a dispute of fact, according to the Respondent other Universities submitted in 2005 been taken into account/marked and that this court should thus order the Respondent to enroll him for MBBCH V/GEMP III as was proposed in Annexure "AA41" P609, which he terms "Amended Order prayed".

format/Structure is the same as in Kwazulu Natal, Cape Town and Walter Sisulu University as well as world wide in Canada and Hong Kong. He not in dispute that the Applicant has failed GEMP II/ MBBCH IV yet he would have wanted this court to order the Respondent to enroll/register him for MBBCH IV /GEMP III. What precedent would the court be creating if it were to do this what message would this be sending to the current and future students at WITS and at other Universities. Such decision would definitely be used by other students in future to advance themselves despite the fact that they had failed GEMP II/ MBBCH IV. This cannot be in the interests of justice nor in the interests of proper administration of institutions. This approach by the Applicant is clearly his failure to appreciate that he did not perform well in his studies, nor did he comply with the requirements of amongst others, submitting portfolios timeously, yet shifted the blame to the Respondent. In the result the Application is dismissed with costs, such costs to include the costs of two (2) counsel.

Further the Applicant avers that other Universities will not be able to admit him because their syllabi and/or Course structures/format are different from that of the Respondent, and that therefore he is prejudiced thereby. This allegation is not substantiated in anyway by the Applicant, there is no confirmatory Affidavit from anyone of the other universities around South Africa to confirm this, nor is there any proof whatsoever by the Applicant that he applied to other Universities but could not be accepted because of the different format

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Molopa JJUDGE OF THE HIGH COURT