

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

CASE NO. 5347/2016

In the matter between:

FEES MUST FALL (NMMU)	FIRST APPLICANT
FEES MUST FALL STEERING COMMITTEE	SECOND APPLICANT
GRETCHEN SUDENIE	THIRD APPLICANT
ZOLISA MARAWU	FOURTH APPLICANT
DOMINIQUE RALARALA	FIFTH APPLICANT
LIZO JIM	SIXTH APPLICANT
THEMBELIHLE LINKS	SEVENTH APPLICANT
AZOLA DAYILE	EIGHTH APPLICANT
LUKHANYO KEPE	NINTH APPLICANT
LISOLAMADZANA MAGADLA	TENTH APPLICANT
KHANYA MAGODLA	ELEVENTH APPLICANT
LAWRENCE LWANGA	TWELFTH APPLICANT
VUSUMZI NKOMO	THIRTEENTH APPLICANT
LUSAPHO PHIKASHE	FOURTEENTH APPLICANT
LERATO MOKOTEDI	FIFTEENTH APPLICANT
YANDISA JUBASE	SIXTEENTH APPLICANT

SIPUMEZE SIPUNZI

SEVENTEENTH APPLICANT

NAZIZIPHIWHO BUSO

EIGHTEENTH APPLICANT

BIZA SHONGWE

NINETEENTH APPLICANT

NONTOBEKO ZUNGU

TWENTIETH APPLICANT

And

**NELSON MANDELA METROPOLITAN
UNIVERSITY**

FIRST RESPONDENT

**NELSON MANDELA METROPOLITAN
UNIVERSITY SRC**

SECOND RESPONDENT

ANSWERING AFFIDAVIT

I, the undersigned,

Dr Sibongile Muthwa

do hereby make oath and state that:

1. I am the Acting Vice-Chancellor of the First Respondent (the "NMMU").
I am duly authorised to represent the First Respondent in these proceedings and to depose to this Affidavit on its behalf.
2. Unless stated to the contrary or the context indicates otherwise, the facts recorded in this Affidavit are within my personal knowledge, or are apparent from the documents in my possession or under my control and are true and correct.
3. I have read the Founding Affidavit by Gretchen Sudenie ("Sudenie"), supplied to the Respondents on 12 November 2016. I wish to reply to certain allegations contained therein. My failure to deal with each individual allegation must not be regarded as an admission of its correctness. Unless specifically admitted, allegations must be read as having been denied.

SUMMARY

4. This application is about an attempt on the part of a movement closely associated with #FeesMustFall, claiming to represent the interests of a select group of students, to compel the NMMU to take certain unspecified steps, or to afford the Applicants certain benefits. At the heart of this application is a thinly veiled attempt to obstruct the NMMU from completing the 2016 academic year.

5. The application is premised on alleged hardship resulting from the steps taken by the NMMU under its academic recovery plan (the "Plan") to re-open the university and to overcome the effects of the national student protest action embarked upon by various students under the #FeesMustFall banner. The Plan is aimed at ensuring the successful completion of the 2016 academic year.
6. The Applicants are not seeking to enforce any contractual rights. The Applicants are not challenging the reasonableness or rationality of the decision by the NMMU to adopt the Plan, nor the NMMU's entitlement to adopt the Plan. The Applicants however allege that the Plan is "exclusionary and discriminatory", essentially due to the less privileged students not possessing access to the technology required to participate in the Plan.
7. The Applicants complain that the Plan adversely affects their rights to equal enjoyment of education in a serious manner. Essentially the Applicants complain that they are being discriminated against unfairly.
8. The Applicants comprise of, without exception, either the FMF, or members of the FMF steering committee. The FMF, in turn, pursues

the objectives adopted countrywide by the #FeesMustFall movement. The #FeesMustFall movement seeks the closure of all South African universities until free education for all students has been secured.

9. As I demonstrate in this affidavit, the Applicants are the unlawful creators of the dire circumstances that necessitated the adoption and implementation of the Plan. They act with complete disregard of the impact of their conduct on their fellow students. They do so in bad faith and disdainful of orders issued by the High Court. It is the very creators of these circumstances that are now complaining about the consequences of their creation. And so these Applicants are now approaching this Court with soiled hands for assistance to resolve the difficulties they crafted and continue to craft for themselves. The Applicants are the authors of their own misfortune.

10. Furthermore, I shall demonstrate that the application in itself amounts to an impermissible attempt to obstruct the NMMU's efforts at completing the 2016 academic year.

11. For these reasons the NMMU contends, and will show, that the application amounts to a cynical attempt to prevent the NMMU from completing the 2016 academic year, amounts to an abuse of the

process of Court, is brought in the utmost bad faith and is deserving of censure.

12. Additionally, the FMF's approach to this Court has denied the Court the opportunity to obtain proper input from a number of significant stakeholders. The failure to join such parties deprives the Court of access to crucially relevant facts and circumstances that would enable this Court to make a fully informed decision.
13. In sum, it is respectfully submitted that this Court cannot make the order requested by the Applicant based on the available information, and the parties before this Court.
14. I thus propose to deal with the Founding Affidavit by the Applicant on the following basis: First: I provide an overview of and background to the events that gave rise to this application; Second: I identify what the NMMU regards as the relevant role-players; Third: I shall explain the nature and content of the Plan. Fourth: I raise various issues the NMMU regards as insurmountable challenges to the hearing of this application. Lastly I deal with the detailed allegations raised in the Founding Affidavit.

OVERVIEW AND BACKGROUND

15. This Application occurs in the midst of a national crisis relating to the funding of students' tuition at Tertiary Education Institutions, and for the most part, centres on demands and issues which are beyond the control of the First Respondent or any University for that matter.

16. The NMMU provides tuition on six campuses (5 in Port Elizabeth and one in George) to some 27 000 students, and employs some 3000 staff, academics and other workers on a fulltime basis. The NMMU is responsible for the safety and security of all its students. In addition, the NMMU is the custodian of all infrastructure and property entrusted to it. The total value of the infrastructure and assets of the NMMU amounts to an estimated R3 billion. The budgeted annual turnover for the NMMU 2016/2017 year amounts to some R2 billion.

17. Furthermore, the NMMU facilitates ongoing research by its students and academics, some of which are of an ongoing nature and entails the investment of incalculable hours of manpower, money and time in the pursuance of research projects and academic initiatives. Research is funded by both the State and the private sector. A large proportion of the projects are such that they should not be interrupted and, if

they are so interrupted, the consequence will be the irretrievable loss of months or years of research with the associated disastrous impact on the academics or students involved. This in turn may have substantial and severe financial implications for the NMMU.

18. In this ongoing and increasingly violent real-life drama, students are demanding free education. The NMMU is reliant on funding, be it from students or the state. The NMMU receives grants from the state, and for the balance, raises fees from its student body. The less the NMMU receives from the state, the more it needs to raise from its students by way of student fees. It cannot function without revenue. The NMMU has no preference as to where the funding originates from, provided it is sufficient to enable the NMMU to discharge its mandate. The NMMU has no or little control over the extent of funding it receives from the state, and thus, the setting of its fees is effectively a reactive exercise. Although it is possible, within reason, to limit student fees to some extent there is a point beyond which the NMMU, without the required funding, will simply be unable to deliver on its mandate.
19. The NMMU relies primarily on Government to fund its education, and is entirely unable to accommodate the demands of the students without the support of National Government, to the extent that it may be required. Although some financial support has been forthcoming from

the state, this was not enough to address the demands of the students. To compound the dilemma that universities find themselves in, the Minister for Higher Education and Training (the "Minister"), in addition, instructed universities not to increase its fees for 2017 by more than 8%. Thus, state revenues have not only reduced, but the ability of the NMMU to raise fees from students has been severely hamstrung. The NMMU and other universities are, literally, between a rock (state) and a hard place (students).

20. The NMMU council has publicly declared itself supportive of free education for the poor. It is not about intention, but economics. To provide education funding is required. Without funding, regardless of its origin, no education whatsoever is possible.

21. And so the NMMU has become trapped between contesting parties, unable to meet either the demands or needs of either party. The Applicants demand free education for all students (regardless of their financial means) and insist on closing the NMMU until their demands are met, not by the NMMU, but by national government. Without appropriate funding from the state, the NMMU cannot do so. The Minister, in turn, made it clear that free education for all at universities is not an option.

22. To compound the dilemma in which the NMMU finds itself:

22.1 significant stakeholders and parent groups are insisting that the NMMU continues its academic activities, and unsuccessfully sought interdictory relief in this Court against the NMMU;

22.2 the Applicants are now, disingenuously, trying to prevent the NMMU from completing the 2016 academic year. They are similarly seeking interdictory relief.

23. From the onset of this crisis, the NMMU had to consider and weigh a number of different options and responses to the protest action by the Applicants. The NMMU, on the conspectus of all the available evidence and with due consideration for the complexity of the situation and the multiplicity of the factors involved, continuously had to evaluate and decide what was and is in the best interests of the NMMU, its staff and the students. The NMMU elected to avoid a confrontational route but rather to engage the students and its stakeholders actively, in an attempt to limit conflict and the inevitable associated downward spiral of violence observed at so many other universities.

24. The NMMU believes that thus far, by adopting a non-confrontational approach it has acted reasonably and in the best interest of all stakeholders, including concerned parents and students. By adopting this strategic response, the NMMU was partially successful in avoiding the escalating violence and extensive property damage experienced on other campuses. Most universities throughout the country are currently operating through academic recovery plans aimed at ensuring the successful completion of the 2016 academic year.

ROLE-PLAYERS

25. The NMMU is a Public Higher Education Institution, duly formed in accordance with the provisions of the Higher Education Act 101 of 1997 (HEA).

26. In terms of the HEA the Council of a Public Higher Education Institution must govern the Public Higher Education Institution, subject to this Act and the institutional statute.¹

27. The Council of the NMMU duly framed, and had adopted and approved an institutional statute for the NMMU in accordance with Section 32 of the HEA. A copy of the Institutional Rules is annexed marked **Annexure "SM 1"**;

28. In terms of the HEA² the NMMU was required to establish, and did establish inter alia, the following structures and offices:

28.1 A Council;

28.2 A Vice-Chancellor; and

28.3 The Students Representative Council ("SRC").³

29. In terms of Section 3 of the HEA, the Vice-Chancellor of a Higher Education Institution is responsible for the management and administration of the Public Higher Education Institution.

30. The functions and powers of the SRC are, inter alia, to preserve and promote the interests of the student community and of the NMMU, and to enhance unity and co-operation among students.⁴

31. From the manner in which the NMMU operates, it is important to note that, Council and Senate operate as a cohesive integrated entity responsible for administrative and academic matters, whilst the SRC acts as the representative body for students and bridges the gap between students and administration. The SRC, being the Second Respondent, is supportive of the plan and the initiatives adopted by

¹ S27(1)

² S26(2)

³ S35

the NMMU, and makes common cause with the NMMU. In this regard I refer to the annexed affidavit by the SRC President, Mr Nicolaas Nyathi marked **Annexure "SM 2"**.

32. The internal NMMU role-players, all of whom have a significant interest in the outcome of these proceedings are, in addition to the cited Respondents, the following persons:

32.1 The student formations at the NMMU actively pursuing the free education agenda (the "Protestors") namely:

- (a) FMF, the Applicant
- (b) Daso (NMMU);
- (c) Sasco (NMMU); and
- (d) Economic Freedom Fighters ("EFF")
- (e) Black Stokvel/Marikana (NMMU).

32.2 The association representing both affected NMMU students and their parents, formed under the name and style of "Concerned Association of Parents & Others For Tertiary Education At Universities" ("CAPTU") as well as any other parents and

⁴ S40

stakeholders who may want to involve themselves in this application; and

32.3 The general body of students requiring to complete the 2016 academic year.

33. In addition, the following external role-players have a real and substantial interest in the outcome of these proceedings:

33.1 The Minister of Education, under whose auspices higher educational institutions operate, representing national government, and who is essentially the only person in a position to address the demands of the FMF;

33.2 The South African Police Services ("SAPS") who has been involved in attempts to address the unlawful activities of protesting students, particularly that conducted by the Applicants, on the various campuses of the NMMU, and are able to address allegations by the FMF regarding police brutality and campus security.

BACKGROUND

A brief history of the events leading up to this Application is the following:

34. Students, under the banner of the #FeesMustFall movement as represented on the NMMU campus by the Applicants, embarked on

protest action on 20th September 2016, after the Minister announced that fee increases at universities for 2017 will be capped at 8%;

35. In response to the protest action the NMMU management engaged constructively with the students in negotiation in an attempt to to seek common ground, and to reach agreement on aspects of the concerns raised by them as the NMMU is capable of resolving;
36. In order to avoid a confrontational approach and the large-scale damage and disruption witnessed at other campuses countrywide, such as Wits, UCT, Kwazulu Natal and the like, the NMMU decided to suspend academic activities pending, and in the hope, of an agreement being reached.
37. The ongoing negotiations with the Applicants was unsuccessful, with the Applicants continuously moving the goal posts. Any proposals put to the Applicants aimed at ensuring the opening of the NMMU campuses were rejected. It soon became apparent that the Applicants would not accept anything other than free education for all. Until this demand was met, the Applicants insisted on closing the NMMU, regardless of consequence;
38. During the week commencing 3 October 2016, management of the NMMU decided to recommence academic activities on Monday 10

October 2016. It was decided to do so by way of a two stage process namely:

38.1 Academic and administrative staff were to return to all campuses on Monday 10 October 2016;

38.2 Classes were to re-commence on Monday 11 October 2016.

39. This intention was circulated to the media during the afternoon of 6 October 2016 and was published in the local media on Friday 7 October 2016. A copy of the extract from the Herald is annexed marked **Annexure "SM 3"**.

40. Shortly after the NMMU announced its intention to recommence academic activities, there was a huge upsurge of protest in the social media, coupled with various threats of violence by the Applicants.

41. In addition, the supporters of the Applicants started burning tyres at the entrances of the NMMU, intimidated staff that endeavoured to return and blocked the access routes to the various NMMU campuses.

42. Furthermore, sound recordings were circulated on social media threatening to do physical harm to any staff member or student who ventured onto any of the NMMU campuses.

43. After various attempts by me and management of the NMMU to persuade the Protestors to discontinue their destructive behaviour, I decided that, consistent with the previous strategy adopted by the NMMU, and in the interest of staff and student safety, not to persist with the announced opening of the campus. My decision was communicated to staff and students the same day.

44. Thereafter, and in a further attempt to restore normality aimed at ensuring that the academic activities and programme for 2016 was successfully completed, during the afternoon of 10 October 2016 the NMMU Management decided to introduce further initiatives aimed at resolving the crisis. To this end the NMMU embarked on the following process:

44.1 NMMU engaged the services of trained, independent and skilled Mediators to engage all stakeholders in mediation in an attempt to seek an inclusive, negotiated solution;

44.2 the NMMU informed the Protestors, including FMF, of its intention to proceed with mediation, and also informed them of:

(a) the NMMU's intention to recommence academic activities on 17 October 2016 (this lead up time was required to

make the appropriate logistical arrangements for the re-opening of the NMMU, and to afford the mediation process a reasonable prospect of success, and to afford the University sufficient time between then and the end of the year to complete academic activities for 2016);

(b) the nature of the Mediation process and invited the Protestors to participate in the mediation (in addition, the Protestors were invited to nominate mediators acceptable to them to act as co-mediators and to assist them in the process);

In this regard the notice to the Protestors is annexed marked **Annexure "SM 4"**.

45. Whilst this was ongoing, other stakeholders of the NMMU became restless and parent groupings started making demands. CAPTU launched an interdict against the NMMU in this Court, under case number 4976/2016 seeking, amongst other, interdictory relief directing the NMMU to recommence with academic activities in a structured manner.

46. Following upon negotiations between the NMMU and CAPTU, CAPTU agreed to postpone the application to 18 October 2016 and to

participate in the mediation process the NMMU had already commenced.

47. This mediation process resulted in an agreement being reached (in principle) between the various stakeholders and the Protestors, including FMF, during the afternoon of 13 October 2016. The adoption of this agreement would have resulted in the NMMU recommencing with normal academic activities. The agreement in principle was put to students represented by the FMF on 14 October 2016. At the students' meeting the proposed agreement was rejected. The FMF reiterated their demand for free education for all and insisted that the NMMU remain closed until such time as their demands were met.
48. In response to the rejection of the agreement in principle, and mindful of its mandatory obligations to provide tuition, the NMMU withdrew from the mediation and applied to the High Court for an Interdict aimed at securing the safe recommencement of academic activities by the NMMU. A copy of the Interdict is annexed marked **Annexure "SM 5"**.
49. The Interdict was served during the course of Saturday 15 October 2016. The following Monday, 17 October 2016, all hell broke loose and anarchy reigned supreme. The Applicants and its members ignored demarcated protest areas specified in terms of the Interdict, burned

tyres, stoned vehicles and set two NMMU buildings on fire. The NMMU nature reserve was set on fire. Students and staff were physically intimidated and harassed. The Interdict was ignored entirely by the FMF and its members. Given the number of campuses, its expanse and the limited availability of riot police, it became extremely difficult, if not impossible, to secure the safety of the NMMU staff, students or property.

50. As a result, the NMMU had no option but to suspend academic activities and to close down its South Campus whilst a solution to the impasse around the protest action was being sought.

51. On 18 October 2016 the CAPTU application was postponed *sine dies* and the NMMU consented to an order directing it to re-engage all stakeholders in mediation. This was done and the Protestors, CAPTU and the NMMU engaged in mediation. The NMMU engaged 6 mediators, being either practicing attorneys or advocates, who offered their services *pro bono*, in an attempt to find common ground between the parties. The mediation ran for almost a week, from early morning till late at night.

52. The mediation process was attended by the Respondents and various other stakeholders, including the FMF and members of its steering committee. Ultimately, the mediation resulted in an agreement being

reached between all stakeholders on 25 October 2016 in terms of which the NMMU agreed to numerous concessions whilst the Protestors agreed that they would assist the NMMU, where necessary, to re-open the University immediately. The agreement was subject to approval by a mass meeting of students including those represented by the FMF.

53. At the mass meeting of students on 28 October 2016, and now officially for the second time, the FMF and their members rejected the agreement and persisted with their demand that the NMMU must close until such time as the Government resolves the issue of free higher education for all. In this regard I annex a copy of the Mediator's Fourth Report to which a copy of the Mediation Agreement is appended (See **Annexure "SM 6"**). Both the Mediator's Fourth Report as well as the Mediation Agreement were disclosed to this Court by agreement between all parties, including FMF and its steering committee.

54. CAPTU re-enrolled their application on the 28th October 2016. This application was heard and dismissed. A copy of the order of court is annexed marked **Annexure "SM 7"**;

55. Immediately following the second official rejection of the mediation agreement by the FMF, the NMMU communicated to all its students its

intention to implement the Plan, with immediate effect (**See Annexure "SM 8"**). The NMMU had no remaining options. The NMMU was and remains committed to completing the 2016 academic year. It had explored all available options and alternatives to finding a solution. The only remaining option to the NMMU was to adopt a multi layered tuition programme that essentially moves tuition away from the traditional centres of learning, decentralises tuition and in so doing ensures that it is not possible for the Applicants to disrupt learning activities. A failure to implement the plan would result in 27 000 students not being able to complete the 2016 academic year.

56. **The Plan**

56.1 I stress that the Plan is not an "e-learning programme" as contended by the Applicants. The Plan can more accurately be described as a blended learning approach, comprising various different components. These components include, inter alia:

- (a) The decentralisation of lecturing and test facilities off campus to facilities secured by the municipality and members of the business community;
- (b) The substitution of scheduled tests with continuous assessment programmes;

(c) Extensive student support, security and logistical arrangements;

(d) Moving examination dates and affording students an opportunity to write examinations either during December, or January, in whatever permutation the students may elect.

56.2 Protect actions linked to the #FeesMusFall Movement have resulted in NMMU being shut down since 20 September 2016.

At that stage:

(a) 10 of the 14 weeks of the semester modules had been completed;

(b) all third term modules were complete and only needed to be examined in November

(c) two to three weeks of the seven to eight week fourth term modules were completed, leaving three to four weeks remaining for completion;

(d) in the case of block release modules, on average six to eight hours were needed to complete the modules; and

(e) the interruption commenced some four weeks before the examinations were due to start. This meant that there was two to three weeks of teaching and assessment work left, followed by one to two weeks of revision before the NMMU year-end exams were due to commence.

56.3 The Plan was thus designed to cover a period of less than 30% of the second semester that remained incomplete when the protest action commenced.

56.4 The overarching guiding principles driving the Plan are the following:

(a) The NMMU will complete the academic year in 2016 or at the start of 2017.

(b) All the faculties assessed the critical teaching, learning and assessment work needed to complete their modules, and then completion plans were developed, documented and approved by senate.

(c) From 1 November 2016, a multi-layered teaching and learning strategy was adopted to complete the academic work needed to complete second semester modules. In this regard the following:

- (i) Key to the Plan is that teaching and learning takes place anytime, anywhere. As NMMU could not complete the remaining academic activities in its classrooms, more time was dedicated to facilitating learning online, coupled with reduced face-to-face teaching, learning and assessment opportunities conducted largely off campus. In relation to some campuses, tuition continues on campus.
- (ii) 1200 of NMMU's modules already had active online e-learning sites on our Moodle Learn LMS e-learning platform ("Moodle"). Since the shutdown, an additional 280 modules were developed. Academics received training in and ongoing support for online learning, how to develop and resource materials, etc. Guidelines were prepared for and communicated to students on how to access Moodle. Tips were provided to enable students to derive maximum benefit when learning online.
- (d) Arrangements were made for increased access to computers and connectivity in a range of places throughout the NMBM.

(e) 11 NMBM libraries were equipped with free NMMU Wi-Fi access and, in some instances computers. These libraries are:

- (i) Uitenhage Library;
- (ii) Kwanobuhle Library;
- (iii) Motherwell Library;
- (iv) Zwide;
- (v) Algoa Park Library;
- (vi) New Brighton Library;
- (vii) Korsten Library;
- (viii) Newton Park Library;
- (ix) North End Library;
- (x) Linton Grange Library;
- (xi) Walmer Library.

(f) NMMU's general computer labs on North Campus, 2nd Avenue Campus, Bird Street Campus and Missionvale Campus and the CSIR have been made available to students. These venues offer access to more than 450

computers and are fully secured with full time security staff and access control.

- (g) A 120-seater computer lab has been developed from scratch and fitted out at the Mandela Bay Stadium (the "Stadium").
- (h) The Stadium has been secured as the major tuition and examination centre. It offers significantly enhanced security to both students and staff. The security comprises high level access control, independent security staff, plainclothes policemen, close circuit TV and a Venue Operating Centre staffed fulltime by the SAPS;
- (i) The NMMU secured zero cost data access for students accessing the NMMU's online platform (which includes online library materials), from the various service providers;
- (j) The main off-campus venue for completion of the NMMU academic activities and exams is the Stadium. For this purpose the Stadium was transformed into a mini-university complete with lecture and test/exam venues, a computer lab, spaces for counselling and relaxation;

- (k) Originally, some 1800 examinations were planned for the second semester examination period, prior to the protest action. In terms of the Plan, alternative assessment methods were employed, especially for non final year modules, thus reducing the need for examinations to approximately 790 examinations;
- (l) Most modules will have completed all the academic work needed by 18 November 2016, with a few completing the work during late November to early December 2016;
- (m) As work in some modules has been completed, examinations have started in these modules already and a number of examinations have been completed. Where work still needs to be completed in a module, examinations will commence on or after 25 November 2016 and will continue to 21 December 2016;
- (n) Students were given the choice to write exams in November-December 2016 or January-February 2017. This choice is not exclusive. Some examinations may be completed in 2016, and others during the beginning of 2017;

(o) Some deferred practical work (especially in the Faculty of Science) and assessments towards a class mark and special and re-examinations will be conducted in the January-February period.

56.5 NMMU sponsored transportation has been arranged for students to and from the Summerstrand campuses and the Stadium. Additional transport providers were secured, and additional routes were introduced to facilitate easy access to Students. The schedules are forwarded to students daily. A Copy of the daily transportation roster for busses and taxis respectively is annexed marked **Annexure "SM 9"**.

56.6 In relation to accommodation, the following:

(a) All NMMU residences remains open until examinations are completed, and in 2017 will open earlier when examinations commence. The residences are fully serviced and students will be provided with the normal catering benefits;

(b) In respect of students staying in NMMU accredited student accommodation off-campus, the NMMU has secured rights

for such students to remain in occupation for the duration of the applicable examination period;

(c) In relation to students renting private accommodation that may expire, the NMMU is compiling a database of students requiring accommodation, and has embarked upon various initiatives aimed at alleviating any hardship that may result from the change in the academic calendar. To date, no needs are being identified and will be attended to through the best available means once a full needs analysis has been conducted.

(d) All campuses (other than South) and the Stadium offers psychological counselling services to students and staff traumatised by the protest action.

56.7 Finally, by Friday 18 November 2016 the academic recovery programme, with one exception, will be completed in all material respects. The academic recovery program of all faculties will be completed by the end of November 2016. Examinations will commence on 25 November 2016.

IN LIMINE - Status:

57. It is contended on behalf of the NMMU that the application is fatally defective on the ground of non-joinder of the following parties:

57.1 the Minister of Higher Education and Training.

57.2 **the Protestors;**

57.3 CAPTU; and

57.4 The SAPS

58. It is a fundamental principle of law that all the parties with a direct and substantial interest in the proceedings and/or whose interests may be directly affected by the relief sought must be given notice of the proceedings.

59. It appears from the Applicants' founding affidavit and this Answering Affidavit that the above mentioned non-joined parties have a direct and substantial interest in these proceeding and that these parties should have been joined. Furthermore, the nature of the issues arising and rights implicated in these proceedings are so inextricably linked that the relief sought cannot be granted insofar as it deals only with the rights and obligations of the Applicants and the First and Second Respondent.

The Applicants have failed to give notice and/or join the above mentioned parties and as such the Honourable Court is not in a position to grant the relief sought. In the circumstances the application is defective and stands to be dismissed for this reason.

IN LIMINE – Legal Entity:

60. The First and Second Applicants are, respectively:

60.1 Fees Must Fall (NMMU);

60.2 The Fees Must Fall Steering Committee.

61. The Deponent to the Founding Affidavit and the Third Applicant, Sudentie, however fails to describe:

61.1 The nature or legal status of the First or Second Applicants;

61.2 Where any of the the Applicants reside, or the address from which they conduct business;

61.3 Whether the Application is being brought:

(a) by the Third to Twentieth Applicants, in their representative capacities as members of the Second Respondent, being the members of the Steering Committee of the First Applicant; or

(b) In their own personal capacities, in addition to the application by the First and Second Applicants.

62. If the Application is not being brought by a recognised legal entity, this Application is fatally defective (at the very least insofar as the First and Second Applicants are concerned), in that Sudenie has failed to establish a status recognised in law for purposes of instituting action in the High Court. In the result, and at best for the Applicants, the application is brought by the Third to Twentieth Applicants litigating in their own capacities.

63. However, Annexure E to the Founding Affidavit purports to be the mandate from which Sudenie derives her authority to depose to the Founding, on behalf of the Applicants. This resolution states that the *"students have disposed Zolisa Marawu and Gretchen Sudenie and the #Fees Must Fall Steering Committee member (sic) to stand as Applicants of the Interdict and submit Confirmatory Affidavits to the Court on behalf of the concerned students"*.

64. It follows that the intention was for FMF to bring the Application, not the Second to Twentieth Applicants. Their involvement is merely to confirm, as members of the steering committee, that they are

authorised to bring the application. Essentially all the Applicants are to be treated as a single unit representing the First Applicant.

65. It thus follows that, if the First Applicant is not a recognised legal entity capable of suing and being sued in a Court of Law, the Second to Twentieth Applicants will suffer from the same fatal shortcoming, justifying this Honourable Court to dismiss this Application on this ground alone.

IN LIMINE – Mandate:

66. The Applicants contend that they were authorised in a mass meeting held on 2 November 2016 to bring this Application. In this regard the following:

66.1 Annexure "E", annexed in support of the claims made by the Applicants, refers to a meeting on 1 November 2016 not 2 November 2016. It is thus uncertain whether this meeting is the same meeting to which reference is made;

66.2 The Minute is not signed, and thus is questionable as to whether it is a valid Minute;

66.3 Reference is made to attendance by some 150 to 200 students, but no Attendance Register is annexed. Again, it is

respectfully submitted that, under these circumstances the entire Minute is to be treated by this Court with great circumspection.

67. The Applicants claim to be representing "*over 1000 students spread across the University faculties*" that have signed a petition. The Applicants lament their alleged challenges that made it "*impossible for the majority of NMMU students to reside in the townships and remote areas across the country to sign this online petition*" and submits (presumably) that the lack of petition support is due to the alleged challenges and not from a true lack of support of their cause. In this regard the following:

67.1 Despite claiming that an online petition was signed by over 1000 students, no such petition is annexed to the papers. It is respectfully submitted that such a petition simply does not exist;

67.2 The nature of the protest and the content of the petition document is not disclosed to this Court. To the extent that 1000 students indicated their support (and it is respectfully submitted that no such support has been established), it is not known what cause the students are supporting, and what mandate the petition accorded the Applicants. In this regard I

annex (see **Annexure "SM 10"**) extracts from the Applicants' Facebook page on social media reflecting the response by numerous students to the Applicants' conduct and activities. A simple overview of this extract will reflect extensive, wide-sweeping disdain of and resistance to the proposed actions by the Applicants.

68. If the Applicants were to represent the interests of the constituency they claim to represent, they can only do so as a recognised legal entity or an association of persons, capable of suing or being sued in a court of law or by way of a class action. The Applicants have not established that they are doing so on any of these grounds.

69. In the absence of the Applicant being a recognised legal entity, the only alternative for the Applicants to gain locus standi is by way of a class action. No submissions in this regard appear in the founding affidavit

70. For these reasons it is respectfully submitted that the Applicants lack locus standi as:

70.1 The First and Second Applicant are no more than a "*movement*" and are not capable of being recognised in law as litigants;

70.2 The Third to Twentieth Applicants, constitute "*nominal*" Applicants essentially supporting the First Applicant, and suffer the same fate as the First Applicant;

71. At best for the Applicants, and if the Third to Twentieth Applicants do not constitute "*nominal*" Applicants, they are simply representing their own interests and are not representative of anybody else;

IN LIMINE – Urgency:

72. As will appear from the chronology of events, all attempts at resolving the ongoing protest action failed on 27 October 2016 when, despite an agreement being reached during mediation meeting, all the internal demands of the protesting students (essentially being led by FMF), were rejected by a mass meeting of students. At this meeting, it was resolved that the protest action would continue until government resolves the issue of free education for all. This protest action inevitably entails the disruption of classes and intimidation aimed at forcing the closure of the NMMU.

73. Immediately following this resolution by the students, the NMMU communicated to all students its intention to implement the Plan, with immediate effect (See **Annexure "SM 8"**).

74. Yet, despite having resolved on 28 October 2016 to continue with protest action, and having been informed of the NMMU's intention to implement the Plan, the Applicants delayed initiating this Application for almost 3 weeks until 12 November 2016, when papers were served on the NMMU on a Saturday morning. Thus the Applicants sat idle for two weeks before they launched this application, despite being aware of the Plan and its implementation.

75. It is therefore respectfully submitted that this Application is not urgent, and is being brought purely as part of an ongoing plan by the FMF in an attempt to ensure that the NMMU academic activities for 2016 are not completed.

IN LIMINE – No Alternate Remedy:

76. I am instructed that an applicant for a final interdict must show a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy. I respectfully submit that the Applicants did not do so.

IN LIMINE – No Alternate Remedy:

77. The Applicants claim that *"there is no alternate remedy, but to obtain the necessary interdict from this Honourable Court, as members of the First Respondent are unwilling to desist from their approach and their*

conduct". They advance no further support for this submission, and do not inform this Court of any alternatives that they have considered. It appears that the Applicants have simply elected the path that they believe will cause the most possible disruption to the NMMU, namely to seek the discontinuance of the implementation of the Plan. It is, with respect, not a coincidence that this course of action is perfectly aligned with the objectives of FMF, namely to force the closure of the NMMU and the non-completion of the 2016 academic year.

78. The NMMU contends that the Applicants are the authors of their own misfortune and that the Applicants are entirely in control of each and every alternate remedy. The Applicants simply choose not to avail themselves of such remedies. In this regard the following:

78.1 The current undesirable situation at the NMMU campuses (and throughout campuses across the country) is a direct result of the protest action by the #FeesMustFall movement, a movement whose objectives the Applicants firmly embrace;

78.2 As part of their protest action, the Applicants embarked on unlawful protest action, by intimidating students, disrupting

classes, stoning vehicles, torching buildings and setting fire to parts of the NMMU Reserve. They did so with complete disregard for the safety of staff and students, and the rights, both constitutional and proprietary, of others;

78.3 In order to address the unlawful conduct by the Applicants, the NMMU sought and obtained an Interdict, adherence to which would have resulted in the restoration of normality to the NMMU campuses and allow for normal tuition to proceed on the NMMU campuses;

78.4 The Applicants completely disregarded the Interdict, continued with their protest action and escalated the violence on the NMMU campuses, thus leaving the NMMU with no alternative but to introduce the Plan;

78.5 If the Applicants had desisted from their unlawful contemptuous behaviour, academic normality could have been restored in its entirety, with the result that the Plan would have been abandoned and the alleged discrimination suffered

by the Applicants as a result of the implementation of the Plan would have disappeared.

78.6 However, it seems that the Applicants believe that they are entitled to disregard all lawful alternatives, persist with their unlawful behaviour and yet appeal to this Court for assistance to secure its objectives by holding the NMMU and its students at ransom.

79. It is respectfully submitted that the Applicants had a lawful, effective remedy available to it that would address each and every alleged discriminatory effect of the Plan, yet chose not to do so.

80. For this reason it is submitted that the Application falls to be dismissed.

IN LIMINE – Equality Claim:

81. I am advised that the claim of the Applicants is based on alleged unfair discrimination and for that reason falls to be dealt with and considered in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000 (“PEPUDA”).

82. I am further advised that, this being the case, the Applicants have to make out a case on the grounds provided for in PEPUDA, and must formulate the relief sought consistent with the provisions of PEPUDA.

83. It is respectfully submitted that the Applicants have failed to do so. Further argument in this regard will be addressed to this Court at the hearing of this matter.

DETAILED RESPONSE

84. I shall now proceed to deal with the detailed allegations made by the Applicants in the Founding Affidavit by Sudenie. I have already extensively dealt with the bulk of the allegations made by Sudenie and shall thus restrict my response to those aspects I regard as strictly relevant to my submissions.

85. Ad Paragraphs 1 and 2

85.1 For the reasons outlined elsewhere in this Affidavit I deny that Sudenie is authorised or entitled to bring this Application in the name of the First Applicant;

85.2 In addition the NMMU bears no knowledge of the nature or status of the First or Second Applicants, is unable to plead thereto and puts the Applicant to the proof thereof.

86. Ad Paragraph 3

The NMMU notes the relief sought by the Applicants and denies that the Applicants are entitled to any relief.

87. Ad Paragraphs 4, 5, 6 and 7

87.1 The Applicants' contentions are premised on the claim that the Plan is primarily an electronic plan, requiring extensive use of either laptops or smart phones;

87.2 As outlined elsewhere in this Affidavit, this is not correct. The plan is a multi-layered, multi-dimensional and multi-disciplined approach which incorporates both electronic tuition as well as face to face tuition;

87.3 Numerous campuses remain open, lectures are continuing and facilities are available to students to address and overcome the

obstacles in completing the 2016 academic year, created by the Applicants;

87.4 Even if the Applicants were to persist with their unlawful conduct, they have access to all the facilities, tools and tuition that will enable them to complete the academic year. The Applicants simply choose not to use these tools as a thinly veiled attempt to promote their attempts at closing the NMMU for the remainder of the 2016 academic year.

88. Ad Paragraphs 8, 9, 10 and 11, 23 and 24

88.1 These paragraphs contain wide-sweeping generalised allegations without any substantiation or proof. The Plan addresses the concerns and needs of the students. The Plan has been implemented and is being enthusiastically embraced by the overwhelming majority of students;

88.2 It is difficult, if not impossible, for the NMMU to respond to the bald allegations that the Plan:

(a) does not guarantee student-readiness to sit for examinations; and

(b) does not facilitate the necessary supervision of content that students need to study, in preparation of examinations;

(c) is more appropriate to some fields than other; and

(d) may lead to congestion or heavy use of websites.

These submissions are unsubstantiated, unsupported and simply self serving.

89. Ad Paragraph 12

89.1 Again the Applicants make a bald unsubstantiated claim around the security situation on NMMU campuses.

89.2 It is denied that the safety risk as alluded to by the Applicants exists. The incident referred to by the Applicants was the direct result of the protest action participated in by the

Applicants and occurred off-site. There are no other reported incidents constituting a security risk on the NMMU campuses, other than the unlawful violent actions perpetrated by FMF and its supporters.

89.3 During the crisis and in order to guarantee the safety of students and staff, the NMMU engaged in the following activities:

- (a) The developing of a security contingency plan;
- (b) The recruitment and deployment of additional security personnel;
- (c) The identification of critical services, and the development of a critical services protocol, so as to ensure that the NMMU continues to function uninterruptedly and to minimise losses and damage;
- (d) An academic recovery contingency plan based on various start-up scenarios;

(e) The development and conclusion of a MOU with SAPS regarding security measures and policing protocols.

89.4 The documents related to these plans are available and will be shown to the Court at the hearing, if necessary. Given the sensitivity around these issues, I respectfully submit that it would not be in the interests of the University or its students and staff, for these documents to be disclosed publicly at this time. The NMMU will, subject to appropriate confidentiality safeguards, be willing to engage on these documents with the Applicant through its legal representatives.

90. Ad Paragraphs 13 to 22

90.1 The NMMU admits the exchange of communications with the Applicants. The NMMU however denies any of the averments to the extent inconsistent with the submissions by the NMMU.

90.2 The NMMU specifically contends that:

(a) The Plan was legitimately introduced for the sole purpose of overcoming the unlawful protest action of the Applicants

and to complete the NMMU 2016 academic year in the interests of the vast majority of its students;

- (b) The Plan is capable of, and is indeed achieving this purpose. Within the next 14 days the Plan would have reached fruition and all that remains will be the completion of examinations.
- (c) Given the nature of the protest action, the numerous efforts made by the NMMU to overcome the concerns raised by the students, and the ongoing obstructive, violent and unlawful conduct by the Applicants and its members, the Plan was the least restrictive and disadvantageous measure available to the NMMU to secure its legitimate objectives;
- (d) The NMMU has taken all reasonable steps to address all disadvantages that arise from the Plan, its implementation and to accommodate the diversity of its students.

91. Ad - Grounds for the Application

For the reasons outlined above, it is respectfully submitted that the relief sought is not competent, and that the application falls to be dismissed with costs, such costs to be paid jointly and severally by all the Applicants, the one paying the other to be absolved.

SIBONGILE MUTHWA

The Deponent has acknowledged that he knows and understands the contents of this affidavit/declaration, which was signed and sworn to/declared before me at PORT ELIZABETH on this the _____ day of _____ 2016, the regulation contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS