Oversubscription, Enrolment Penalties and the Right of Access to Higher Education

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SUMMARY

Not only are the financial barriers in higher (or tertiary) education real, but they are often exacerbated by funding models and public universities' dependence on government funding (being first-stream income). Generally, public universities are encouraged to find alternative funding and look towards second- and third-stream income sources to supplement government funding. Although this provides avenues to reduce public universities' dependence on government funding, it does not address the systemic barriers within the government grant model, particularly those related to teaching input units and enrolment-planning structures. The financial penalties for material deviation from the agreed enrolment numbers are significant, and although there may be good reasons for implementing penalties, such a penalty-driven compliance structure has the unintended consequence that deserving students are often barred from furthering their studies at a public university. This was illustrated in the cases of *Mbana v Walter Sisulu University*, *Genukile v Walter Sisulu University and Mnqandi v Walter Sisulu University*, where prospective students were not allowed to register at the university as the particular programme for which they had been admitted had been oversubscribed. Although these cases were decided on the assessment of the contractual principle of "offer and acceptance", the underlying reason for not allowing such enrolments in oversubscribed programmes can be linked to the far-reaching impact of the financial penalties for material deviation from enrolment numbers. In these circumstances, prospective students are left with limited (and often no) recourse to solutions from public universities, as well as to consumer-protection laws and the underlying contractual principles that regulate admissions and registrations. To make matters worse, public universities' hands are effectively tied in that enrolling prospective students in oversubscribed programmes triggers financial penalties from the government, which in turn threatens the institution's financial sustainability. This leaves many students in the current educational structure with no recourse and effectively functions as a systemic barrier to education. Measured against section 29(1)(*b*) of the Constitution, read with article 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights, it is argued that the penalty-driven compliance model is difficult to defend, and that its re-evaluation is a matter for government rather than the universities (which are financially constrained by the compliance model).

KEYWORDS: right to further education, enrolment planning, teaching input units, systemic barriers to higher education

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1 INTRODUCTION

Education is the path to a better life, but the stark reality is that there are limited resources available to realise educational dreams and not all prospective students have the opportunity to study at higher (or tertiary) education institutions. Resource restraints are particularly prevalent in public universities,[1] where a significant portion of funding is secured by means of government grants. Such grants are allocated among the number of students enrolled for a particular programme. Unfortunately, it has become the norm that the number of applications far exceeds the number of available spaces for a particular programme,[2] leaving many applicants without the opportunity to study at a public university. A good example of this may be found in the January 2025 university registration period, where a staggering 100 000 matriculants could not be placed at public universities.[3]

The issue of oversubscription as a barrier to education is also illustrated in the cases of *Mbana v Walter Sisulu University*,[4] *Genukile v Walter Sisulu University*[5] and *Mnqandi v Walter Sisulu University*,[6] where the applicants (being prospective students) were prevented from registering at Walter Sisulu University (WSU). In all three instances, the particular programme had become fully subscribed, and the applicants argued that their rights under section 29(1)(*b*) of the Constitution of the Republic of South Africa, 1996 (the Constitution) had been infringed. The success of the applicant in *Mbana* and the failures of the applicants in *Genukile* and *Mnqandi* hinged on the underlying contractual principles,[7] particularly the construction of the offer and the mode of acceptance. Oversubscription, on this analysis, is the visible face (or more accurately the consequence) of the barrier to education, but the source of the barrier to education lies in the funding framework and enrolment-planning limits that make oversubscription both inevitable and, for the institution, irremediable. The concern is with physical access to higher education, being the prospective student's ability to be admitted to and to register at a public university. Questions of epistemological access and meaningful engagement with learning once registered fall beyond the scope of this discussion.[8]

It is not unusual for the student-university relationship to be perceived as contractual; however, such contractual relationships with public universities

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1 S 1 of the Higher Education Act 101 of 1997 refers to this as a public higher education institution.

2 Madubela "Record Demand for University Leaves Over 100k Students Without Placement" (22 January 2025) https://www.moneyweb.co.za/news/south-africa/record-demand-for-university-leaves-over-100k-students-without-placement/ (accessed 2025-01-24). Madubela also reported that 358 992 applications were received for 10 500 available undergraduate spaces at the University of Johannesburg.

3 Madubela https://www.moneyweb.co.za/news/south-africa/record-demand-for-university-leaves-over-100k-students-without-placement/.

4 [2023] ZAECMHC 9.

5 [2024] ZAECMHC 12.

6 [2024] ZAECMHC 40.

7 It is generally accepted that the student-university relationship is contractual in nature. See, for example, *Sibanyoni v University of Fort Hare* 1985 (1) SA 19 (CkS).

8 See also, generally, Morrow *Bounds of Democracy: Epistemological Access in Higher Education* (2009).

do not operate in a vacuum. Contracts with public universities have both a public and private element, and insofar as the institution exercises public power, the assessment of the contract would include principles of both contract and administrative law.[9] As no public power was exercised in *Mbana*, *Genukile* and *Mnqandi*, the cases turned on the commercial nature of the student-university contract. Notwithstanding this, state-imposed enrolment controls and the institutional autonomy of public universities may play a role in determining the public nature of the student-university contract. However, this does not form part of the scope of this article.[10] The focus remains on the position of the prospective student. The commercial nature of the student-university contract is also strongly influenced by the financial and strategic considerations of government and public universities, and it is the government's strategic outlook on education, enrolment plans, and teaching input unit grants that provide contextual background to the *Mbana*, *Genukile* and *Mnqandi* cases. These factors are briefly discussed in each case, with particular focus on the underlying contractual principles upon which each case turned. The contractual principles, the Consumer Protection Act (CPA),[11] as well as the application of the *contra proferentem* rule, are discussed to illustrate the limited rights or recourse of prospective students within the existing legislative structures and to show that the current enrolment structures are only exacerbated by financial penalties that disincentivise public universities from condoning additional enrolments that may exceed the enrolment-plan numbers. Added to these commercial realities, the article considers section 29(1)(*b*) of the Constitution, read with article 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR),[12] in order to assess the penalty-driven compliance model. In the course of this discussion, the political, commercial and contractual realities that exist in higher education within South Africa come to the fore, demonstrating a negative impact on prospective students' ability to realise their educational dreams.

2 ENROLMENTS AND A PENALTY-DRIVEN COMPLIANCE MODEL

Education is key to improving individuals' economic status. With the advent of democracy in 1994, the government recognised the important role education plays within society and the urgent need to address inequalities of the past so

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9 The student-university contracts are placed within a legislative and regulatory framework of the country and are also influenced by the societal setting. As universities are considered organs of state in terms of *Mbuthuma v Walter Sisulu University* 2020 (4) SA 602 (ECM) par 39, referring to *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) (1999 (10) BCLR 1059; [1999] ZACC 11) par 143, certain decisions may be subject to review under the Promotion of Administrative Justice Act 2 of 2001. See, for example, *Kusainda v University of Limpopo* [2024] ZALMPPHC 60 and *Dyantyi v Rhodes University* [2022] JOL 52644 (SCA); *Maxwele v University of Cape Town* [2017] JOL 38398 (WCC); *Mzansi Fire and Security (Pty) Ltd v Durban University of Technology* [2022] 2 All SA 475 (KZD), where such administrative action was applicable.

10 S 16(1)(*d*) of the Constitution protects academic freedom and freedom of scientific research, and the Preamble to the Higher Education Act 101 of 1997 records the desirability of public higher education institutions enjoying autonomy in their relationship with the State.

11 Consumer Protection Act 68 of 2008 (CPA).

12 UNGA 993 UNTS 3 (1966). Adopted: 16/12/1966; EIF: 03/01/1976 (ICESCR).

as to solidify future opportunities for higher education within South Africa. For this reason, the 1997 White Paper on Education was published, presenting a strategic outline for transformative change within the education system. The White Paper specifically provided the following:

> "The White Paper outlines the framework for change, that is, the higher education system must be planned, governed and funded as a single national co-ordinated system. This will enable us to overcome the fragmentation, inequality and inefficiency which are the legacy of the past, and create a learning society which releases the creative and intellectual energies of all our people towards meeting the goals of reconstruction and development."[13]

At the heart of the White Paper's strategic ideals is a goal-oriented funding model intended to advance transformation of the higher education system.[14] The 2001 National Plan for Higher Education gives effect to this transformative vision of higher education in the White Paper.[15] These strategic goals include providing increased access to higher education and promoting "equity of access" to redress past inequalities.[16] The strategic objectives take into account the number of students (size) and the fields of study, which are factors to accommodate and meet the needs of the labour market.[17] Such transformation has a financial cost in that increased access to education requires funding, and the funding available to the State and to public universities does not necessarily match the demand for education. Financial constraint therefore operates as one of the main inhibitors of the White Paper's transformative vision – for institutions and for individual students alike.[18] Limited resources within the higher education system, and what the State itself identifies as inefficiencies in the use of those resources,[19] further frustrate the realisation of the transformative vision set out in the White Paper.[20] Such constraints are not limited to affecting the individual student's ability to pay tuition fees but also impact the financial feasibility and funding of public universities.

There are three major categories of funding applicable to public universities: government grants (known as first-stream income), student tuition fees (known as second-stream income) and other private income and other funding opportunities (known as third-stream income).[21] Much focus has been placed

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13 GN 1196 in *GG* 18207 of 1997-08-15. Department of Education *Education White Paper 3: A Programme for the Transformation of Higher Education* (July 1997) 1.

14 *GG* 25824 of 2003-12-09. Ministry of Education *Funding of Public Higher Education* par 1.1.

15 GN 230 in *GG* 22138 of 2001-03-09. Department of Education *National Plan for Higher Education* par 1.1.

16 *National Plan for Higher Education* par 1.7.

17 *National Plan for Higher Education* par 2.1.2.

18 *National Plan for Higher Education* par 1.3.

19 Department of Higher Education and Training *Ministerial Statement on Student Enrolment Planning 2014/15–2019/20 for Universities* (June 2014) par 1.1. This statement identifies the management of inefficiencies within the higher education system as a purpose of enrolment planning.

20 *National Plan for Higher Education* par 1.1.

21 Ministry of Education "A New Funding Framework: How Government Grants Are Allocated to Public Higher Education Institutions" (undated) https://www.dhet.gov.za/Reports%20Doc%20Library/New%20Funding%20Framework%20How%20Government%20grants%20are%20allocated%20to%20Public%20Higher%20Education%20Institutions.pdf (accessed 2025-01-25). See also Ntsjoe and De Villiers "Funding Sources for Public Higher

on second- and third-stream income as a way to unshackle an institution's financial dependence on government. Public universities reported, in 2008, as receiving between 30 and 60 per cent of their funding from government.[22] According to Statistics SA, government grants amounted to between 43 and 48 per cent of higher education institutions' revenue sources between 2010 and 2019.[23] A particular form of grant, within the block grant structure of first-stream income, is linked to the enrolment of full-time equivalent students (or FTE) at a particular public university.[24] This type of grant is called a "teaching input unit" (or TIU),[25] and is closely linked to the enrolment planning of an institution. Enrolment planning is the "process of determining how many students a programme or institution should enrol, considering factors such as capacity, infrastructure, cost and demand for skills, to determine size and shape of institutions, sectors and the system".[26] A key purpose of enrolment planning is to manage inefficiencies within the higher education system and to identify areas that require attention and correction.[27] A more practical purpose of the enrolment-planning process is arguably to assist with the White Paper's goal-oriented funding model for public universities.

The goal-oriented funding model assists in the planning of institutional enrolment numbers and budget requirements three years in advance.[28] In this regard, the Minister engages in discussions with individual public universities regarding their enrolment planning[29] to ensure that the enrolment plans strike a balance between the capacity of the institution and available funding.[30] The National Enrolment Plan sets out these targets, and individual agreements are concluded with public universities regarding their particular targets.[31] The enrolment plan is therefore directly linked to the grants (or subsidised funding) paid to a public university, which are announced three years in advance.[32]

The impact of all of this is that any students enrolled at a public university in excess of the number of available publicly subsidised FTE places are

Education in South Africa: Institutional Responses" 2013 31 *Perspectives in Education* 71 71–84.

22 Wangenge-Ouma and Cloete "Financing Higher Education in South Africa: Public Funding, Non-Government Revenue and Tuition Fees" 2008 22 *SAJHE* 906 907.

23 Statistics SA "Universities Depend More on Government for Funding" (28 October 2020) https://www.statssa.gov.za/?p=13719 (accessed 2026-07-29).

24 Ntsjoe and De Villiers 2013 *Perspectives in Education* 74.

25 Department of Higher Education and Training "Ministerial Statement on University Funding: 2022/23 and 2023/24" (December 2021) https://www.dhet.gov.za/Institutional%20Funding/Ministerial%20Statement%20on%20University%20Funding,%20Dec%202021.pdf (accessed 2025-01-22) par 1.1.

26 Department of Higher Education and Training "National Plan for Post-School Education and Training 2021–2030" (2023) https://www.dhet.gov.za/SiteAssets/NPPSET/DHET%20NPPSET%20_%20Web%20version%2018092023.pdf (accessed 2025-01-22) 5.

27 *Ministerial Statement on Student Enrolment Planning 2014/15–2019/20 for Universities* par 1.1.

28 *Education White Paper 3* par 4.21.

29 See *Economic Freedom Fighters Student Command v Minister of Higher Education, Science & Technology* [2021] ZAGPPHC 255 par 15.

30 *Ibid*.

31 See, for example, *Economic Freedom Fighters Student Command v Minister of Higher Education, Science & Technology supra* par 16–17.

32 *Education White Paper 3* par 4.23.

funded by the institution, not the government.[33] The financial impact is, however, much greater than for a private university simply self-funding additionally enrolled students. A significant deviation from the enrolment plan has a negative financial impact on a public university, as an institution is at risk of forfeiting or having a reduction in some of its grants.[34] In the Ministerial Statement on University Funding: 2022/23 and 2023/24, so-called "corrective financial measures" would be implemented for an institution that does not "stay within the reasonable limit of their Ministerially approved TIUs".[35] The benchmark for acceptable deviation is currently a range of two per cent from the enrolment-planning numbers (for both under-enrolments and over-enrolments). Insofar as enrolments exceed the acceptable deviations, an adjustment of funding is made to the particular public university.[36] Additional future "corrective measures" are anticipated to include potentially reducing the acceptable deviation range (currently at 2 per cent), removing TIUs from universities that operate outside the acceptable deviation range, and reallocating funds to universities that operate within the acceptable deviation range.[37] Although termed "corrective measures", these measures are clearly penalty-driven, aimed at ensuring enrolments remain within the agreed enrolment plans. A failure to keep within the acceptable deviation range negatively impacts the financial sustainability of a public university and effectively bars an institution (regardless of available third-stream income) from enrolling more students than originally agreed in the enrolment plan. Doing so negatively affects the receipt of government grants by the university.

This notwithstanding, there are good reasons for keeping to agreed enrolment numbers, as student enrolment has a much wider societal and economic impact than only the financial impact on public universities. For instance, under-enrolment impacts the individual student's life as it "adversely affect[s] access to students, especially poor and disadvantaged students".[38] Although over-enrolment does not have a direct negative impact on the individual student (except those barred from studying owing to oversubscribed programmes), the negative impact on the higher education system as a whole can be considerable. The Department describes these risks as follows:

> "Over-enrolments impact on the quality of teaching and learning provided to students, negatively impact on the TIU shares amongst universities and the rand-value of TIUs in future enrolment planning, and also adversely impact on the NSFAS to be able to properly cater for poor and missing middle students".[39]

This indicates that over-enrolment places a strain on teaching quality, on the Rand value of teaching input units and on the National Student Financial Aid Scheme (NSFAS). It is these risks that the corrective measures are designed

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33 *Education White Paper 3* par 4.24.

34 *Ibid*.

35 *Ministerial Statement on University Funding: 2022/23 and 2023/24* par 1.3. See also Department of Higher Education and Training "Ministerial Statement on University Funding: 2024/25 and 2026/27" (December 2023) https://www.dhet.gov.za/Institutional%20Funding/Ministerial%20Statement%20on%20University%20funding%20-2024-25%20to%202026-27%20December%202023.pdf (accessed 2025-01-25) par 1.3.

36 *Ministerial Statement on University Funding: 2022/23 and 2023/24* par 1.3.

37 *Ibid*.

38 *Ibid*.

39 *Ibid*.

to avert. Ultimately, over-enrolments place a significant risk of "overcrowded facilities, low morale of academic staff, poor quality programmes, a fall in research output and quality, and, ultimately, a loss of confidence by students, employers and funders in the devalued products of higher education".[40] Ensuring correct enrolment numbers is clearly an important factor when registering students at a public university, and, for this reason, there are strong incentives (in the form of financial penalties) put in place to ensure that public universities remain within the enrolment-planning numbers.

3 A TRIO OF CASES

Admission policies of public universities inevitably reflect the requirements of the enrolment plan (as discussed above). This results in practical (and often unintended) consequences for the prospective student. This can be illustrated in the *Mbana*, *Genukile* and *Mnqandi* cases, where the applicants were barred from registering as the programmes they had applied for had become oversubscribed. Implementing the strategic approach to enrolments (discussed above) in a top-down manner results in certain practical "on the ground" implications for prospective students, which have manifested in contractual arguments. All three cases are discussed in the context of the contractual principles regulating the applicants and WSU so as to illustrate the practical implications and legal arguments that stem from barring students from oversubscribed programmes.

3 1 *Mbana* case

Mbana (the applicant) approached the court to seek a declaratory order regarding registration for a Bachelor of Laws (LLB) degree in 2023 at WSU.[41] On 7 February 2023, Mbana received an admission letter from WSU offering him a place in the LLB programme.[42] WSU had issued 276 similar admission letters, but only 75 spaces were available.[43]

The admission letter specified that Mbana had to accept the offer within three days and that registration would be conducted online on a first-come-first-served basis.[44] This meant that LLB registration was subject to space availability at WSU.[45] On the same day, Mbana phoned the registrar's office, where, according to Mbana, he verbally accepted the offer and paid the registration fee.[46] WSU did not have a record of such a phone call, but nothing

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40 *Education White Paper 3* par 4.4.

41 *Mbana v Walter Sisulu University supra* par 1.

42 *Mbana v Walter Sisulu University supra* par 3.

43 *Mbana v Walter Sisulu University supra* par 35.

44 *LAWSA IX Contract* par 300 defines an offer as "a statement of intention in which the offeror sets out to the person to whom the offer is made what performance and what terms he or she is prepared to bind him- or herself to". In this context, one may say that the admission letter indicated on what basis WSU would be willing to contract with a prospective student.

45 *Mbana v Walter Sisulu University supra* par 12–13.

46 *Mbana v Walter Sisulu University supra* par 4. *LAWSA IX Contract* (par 304) defines acceptance as "a statement of intention in which the offeree signifies assent to the proposal embodied in the offer. An acceptance, like an offer, can be tacit, that is by conduct". See also *Withok Small Farms (Pty) Ltd v Amber Sunrise Properties 5 (Pty) Ltd* 2009 (2) SA 504 (SCA)

in this case turned on the phone call, as a phone call was not the correct method to accept the offer.[47] Although this was not a point discussed in the case, the manner of acceptance is determined by the language used in the offer,[48] and, as such, the offer was incapable of being accepted verbally. Nevertheless, Mbana attempted to register online but soon discovered that there was no space left in the LLB programme, and as a result, registration was impossible.[49] It transpired that the LLB programme had become fully subscribed on the same day the admission letter had been sent to Mbana.[50]

Mbana contended that three days had been given to either accept or reject WSU's offer. This meant that his space could not be given to another candidate within that three-day period.[51] On the other hand, WSU, relying on section 37(4) of the Higher Education Act,[52] argued that it was allowed to determine its admission policy.[53] WSU's rules were published in its annual prospectus, where WSU maintained the right to admit or refuse admission in respect of WSU's targets and capacity.[54] WSU maintained that registration could no longer be facilitated owing to capacity constraints, as the 2023 academic year only permitted 75 first-year students to register at the Faculty of Law.[55] This particular number was determined by the Department of Higher Education and Training (DHET), which provided the funding for the LLB.[56] Therefore, WSU could not register more students than the prescribed number.[57] To do so would result in over-subscription, and consequently, penalties would be levied, as it would not be subsidised by DHET for the over-subscribed number of students.[58] The admission letter confirmed that Mbana had met the requirements for the LLB,[59] but the formal registration could only be done online, which was the form in which the offer (contained in the admission letter) could be accepted.[60]

The legal issue in this matter revolved around the language used in the admission letter, which read as follows:

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par 11, which highlights that the mode of acceptance is determined by the wording of the offer.

47 *Mbana v Walter Sisulu University supra* par 17. This is supported in *Amcoal Collieries Ltd v Truter* [1990] 1 All SA 248 (A) 249, which confirms that acceptance must be communicated to the offeror, but if the offeror requires a specific method of acceptance, then such a method must be adhered to. It is only when one complies with such a method that a valid contract is concluded upon acceptance. See also *Collen v Rietfontein Engineering Works* [1948] 1 All SA 414 (A) 419; *LAWSA IX* Contract par 305.

48 See *Withok Small Farms (Pty) Ltd v Amber Sunrise Properties supra* par 11.

49 *Mbana v Walter Sisulu University supra* par 6, 18.

50 *Mbana v Walter Sisulu University supra* par 19.

51 *Mbana v Walter Sisulu University supra* par 7.

52 101 of 1997. In terms of s 37(1) of the Higher Education Act, the council of a public higher education institution, after consulting its senate, determines the admission policy of the institution; it was on s 37(4) that WSU relied for its entitlement to determine and apply that admission policy.

53 *Mbana v Walter Sisulu University supra* par 8.

54 *Mbana v Walter Sisulu University supra* par 9.

55 *Mbana v Walter Sisulu University supra* par 10.

56 *Ibid*.

57 *Ibid*.

58 *Ibid*.

59 *Mbana v Walter Sisulu University supra* par 12.

60 *Mbana v Walter Sisulu University supra* par 12–13, 35.

> "1. Acceptance or rejection of firm offer of admission.
>
> As only a limited number of admissions can be made for this program, it is imperative that the University receives your response of accepting or rejecting the firm offer within three (03) days of receiving this letter from the date of issue. Failure to do so will result in your space being given to the next deserving student.
>
> Please note that registration is done online subject to availability of space and first come first served. Registration guidelines and procedures are available on the University website w[...].
>
> First time entering/new students must register from Monday, 23 January 2023 until Friday, 27 January 2023. Failure to do so will result in your space being given to the next deserving student."[61]

The way the letter was drafted indicated that Mbana's space could only be given to the next deserving candidate after the three days had elapsed.[62] Although not expressly mentioned, this closely resembled an option,[63] which prevents the grantor (WSU in this case) from revoking or withdrawing the offer during a specified period of time.[64] This meant that the offer would be irrevocable for a period of three days.[65]

The issue was not *Mbana*'s admission into the LLB programme, but rather that he had been prevented from registering on time.[66] Thus construed, the only way for WSU to escape from being contractually bound would have been to prove that Mbana's registration was late.[67] This it had not done. The court found that WSU was in breach of section 29(1)(*b*) of the Constitution,[68] and ordered WSU to register Mbana immediately for the 2023 academic year in the LLB programme.[69]

3 2 *Genukile* case

Shortly after the *Mbana* case, Genukile approached the court on an urgent basis for a declaration that his right to education in terms of section 29(1)(*b*) of the Constitution had been violated.[70] This stemmed from Genukile having been barred from registering for a diploma in human resources management at WSU.[71] There were 168 positions available to study the diploma, and out

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61 *Mbana v Walter Sisulu University supra* par 3.

62 *Mbana v Walter Sisulu University supra* par 23.

63 *LAWSA IX* Contract par 302. An option is a form of a *pactum de contrahendo* "to keep the offer open for a period of time". Hutchison and Pretorius ((eds) *The Law of Contract in South Africa* (2022) 67) notes that for the duration of the option, it is up to the grantee to decide whether to contract or not. This is done by either accepting or rejecting the offer contained in the option.

64 This is one of the negative duties that is placed on a grantor. The other duty is to ensure that the grantor does not do anything to prevent the contract from coming into being. See Hutchison and Pretorius (eds) *The Law of Contract in South Africa* 70.

65 Hutchison and Pretorius (eds) *The Law of Contract in South Africa* 70.

66 *Mbana v Walter Sisulu University supra* par 30.

67 *Mbana v Walter Sisulu University supra* par 33.

68 S 29(1)(*b*) of the Constitution provides that everyone has the right "to further education, which the state, through reasonable measures, must make progressively available and accessible".

69 *Mbana v Walter Sisulu University supra* par 35.

70 *Genukile v Walter Sisulu University supra* par 1.

71 *Ibid*.

of the 8 198 applicants, only 2 434 qualified to study the diploma in 2024.[72] Unlike the *Mbana* case where an admission letter was provided, Genukile had received an SMS indicating that the registration for the diploma was subject to available space.[73]

Just like Mbana, Genukile verbally accepted the offer and attempted to pay the registration fee.[74] On the same day, he tried to register for the diploma on the online portal but was not able to do so.[75] It later transpired that the qualification had reached its maximum capacity.[76] Nevertheless, Genukile argued that he had accepted the offer from WSU and had been admitted into the diploma programme;[77] thus, he argued, his admission had been confirmed, and a contract had been concluded between himself and WSU.[78] WSU argued that, although he had met the minimum admission requirements, there was no guarantee of registration for the diploma.[79] After all, there were many applicants who met the minimum requirements, but only a limited number of spaces were available.[80] WSU again emphasised that if more prospective students were admitted than there were available spaces, they would be penalised by DHET,[81] and that WSU could not fund students who were not subsidised.[82] Registration depended on the availability of spaces,[83] and WSU's prospectus stated that once a programme was fully subscribed, no further registrations would be allowed for the programme.[84]

The court faced the same question as in *Mbana*, being whether a contract had been concluded between Genukile and WSU.[85] However, the facts were different in that no admission letter had been provided. Genukile argued that WSU made it impossible for him to perform in terms of the contract (effectively, although not specifically mentioned, a form of prevention of performance) – specifically that he was prevented from paying the registration fee, and this prevented him from registering for the diploma.[86] He further argued that the term of the contract was that he would pay the registration fee after he had accepted WSU's offer.[87] However, consensus *ad idem* (or the meeting of the minds) could not be proved,[88] and the court reasoned that even if such a

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72 *Genukile v Walter Sisulu University supra* par 12.
73 *Genukile v Walter Sisulu University supra* par 13.
74 *Genukile v Walter Sisulu University supra* par 5(c).
75 *Genukile v Walter Sisulu University supra* par 5(g).
76 *Genukile v Walter Sisulu University supra* par 5(g).
77 *Genukile v Walter Sisulu University supra* par 5(c).
78 *Ibid*.
79 *Genukile v Walter Sisulu University supra* par 15.
80 *Ibid*.
81 *Genukile v Walter Sisulu University supra* par 19(d).
82 *Genukile v Walter Sisulu University supra* par 19(f).
83 *Genukile v Walter Sisulu University supra* par 22.
84 *Genukile v Walter Sisulu University supra* par 19(a).
85 *Genukile v Walter Sisulu University supra* par 6.
86 *Genukile v Walter Sisulu University supra* par 42. In terms of *Van Jaarsveld v Ackermann* (1975 (2) SA 753 (A)), the acceptance of the offer illustrates the point when consensus is reached between the parties.
87 *Genukile v Walter Sisulu University supra* par 49.
88 *Genukile v Walter Sisulu University supra* par 27, 49. The acceptance of an offer must be communicated to the offeror; this is to ensure that there is a meeting of the minds. Put differently, reaching consensus *ad idem* includes that the offeror is notified of the acceptance

contract could be proved, it would have been subject to a suspensive condition of payment of the registration fee, which would have suspended the contract, – that is, no rights could have been enforced until the condition was fulfilled.[89] The one exception to this would be where one of the contracting parties prevented the fulfilment of the condition; that party would then be bound to the contract, and there would be a deemed fulfilment of the condition.[90] However, WSU had not prevented Genukile from registering; rather, registration was on a first-come-first-served basis, and the system would not allow Genukile to register because the programme was full.[91] Put differently, another student had registered before Genukile.[92] There was no evidence that WSU had blocked or prevented Genukile from registering.[93] Ultimately, the application was dismissed with costs.[94] The judgment rests on the fact that no contract came into existence at all (in that there was no proof of acceptance communicated in the prescribed manner and there was no consensus *ad idem*). Even if there were an argument that a contract had come into existence, the court was of the view that such a contract would have been subject to a suspensive condition of payment of the registration fee (a condition that had failed without any obstruction by WSU, and, as such, the doctrine of fictional fulfilment could not assist Genukile).

3 3 *Mnqandi* case

The *Mnqandi* case is the final of the trio under discussion. On 1 February 2024, Mnqandi approached the court for a declaratory order that WSU was in breach of contract, resulting in the breach of her right to further education under section 29(1)(*b*) of the Constitution.[95] On 7 February 2024, an interim order was granted, allowing Mnqandi to enrol pending the outcome of the final application.[96] The matter before the court was the determination of the application.

Mnqandi was admitted to the Bachelor of Education in Foundation Phase Teaching (B.Ed degree) at WSU in 2023.[97] There were 110 vacancies and 501 applicants who met the minimum requirement for the programme.[98] As was the case in *Genukile*, Mnqandi was informed via SMS and email that registration was subject to the availability of space.[99] Nevertheless, as she had met the minimum requirements, she made payment of the registration fee on 24 January 2024.[100] As was the case in *Mbana* and *Genukile*, Mnqandi

of the offer. In this regard, see *Seeff Commercial and Industrial Properties (Pty) Ltd v Silberman* [2001] 3 All SA 133 (A).

89 *Genukile v Walter Sisulu University supra* par 29, 49.

90 *Genukile v Walter Sisulu University supra* par 32.

91 *Genukile v Walter Sisulu University supra* par 50.

92 *Genukile v Walter Sisulu University supra* par 51.

93 *Genukile v Walter Sisulu University supra* par 65.

94 *Genukile v Walter Sisulu University supra* par 83.

95 *Mnqandi v Walter Sisulu University supra* par 6.

96 *Ibid*.

97 *Mnqandi v Walter Sisulu University supra* par 5.

98 *Mnqandi v Walter Sisulu University supra* par 25.

99 *Ibid*.

100 *Mnqandi v Walter Sisulu University supra* par 13.

argued that she had accepted the offer by calling the office of the registrar to confirm telephonically that she had accepted the offer.[101] She attempted to register on the online portal, which confirmed her admission status as "admitted" and that the programme had been fully subscribed.[102] As a result, she could not register.[103]

As with the *Mbana* and *Genukile* cases, the issue before the court was whether there was a contract.[104] Specifically, the court had to determine whether the payment of the registration fee amounted to an acceptance of WSU's offer and, consequently, whether not allowing Mnqandi to register on the portal amounted to a breach of contract.[105] According to Mnqandi, a contract came into being when she had accepted the offer to register and was "perfected" when she paid the registration fee.[106] As a result, it was unconstitutional to give her space to another student.[107] Her arguments were similar to those in the *Mbana* case, namely that she had been given three days to register and that her space could be given to another student only after those three days had elapsed.[108] The admission notification implied that a space was reserved for her and thus that an irrevocable offer had been made.[109] WSU's argument was similar to that raised in *Mbana* and *Genukile*,[110] and maintained that there was no open-ended offer for acceptance.[111] Allowing a programme to become over-subscribed would be financially detrimental to WSU.[112]

The court found that the information appearing on the online registration portal was not the equivalent of a "notification in writing from the [r]egistrar" that Mnqandi had been admitted.[113] Mnqandi relied on the offer received on 24 January 2024 as well as the online registration portal,[114] but could not produce a copy of the admission letter to confirm the required mode of acceptance.[115] This meant that there was no evidence that there was a three-day window for the acceptance of the offer.[116] Ultimately, Mnqandi failed to prove that a contract had come into existence and failed to follow WSU's registration policy.[117] WSU was justified "in excluding students from registration based on its quota requirements".[118] The application was dismissed.[119]

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101 *Mnqandi v Walter Sisulu University supra* par 16.
102 *Mnqandi v Walter Sisulu University supra* par 5.
103 *Mnqandi v Walter Sisulu University supra* par 14.
104 *Mnqandi v Walter Sisulu University supra* par 15.
105 *Ibid*.
106 *Mnqandi v Walter Sisulu University supra* par 20.
107 *Mnqandi v Walter Sisulu University supra* par 21.
108 *Mnqandi v Walter Sisulu University supra* par 32.
109 *Mnqandi v Walter Sisulu University supra* par 34, 38.
110 *Mnqandi v Walter Sisulu University supra* par 29.
111 *Mnqandi v Walter Sisulu University supra* par 49.
112 *Mnqandi v Walter Sisulu University supra* par 30.
113 *Mnqandi v Walter Sisulu University supra* par 65.
114 *Mnqandi v Walter Sisulu University supra* par 67.
115 *Mnqandi v Walter Sisulu University supra* par 69.
116 *Mnqandi v Walter Sisulu University supra* par 68.
117 *Mnqandi v Walter Sisulu University supra* par 84, 93.
118 *Mnqandi v Walter Sisulu University supra* par 91.
119 *Mnqandi v Walter Sisulu University supra* par 93.

4 COMMERCIAL PERSPECTIVE

All three cases discussed above were determined on contractual principles, being a consequence of the contractual nature of the student-university relationship. As mentioned earlier, the top-down approach in implementing enrolment strategies within public universities has resulted in certain practical "on the ground" implications for prospective students, which have manifested in a contractual argument. This necessitates a discussion of the applicable commercial principles so as to illustrate the limited rights a prospective student may have in instances where a programme becomes oversubscribed. Naturally, pre-contractual principles (such as misrepresentation) could apply insofar as the making of any pre-contractual misstatements, which was not relevant in the cases under discussion. There are, however, three possible avenues of rights and protections that warrant discussion in this setting, being the protections afforded under the CPA, the contract doctrine of "offer and acceptance", and the application of the *contra proferentem* rule in instances of ambiguous offers.

4 1 Consumer protection

The first hurdle is to determine whether the CPA applies to contracts between students and universities. There are differing international views on whether consumer-protection laws would apply to the higher education sector.[120] However, there is a growing acceptance that students are afforded at least some form of consumer protection.[121] In the United Kingdom, for example, the Competition and Markets Authority recognises consumer protection as applying to students. From a South African context, Reddy argues that as the relationship between a student and a university is contractual in nature, "the CPA supplements the students' rights in terms of such contract".[122] Reddy's position can be supported by a closer examination of the CPA's provisions. First, the definition of "services" includes "the provision of any education".[123] This indicates that the legislature also had educational services in mind in drafting the CPA. The concept of services has a wide scope, and Reddy explains that

> "[s]uch services would consist of education (including, in the traditional sense, lectures, practicals and tutorials, as well as, in the contemporary sense, distance education or through electronic communication), accommodation and other services normally provided for students, such as library services,

[120] See discussion in Reddy "Students as Consumers: The Implications of the Consumer Protection Act for Higher Education Institutions in South Africa" 2012 26 *SAJHE* 586 588–590.

[121] One may object to viewing a student as a consumer as it sits uneasily with the pedagogical purpose of a university, which is the transfer of knowledge and skill rather than the satisfaction of customer preference. The objection is normatively defensible, but it does not address the fact that the legislature included "the provision of any education" within the CPA's definition of "services" in s 1, and the CPA's application does not depend on one's view of consumerism in higher education. Nevertheless, the broader debate falls beyond the scope of this discussion.

[122] Reddy 2012 *SAJHE* 589.

[123] S 1 of the CPA, definition of "services".

> computer facilities and electronic communication services, educational development programmes, financial aid services, etc."[124]

As the question in the *Mbana*, *Genukile* and *Mnqandi* cases related to whether the university's offer was accepted, the issue is whether the CPA would apply to pre-contractual engagements. The answer lies in the CPA's definitions of "supplier" and "transaction". A public university would be considered the supplier of services, which includes a "person who promotes, supplies or offers to supply any service".[125] The term "promotes" implies pre-contractual conduct. Section 5(1)(*a*) indicates that the CPA applies to "every transaction occurring within the Republic", and a "transaction" relates to the services in the ordinary course of business, which includes the "potential supply of any goods or services in exchange for consideration".[126] This means that the CPA would conceivably apply to prospective students.[127] This position is supported by Universities South Africa's guidelines on the CPA.[128] Also, according to Reddy, the CPA would apply before any contract was concluded with a prospective student.[129] Prospective students and the applicants in *Mbana*, *Genukile* and *Mnqandi* should then be afforded rights under the CPA.[130]

The CPA promotes access to services, which, in turn, also applies to educational services,[131] and prohibits the unfair exclusion of a consumer (a prospective student, in this case) from educational services.[132] The issue in *Mbana*, *Genukile* and *Mnqandi* was not whether the prospective student was unfairly excluded; after all, they were admitted to the programme but were not registered. The concepts of admission and registration are "two distinct processes with different rules and requirements".[133] Admission is confirmation that the prospective student meets the programme's minimum requirements, whereas the registration process depends on receiving written notification of admission.[134] Put differently, registration depends on admission, but not *vice versa*. In the context of the CPA, both the admission and registration processes would be considered to be pre-contractual in nature, and most (but not all) of the protections afforded in the CPA would apply only once a contract had been concluded. Yet, there may be some limited provisions that are relevant in a pre-contractual setting.

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124 Reddy 2012 *SAJHE* 591–592. See also an additional list, Universities South Africa "Consumer Protection Act Guidelines for Universities" (August 2015) https://usaf.ac.za/wp-content/uploads/2016/09/Consumer-Protection-Act_-guidelines-for-universities_1.pdf (accessed 2025-01-25) 4–5.

125 S 1 of the CPA, definition of "supplier".

126 S 1 of the CPA, definition of "transaction".

127 Reddy 2012 *SAJHE* 590. This would also be the case insofar as none of the exemptions in s 5(2)–(4) of the CPA is applicable. It is, however, unlikely that such exemptions would be applicable in the context of a student-university relationship.

128 Universities South Africa https://usaf.ac.za/wp-content/uploads/2016/09/Consumer-Protection-Act_-guidelines-for-universities_1.pdf.

129 Reddy 2012 *SAJHE* 590.

130 See also Reddy 2012 *SAJHE* 590.

131 Reddy 2012 *SAJHE* 594.

132 S 8 of the CPA. See also Reddy 2012 *SAJHE* 594.

133 *Mnqandi v Walter Sisulu University supra* par 60.

134 *Ibid*.

The way in which educational services are marketed is impacted by the CPA, and the relevant question is how the public university marketed its programmes. Of particular interest for the cases under discussion is bait marketing under section 30(1) of the CPA, which stipulates:

> "A supplier must not advertise any particular goods or services as being available at a specified price in a manner that may result in consumers being misled or deceived in any respect relating to the actual availability of those goods or services from that supplier, at that advertised price."

One cannot say that WSU was guilty of bait marketing in the *Mbana*, *Genukile* and *Mnqandi* cases. In all three instances, there was clear communication regarding the limited space available.[135] In fact, WSU always communicated about the limitation on the availability of space, which closely aligns with the requirements in section 30(2) of the CPA, which reads:

> "If a supplier advertises particular goods or services as being available at a specified price, and the advertisement expressly states a limitation in respect of the availability of those goods or services from that supplier at that price, the supplier must make those goods or services available at that price, to the extent of the expressed limits."

Beyond Universities South Africa's guidelines on the application of the CPA, little formal guidance exists on the consumer rights of prospective students confronted with oversubscribed programmes. Neither the CPA nor the guidelines contemplate the position of a prospective student who is barred from registering because a programme is full, and no consumer remedy appears to address such a position directly.[136]

From an international comparative perspective, it is notable that the United Kingdom's Competition and Markets Authority has issued guidelines as to the applicability of consumer protection to student-university relationships.[137] The guidelines clarify that the consumer-protection rules apply where a university issues an offer to a prospective student. In fact, consumer protection would apply in three broad categories: upon application, acceptance and enrolment.[138] However, the guidelines do not address oversubscription; their focus is on ensuring that the necessary information is provided to a prospective student so that they can make an informed decision as to whether or not to accept the offer.[139] Emphasis is also placed on the fairness of the

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[135] See also this requirement in Universities South Africa https://usaf.ac.za/wp-content/uploads/2016/09/Consumer-Protection-Act_-guidelines-for-universities_1.pdf 13–14.

[136] There was no indication of false marketing (such as advertising available space when there was none), nor did WSU accept fees when oversubscribed. If this were the case, then there would be remedies available under the CPA.

[137] Competition and Markets Authority "Restatement of the CMA's Views on How Consumer Protection Law Applies When a Student Has Accepted an Offer of a Place From an HE Provider" (undated) https://assets.publishing.service.gov.uk/media/5fc4bab98fa8f5474e63ab0b/HE_restatement_.pdf (accessed 2025-01-25).

[138] Competition and Markets Authority "UK Higher Education Providers – Advice on Consumer Protection Law" (31 May 2023) https://assets.publishing.service.gov.uk/media/6475b2f95f7bb7000c7fa14a/Consumer_law_advice_for_higher_education_providers_.pdf (accessed 2025-01-25) par 4.4.

[139] Competition and Markets Authority https://assets.publishing.service.gov.uk/media/6475b2f95f7bb7000c7fa14a/Consumer_law_advice_for_higher_education_providers_.pdf par 4.23.

contract and on the fact that prospective students should be treated fairly under consumer protection rules.[140] The requirement of fairness is applicable to the contractual terms between the student and the university.[141] What is of interest is the Competition and Markets Authority's recognition that fairness would be negatively impacted if universities were to withdraw or cancel an offer presented to a prospective student. In this regard, "[a] term that affords a wide discretion to the [university] to withdraw or cancel an accepted offer effectively means the [university] could simply choose not to comply with the terms of the offers it has made to prospective students".[142] Despite these protections, a contract is formed only at the moment of acceptance.[143] Acceptance, in this context, means that a university "has agreed to reserve a place and allow the student to enrol on the relevant course if they meet any specified entry requirements".[144] Put differently, once an offer for a place to study has been made, the university is required to admit the student.[145] Internationally, little protection exists for prospective students in an oversubscribed programme. In a South African context, much of the consumer protection would only apply after acceptance of an offer.

Consumer protection should, in principle, protect consumers against abuse in the consumer market. Although consumer protection applies to prospective students, there are few (if any) provisions that would be directly applicable to oversubscribed programmes. Clearly, the CPA will not come to the aid of prospective students who are barred from registering for oversubscribed programmes.

4 2 Offer and acceptance

In all three cases (*Mbana*, *Genukile* and *Mnqandi*), the question was whether a contract had been concluded. A contract can be defined as "an agreement entered into with the intention of creating a legal obligation".[146] This implies that there must be mutual understanding between the parties to ensure they agree on the material terms of the agreement.[147] The mechanism of "offer and acceptance" assists in determining whether there is consensus between the contracting parties and is also a tool for determining when and where a

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[140] Competition and Markets Authority "Restatement of the CMA's Views on How Consumer Protection Law Applies When a Student Has Accepted an Offer of a Place From an HE Provider" (undated) https://assets.publishing.service.gov.uk/media/619cd8bc8fa8f50382034d8c/211124_Higher_Education_Statement_on_Admissions.pdf (accessed 2025-01-25) par 4.

[141] Competition and Markets Authority https://assets.publishing.service.gov.uk/media/619cd8bc8fa8f50382034d8c/211124_Higher_Education_Statement_on_Admissions.pdf par 6.

[142] Competition and Markets Authority https://assets.publishing.service.gov.uk/media/619cd8bc8fa8f50382034d8c/211124_Higher_Education_Statement_on_Admissions.pdf par 7.

[143] Competition and Markets Authority https://assets.publishing.service.gov.uk/media/5fc4bab98fa8f5474e63ab0b/HE_restatement_.pdf par 5.

[144] *Ibid*.

[145] Competition and Markets Authority https://assets.publishing.service.gov.uk/media/6475b2f95f7bb7000c7fa14a/Consumer_law_advice_for_higher_education_providers_.pdf par 4.25.

[146] *LAWSA IX Contract* par 295.

[147] *LAWSA IX Contract* par 296.

contract was concluded. What differentiates the outcomes of *Mbana*, *Genukile* and *Mnqandi*[148] is the way in which the offers were framed, as well as the manner of their acceptance.

The applicants in *Genukile* and *Mnqandi* were not successful as the formulation of the offer did not amount to an option, as had been the case in *Mbana*. Rather, the offer in *Genukile* and *Mnqandi* was found to be an ordinary offer, a proposal to contract that could be revoked at any time before acceptance.[149] An offer may also include requirements as to the way in which acceptance must be made. However, unlike an option (which is a contract in its own right), no legal obligations arise before acceptance of an ordinary offer.[150] The reason for the applicant's success in *Mbana* was that the admission letter was framed as an option (being a type of *pactum de contrahendo*) and was a contract in its own right, which created legally enforceable obligations. The option provided the applicant with three days to accept or reject the offer. However, WSU breached the terms of the option by offering the applicant's space to another deserving student. This was not the case in *Genukile* and *Mnqandi*, where ordinary offers were applicable, and where WSU had the right to withdraw or revoke those offers at any time. Put differently, ordinary offers do not function as separate contracts, and prior to acceptance of the offer, no contractual obligations are formed.

Whether an option or an ordinary offer applies rests on the wording of the offer as well as the unique factual circumstances of a particular matter. This means that prospective students should address each situation on its own merits. This also means that the remedies and recourse for a prospective student are limited, as much revolves around the way in which the admission letter is worded.

4 3 *Contra proferentem*

As the contractual remedies for prospective students are linked to the wording of an admission letter, the importance of language cannot be overstated. A contract is reflected in the language used to express the internal workings of the parties' mind and intent.[151] Therefore, the words of the offer and the individual factual circumstances determine the outcome of a contractual transaction. This can be illustrated in the success of *Mbana* and the dismissal of the applications in *Genukile* and *Mnqandi.* The words used in the offer will determine the terms of the contract and the way in which the contract would eventually be concluded. The offeror's words may dictate the mode of acceptance,[152] and the words used will determine whether an option or an ordinary offer is being presented to a prospective student.

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148 The cases are differentiated from *Lunt v University of Cape Town* 1989 (2) SA 438 (C), where a postgraduate student was refused re-registration and the issue was whether previous conduct had created a legitimate expectation in the mind of the postgraduate student. There is no issue of "legitimate expectation" in the cases under discussion.

149 *LAWSA IX* Contract par 302.

150 *Ibid*.

151 Jones *A Treatise on the Construction or Interpretation of Commercial and Trade Contracts* (1886) 1–2.

152 See *Rex v Dembovsky* 1918 CPD 230.

In all three matters, WSU required that the prospective student register on the online portal. The language used in the admission letter in *Mbana* created an option, but in *Mnqandi*, the admission letter could not be produced. Thus, insofar as there may be ambiguity in the language used, the common-law principle of *contra proferentem* may provide some protection for prospective students. Where there is any doubt as to the meaning of the words in a written document (in this case, the offer), the *contra proferentem* rule may be applicable. The rule "requires a written document to be construed against the person who drew it up, on the ground that it was for him to express himself in plain terms".[153] In fact, this rule was applied against the person who drafted the clause in *McCain Frozen Foods*.[154]

Although prospective students do not necessarily have express protections under the CPA, if the admission letter or the university's offer is ambiguous, then the *contra proferentem* rule requires that such an ambiguity should be interpreted to the benefit of the prospective student. This appears to be the only legal principle that may come to a prospective student's aid in these circumstances.

5 STRATEGIC AND HUMAN-RIGHTS PERSPECTIVE

The commercial setting of consumer protection and contractual principles provides almost no meaningful protection for prospective students and certainly offers no solution to students who are barred from enrolling in oversubscribed programmes. Rather, a solution must be found at a more strategic level. The potential courses of action are not limited to the private law of contract but include pursuing the right of access to higher education itself.

5 1 Policy aspirations

Sustainable Development Goal 4 (SDG 4) sets the global objective for education, which is "[to] [e]nsure inclusive and equitable quality education and promote lifelong learning opportunities for all".[155] Although SDG 4 is focused on primary and secondary education, SDG 4.3 is relevant to the higher education setting, which is a subsidiary goal in that "[b]y 2030, [it aims to] ensure equal access for all women and men to affordable and quality technical, vocational and tertiary education, including university".[156] SDG 4.3 speaks of "equal access" and "affordable" higher education, but the *Mbana*, *Genukile* and *Mnqandi* cases demonstrate that access itself is often the problem. This challenge is supported by the gross enrolment value or ratio (being the number of people enrolled across the population of South Africa). Our World in Data reported a gross enrolment ratio in South African tertiary education of 25,4 per cent as at 2021.[157] The gross enrolment ratio is an

[153] *Greenwood v Old Mutual Staff Retirement Fund* [2000] 9 BPLR 978 (PFA) par 67.

[154] *McCain Frozen Foods (Pty) Ltd v Beestepan Boerdery (Pty) Ltd* [2005] JOL 13308 (T).

[155] United Nations "Goals" (undated) https://sdgs.un.org/goals/goal4 (accessed 2025-01-25).

[156] The Global Goals "4 Quality Education" (undated) https://www.globalgoals.org/goals/4-quality-education/ (accessed 2025-01-25).

[157] Our World in Data "Gross Enrolment Ratio in Tertiary Education" (undated) https://ourworldindata.org/grapher/gross-enrollment-ratio-in-tertiary-education#explore-the-

indicator policymakers use to track "progress towards educational goals, detect gaps, and conduct targeted interventions to increase access to high-quality education".[158] The importance of participation in higher education cannot be overstated. In 2024, the DHET explained the importance of access to higher education as follows:

> "The level of participation in tertiary education is considered a key social and economic indicator internationally, primarily because tertiary education is crucial for developing a highly skilled, knowledgeable and innovative workforce. In turn, this is essential for economic growth and competitiveness in the modern, knowledge-based economy. Higher levels of tertiary educational attainment generally correlate with increased productivity, technological advancements, and the ability to adapt to changing economic and social conditions. Moreover, access to tertiary education provides individuals, especially those from disadvantaged backgrounds, with opportunities for social and economic mobility, helping to reduce inequality and promote more inclusive societies. In addition, increased participation in tertiary education can lead to better employment prospects, higher incomes, and improved living standards, contributing to greater social cohesion and equality."[159]

Notably, the SDGs are a political commitment rather than a source of binding legal obligations. The gross enrolment ratio and the DHET's account of participation describe the scale of the problem, but an assessment of the enrolment-planning arrangements cannot rest on policy aspirations. The answer must then be found elsewhere – specifically in article 13(2)(c) of the ICESCR (which South Africa signed in 1994) and ratified in 2015,[160] and in section 29(1)(*b*) of the Constitution.

5 2 Article 13(2)(c) of the ICESCR

Article 13(2)(c) provides that higher education "shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education". This provision has three implications for purposes of this discussion. First, higher education, unlike basic education, need not be made generally available. This provision tolerates scarcity, and it accepts that not every applicant will find a place in higher education institutions.[161] However, inequitable access to such institutions is not allowed. Where admission seats are limited, article 13(2)(c) lays down a criterion by which they may be allocated, being "capacity".[162]

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data (accessed 2025-01-25). The data represents the enrolment value "regardless of age, expressed as a percentage of the total population of the five-year age group following on from secondary school leaving".

158 DHET "Access to Tertiary Education in South Africa: Country Comparison Using Gross Enrolment Ratio" (August 2024) https://lmi-research.org.za/wp-content/uploads/2024/09/WEB-DPRU-FACTSHEET-7-7-1b-Access-Tertiary-Education-2024.pdf (accessed 2025-01-25) 2.

159 DHET https://lmi-research.org.za/wp-content/uploads/2024/09/WEB-DPRU-FACTSHEET-7-7-1b-Access-Tertiary-Education-2024.pdf 1.

160 Art 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR). South Africa signed the ICESCR on 3 October 1994 and ratified it on 12 January 2015.

161 Beiter *The Protection of the Right to Education by International Law* (2006) 522.

162 Beiter *The Protection of the Right to Education by International Law* 216 522–524. See also art 11(3)(c) of the Organisation of African Unity's *African Charter on the Rights and Welfare of the Child* (CAB/LEG/24.9/49 (1990). Adopted: 11/07/1990; EIF: 29/11/1999), which obliges

Secondly, the accessibility of higher education may be realised gradually within available resources; thus, deliberately retrogressive measures attract a strong presumption of impermissibility.[163] Thirdly, states must promote access in appropriate ways, which include (for example) study bursaries, admission via different paths, accurate information to applicants and expanded distance education.[164]

The criterion of capacity includes a qualitative criterion, which relates to the intellectual ability of the applicant, being the potential to complete the studies concerned.[165] The Committee on Economic, Social and Cultural Rights (CESCR) has stated that the capacity of individuals "should be assessed by reference to all their relevant expertise and experience".[166] A state may not restrict student numbers in order to answer the demands of the labour market, for such a restriction limits access where the duty is to promote it.[167] Where a restriction is imposed because admission seats are genuinely limited, the German Federal Constitutional Court held, in reasoning Beiter adopts for article 13(2)(c), that the restriction is permissible only if the existing intake capacity of institutions is fully exhausted and the selection of students occurs on the basis of capacity.[168]

Measured against these standards, the penalty-driven compliance model sits uneasily with the provision. The trio of cases proceeded on the footing that every applicant before the court had the capacity to study; each had been admitted, and admission confirmed that the minimum requirements of the programme had been met. What barred them was not capacity but sequence, being the speed with which the online portal was reached by other prospective students. Selection among admitted candidates on a first-come-first-served basis is an administrative criterion; it stands closer to the drawing of lots than to an assessment of "relevant expertise and experience", and it is difficult to see how it amounts to selection on the basis of capacity.[169] Secondly, an institution with physical space and third-stream funds is deterred from admitting a further capable student because the penalty attaches to the enrolment number itself. Put differently, a student would therefore not be enrolled despite existing intake capacity of the institution not being fully exhausted. The corrective measures should be narrowing the deviation band.[170] A tightening of the band is, in substance, a retrogressive step in the

States Parties to "make higher education accessible to all on the basis of capacity and ability by every appropriate means".

163 Beiter *The Protection of the Right to Education by International Law* 387 and 388.

164 Beiter *The Protection of the Right to Education by International Law* 523.

165 Beiter *The Protection of the Right to Education by International Law* 524.

166 UN Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No.13: The Right to Education* par 19.

167 Beiter *The Protection of the Right to Education by International Law* 524.

168 Beiter *The Protection of the Right to Education by International Law* 525.

169 CESCR *General Comment 13* par 19; Beiter *The Protection of the Right to Education by International Law* 525.

170 See, for example, DHET "Ministerial Statement on University Funding: 2024/25 to 2026/27" (2023) https://www.dhet.gov.za/Institutional%20Funding/Ministerial%20Statement%20on%20University%20funding%20-2024-25%20to%202026-27%20December%202023.pdf par 1.3.

context of making higher education more accessible, and would require further justification.[171]

5 3 Section 29(1)(*b*) of the Constitution

Section 29(1)(*b*) of the Constitution provides that everyone has the right "to further education, which the state, through reasonable measures, must make progressively available and accessible". All three cases discussed in this article fall within further education for this purpose, and the court in *Mbana* found the university to be in breach of the applicant's right.[172] Unlike section 29(1*)(a)*, which grants the right to basic education without internal qualification and which the Constitutional Court has described as immediately realisable, the right to further education is qualified in the manner familiar to socio-economic rights, being that the State must act through reasonable measures, and availability and accessibility are to be achieved progressively.[173]

The content of reasonable measures draws on the jurisprudence developed under sections 26(2) and 27(2) of the Constitution – namely that measures must be balanced and flexible, must make appropriate provision for short-, medium- and long-term needs, and may not exclude those whose need is most urgent.[174] Furthermore, section 39(1)(*b*) obliges a court interpreting the Bill of Rights to consider international law, so that article 13(2)(*c*) and General Comment No. 13 will properly inform the content of section 29(1)(*b*).[175] It must be conceded that the right to further education has received far less judicial and academic attention than has the right to basic education, and the trio of cases under discussion is among the few to test section 29(1)(*b*) against enrolment controls. (The analysis herein is offered as a step in that direction).

Read in this way, section 29(1)(*b*) does not oblige the State to fund every place; after all, the financial constraints are real, and a subsidy budget fixed three years in advance is not, in itself, unreasonable. The difficulty lies in the compliance model that penalises an institution for admitting a capable, self-funded student where physical capacity exists. This does more than decline to fund the place; it deters the creation of a place the State was never asked to fund. A measure of that kind renders further education progressively less available and less accessible. It is difficult to describe as reasonable a measure that is, in its operation, inflexible to the point of punishing access itself.

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171 CESCR *General Comment 13* par 45.

172 *Mbana v Walter Sisulu University supra* par 35.

173 *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC) par 37.

174 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) par 41 to 44.

175 S 39(1)(*b*) of the Constitution.

5 4 The penalty-driven compliance model measured against the right

The DHET recognises that barriers to access to education may be linked to respective income brackets and gender,[176] but an additional barrier is the limited spaces available within public universities and the barriers resulting from the "corrective measures" in ensuring compliance with the enrolment plans. It is defensible for the government to decline to subsidise students enrolled in excess of agreed numbers. The subsidy budget is fixed three years in advance, and an institution that over-enrols must carry the cost of the additional students itself. The "corrective measures", in their present articulation, function as a double penalty system. First (and rightly so), it places the financial burden on the public university for over-enrolments, but this is extended to additional penalties that impact government funding. This limits an institution to the enrolment numbers in the enrolment plan but removes any flexibility for public universities (other than the two per cent deviation threshold). The broad financial implication of the secondary penalty effectively bars public universities from self-funding deserving students via third-stream income or otherwise. The inflexibility of the current structure and the implications of the secondary penalty have a negative impact on prospective students and may be illustrated in the practical manifestation of such policies within the applications of the *Genukile* and *Mnqandi* cases. Whether WSU itself could have funded additional places is doubtful, as in *Genukile* the university stated that it cannot fund students who are not subsidised.[177] The structural objection, however, does not depend on an institution's financial means. Even an institution with healthy third-stream income is deterred from using such means to admit a further capable student, because the secondary penalty attaches to the enrolment number itself and not to the source of the funding.

Unfortunately, there is no meaningful recourse for deserving prospective students in these instances. Such penalty-driven compliance measures (found in the "corrective measures" of the enrolment plans) not only penalise public universities (which are financially constrained by the grant system and are indirectly barred from funding such students themselves) but also prospective students (many of whom are willing, able and arguably could obtain funding to study, whether through NSFAS bursaries, private bursaries, employer sponsorship, bank loans or family resources). This is further exacerbated by commercial principles and the lack of protections afforded in the CPA and contract doctrine, which provides no real recourse to prospective students (unless, as in the *Mbana* case, there is some unintended wording in the admission letter). All these are effectively barriers to higher education. Additional second and third-stream income remains desirable, and nothing said here discourages universities from pursuing it. The point, however, is that additional income cannot, by itself, unlock additional places, because the penalty attaches to the enrolment numbers and not to the source of the funding. The solution therefore lies not with the universities but with

[176] DHET https://lmi-research.org.za/wp-content/uploads/2024/09/WEB-DPRU-FACTSHEET-7-7-1b-Access-Tertiary-Education-2024.pdf 5–6.

[177] *Genukile v Walter Sisulu University supra* par 19(f).

government, which alone can re-evaluate the penalty-driven compliance model embedded in its enrolment strategy and plans.

6 CONCLUSION

There is clearly an issue in relation to available funding, specifically public universities' dependence on government funding. At first, one may argue that funding deficits should be met through second- or third-stream income,[178] but this would not address the issues illustrated in the *Mbana*, *Genukile*, and *Mnqandi* cases. After all, the enrolment planning structure would not allow public universities to enrol more students than the pre-determined and agreed number. Put differently, even if a university finds alternative funding, it is barred from deviating from the pre-determined enrolment numbers by more than two per cent owing to the double penalty found in the penalty-driven compliance model.

This means that the situation described in these cases, although a funding issue, is not one that can be solved at a university level. Rather, to echo the DHET's sentiments, there is a need "for improved strategic measures and innovative solutions by the South African government, in order to enhance access to higher education, thereby promoting inclusivity, equity and socio-economic advancement".[179] Such strategic measures should, for example, include a re-assessment of the penalty-driven compliance model. Government could, for example, exclude fully self-funded enrolments from the secondary penalty, so that the State declines to subsidise such students but without punishing the institution that admits them. It could permit the in-year variation of an enrolment plan where a programme is oversubscribed by demonstrably capable applicants, and the institution shows the physical and financial capacity to carry them. It could differentiate the two-per-cent deviation band by programme and by scarce-skills priority rather than applying a uniform threshold, and it could, in time, restore to universities a greater measure of freedom to determine their own enrolments within transparent capacity limits, a freedom that would sit more comfortably with the institutional autonomy the Higher Education Act itself professes to respect.[180] None of this asks government to fund places for which it has not budgeted, but it asks that the funding model stop standing between a capable student and a place that may exist. Without such government-level intervention, the existing barriers to higher education will remain, and for the prospective student standing before a closed door, section 29(1)(*b*)'s promise of further education made progressively available and accessible will remain just words on a page. Education is the path to a better life. The model that funds it should not be the barrier that closes it.

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[178] See also discussion in Wangenge-Ouma and Cloete 2008 *SAJHE* 906–919.

[179] DHET https://lmi-research.org.za/wp-content/uploads/2024/09/WEB-DPRU-FACTSHEET-7-7-1b-Access-Tertiary-Education-2024.pdf 7.

[180] See the Preamble to the Higher Education Act 101 of 1997.