

# **Retaining Degree Certificates for Outstanding Student Debts: A Social-Justice and Ethical Issue in the Legal Profession**

Michele van Eck

*BCom (Law) LLB LLM LLD BTh BTh (Hons)*

*Associate Professor, University of Johannesburg,  
South Africa*

<https://orcid.org/0000-0001-5177-3503>

## **SUMMARY**

The right to education, as protected under section 29 of the Constitution of the Republic of South Africa, is marred by disparities and inequalities owing to the cost of accessing higher education. This has culminated in excessive student debts and has, in turn, resulted in higher educational institutions (HEIs) implementing student debt-collection practices that include withholding degree certificates, marks and academic transcripts as a means of debt recovery. Although such debt-recovery practices are commercially defensible, the retention of degree certificates, marks and academic transcripts has a negative impact on a graduate's ability to enrol for further studies and secure gainful employment, thereby having the unintended consequence of barring graduates from the very thing that would enable them to repay their student debt – namely, employment. Graduates from marginalised socio-economic backgrounds carry the heaviest load under these debt-collection practices, which often have the effect of perpetuating cycles of poverty and inequality. Drawing on international experience, particularly in the United States and the United Kingdom (where legislative safeguards have been instituted to curtail similar practices), this article underscores the need for both legislative intervention and the development of innovative debt-collection strategies by HEIs in South Africa. The focus here is specifically placed on debt-collection practices within the legal profession, where the retention of degree certificates prevents law graduates from being admitted into the legal profession. Ultimately, an assessment is made of the two pillars of assessing suitability of candidate legal practitioners: technical competence (evidenced through the LLB degree) and moral suitability of the individual (reflected in being a “fit and proper” person and also compliance with the expected standards of conduct). Here, the values of reliability, responsibility, trust, integrity and honesty are highlighted in the context of honouring a person's contractual obligations. The fulfilment of contractual obligations within the legal industry is said to reflect the ethical values of legal practitioners and candidate legal practitioners. However, non-payment of student debts cannot (on its own) be an indicator of a lack of moral character or a breach of ethics. The author argues that a distinction must be made between those candidate legal practitioners who cannot repay their student debts owing to socio-economic conditions and those candidate legal practitioners who can (or would in the future be in a position to) repay student debts but simply choose not to do so. This latter group's conduct constitutes not only a flagrant breach of contractual promises and undertakings but also spills into the realm of questionable ethical conduct. This article ultimately concludes that rather than HEIs retaining documents that are necessary for employment, the focus should be placed on fostering environments

that allow graduates the opportunity to secure gainful employment, with the ultimate aim being that graduates should repay outstanding student debts upon securing such employment. It appears that South Africa has yet to consider international developments in this area. There is an urgent need for the legislature to intervene and for HEIs to develop alternative and creative debt-collection mechanisms to avoid a deepening of the inequalities within higher education and the legal profession, but also to prevent the looming social-justice crises within the country stemming from student debt-collection practices. Failure or a delay in this regard will only be to the detriment of our students and the economy.

**KEYWORDS:** student debts, debt-collection practices, ethical values, retaining degree certificates

## 1 INTRODUCTION

Education is generally seen as the gateway to a better life and one of the tools to escape poverty and poor socio-economic conditions.<sup>1</sup> Education is a human right and has been recognised internationally – for example, in article 26 of the Universal Declaration of Human Rights,<sup>2</sup> article 4(a) of the UNESCO Convention Against Discrimination in Education,<sup>3</sup> and in Goal 4 of the United Nations Sustainable Development Goals.<sup>4</sup> Similarly, in South Africa, the right to education is enshrined in section 29 of the Constitution of the Republic of South Africa, 1996 (the Constitution). However, much focus has been placed on the right to basic or fundamental education, with historically little attention given to the right to higher (or tertiary) education. UNESCO has, however, noted that there are clear inequalities in realising the right to higher education,<sup>5</sup> much of which stems from the cost of higher education. In response to inequalities and a lack of access to higher education owing to the cost thereof, various student loan schemes have been implemented in several jurisdictions to assist students with education costs and fees. For instance, in South Africa, the National Student Financial Aid Scheme (NSFAS) was established with the purpose of providing loans and bursaries to students for studying in higher education structures.<sup>6</sup>

Irrespective of such funding schemes, education comes at a cost. From a commercial perspective, the cost of education is simply a commercial transaction. Such an approach to education alongside the implementation of student funding schemes (as well-intentioned as they are) has often resulted in unprecedented long-term hardship for graduates, societies and

<sup>1</sup> See Department of Global Communication “What Is Goal 4 – Quality Education” (August 2023) [https://www.un.org/sustainabledevelopment/wp-content/uploads/2023/09/Goal-4\\_Fast-Facts.pdf](https://www.un.org/sustainabledevelopment/wp-content/uploads/2023/09/Goal-4_Fast-Facts.pdf) (accessed 2024-03-25).

<sup>2</sup> See United Nations General Assembly *Universal Declaration of Human Rights* A/RES217(III) (10 December 1948).

<sup>3</sup> UN Educational, Scientific and Cultural Organisation (UNESCO) *Convention Against Discrimination in Education* 429 UNTS 93 (1960). Adopted 14/12/1960; EIF: 22/05/1962.

<sup>4</sup> Department of Global Communication [https://www.un.org/sustainabledevelopment/wp-content/uploads/2023/09/Goal-4\\_Fast-Facts.pdf](https://www.un.org/sustainabledevelopment/wp-content/uploads/2023/09/Goal-4_Fast-Facts.pdf).

<sup>5</sup> See UNESCO “Right to Higher Education: Unpacking the International Normative Framework in Light of Current Trends and Challenges” (2022) <https://unesdoc.unesco.org/ark:/48223/pf0000382335> (accessed 2024-03-25).

<sup>6</sup> S 4 of the National Student Financial Aid Scheme Act 56 of 1999.

economies. UNESCO describes the situation as follows: “[w]hile such income-contingent loans aim to alleviate the financial burden, student loans generally have catastrophic effects for students and families across the world”.<sup>7</sup> For example, UNESCO reports that nearly a third of all college students in the United States have gone into debt to complete their higher education qualification.<sup>8</sup> In March 2022, it was reported that South African student debt had grown to R16.5 billion (which is expected to increase),<sup>9</sup> and, in 2023, the total student debt in the United States reportedly amounted to a collective \$1.75 trillion.<sup>10</sup> Such excessive student debt not only places a strain on the economy but also the education system, resulting in an unsustainable commercial model for higher education institutions (HEIs).<sup>11</sup> It is probably for this reason that HEIs (like universities and colleges) have implemented various debt-collection practices, including the withholding of degree certificates, marks and academic transcripts to solicit payment of outstanding student debts.<sup>12</sup> Such debt-collection practices are not unique to South Africa; jurisdictions like the United States and the United Kingdom have employed similar debt-collection practices.

Although student debt-collection practices are commercially defensible, the practice does have both commercial and non-commercial costs to students, society and the economy. This cost is most acutely felt by students from poor socio-economic backgrounds who simply do not have the financial means to repay outstanding student debts, but who, at the same time, require their degree certificates, marks and academic transcripts to secure employment. The withholding of such documents may inadvertently prevent the student from gaining the financial means (through employment) to repay their outstanding student debt. Debt-collection practices that include the withholding of degree certificates, marks and academic transcripts may damage equality in education and, dare one say, may even be a social-justice issue when a student requires such documents to study further or secure gainful employment. The United States has generally recognised the inequality resulting from these types of student debt-collection practices and their impact on a graduate’s ability to secure employment. In response to these inequalities, certain states (such as New York, Connecticut, Colorado,

<sup>7</sup> See UNESCO <https://unesdoc.unesco.org/ark:/48223/pf0000382335> 32.

<sup>8</sup> *Ibid.*

<sup>9</sup> Van der Merwe “South Africa’s Student Debt Mountain Grows to R16.5bn” (3 March 2023) <https://www.researchprofessionalnews.com/rr-news-africa-south-2022-3-south-africa-s-student-debt-mountain-grows-to-r16-5bn/> (accessed 2024-03-25). See also Nganga “Mounting Levels of Student Debt Calls for Longer-Term Solutions” (29 August 2022) <https://www.iol.co.za/weekend-argus/news/mounting-levels-of-student-debt-calls-for-longer-term-solutions-f94354e4-310b-44b9-969b-d139da4836db> (accessed 2024-03-25).

<sup>10</sup> Hahn and Tarver “2024 Student Loan Debt Statistics: Average Student Loan Debt” (16 July 2023) <https://www.forbes.com/advisor/student-loans/average-student-loan-debt-statistics/#:~:text=Average%20Student%20Loan%20Debt%20in%20the%20United%20States,private%20nonprofit%20four-year%20institutions%20took%20on%20education%20debt> (accessed 2024-03-25).

<sup>11</sup> As defined under s 1 of the Higher Education Act 101 of 1997. However, the term is used in this article generally to refer to educational institutions that provide educational services to students at a tertiary or higher education level.

<sup>12</sup> See, for example, Ndlovu “Academic Record and Certificate Retention for Outstanding Fees: A National Shame” 2023 (Sept) *De Rebus* 23.

California, Washington, Illinois and Maine) have either implemented or proposed legislative interventions that prohibit (or, at the very least, limit) HEIs from withholding degree certificates, marks and academic transcripts by reason of outstanding student debt. South Africa, on the other hand, has neither implemented similar legislative interventions for student well-being nor legislated preventative rules to protect students from potential inequalities that may stem from such student debt-collection practices. Rather, from a South African context, the practice of withholding degree certificates, marks and academic transcripts as a debt-collection strategy has reached a level of normalcy that has arguably impacted (among other effects) the admission and employability of law graduates within the legal profession. Several considerations are at odds with one another in this scenario, including the cost of education for the graduate, the financial impact and sustainability of the HEI owing to unpaid student debts, and the impact on the economy when graduates are stifled in their efforts to secure gainful employment owing to student debt-collection processes. In the legal profession, there are added considerations, namely the legal and ethical duties of a law graduate to repay monies that they may owe to an HEI. The legal duties stem from the contractual relationship between law graduate and HEI, and the ethical duty relates to the expected values of trust, reliability, accountability, honesty and integrity expected of members of the legal profession, which (in this context) includes honouring contractual commitments.

There are law graduates who simply do not have the financial means to repay outstanding student debts; withholding degree certificates, marks, and academic transcripts under these circumstances may perpetuate the cycle of poverty.<sup>13</sup> It is important to distinguish between law graduates who cannot pay outstanding student debts owing to socio-economic conditions (which is a matter of equality and social justice), and those law graduates who are able to pay their outstanding student debts either fully or partially but simply will not pay (which is a matter of ethics, and relates specifically to their values of trust, reliability, accountability, honesty and integrity). It is this latter group of law graduates who find themselves within the realm of questionable ethical conduct, and whose conduct should be examined before they be admitted into the legal profession. However, there appears to be little distinction made between the two groups of law graduates within a South African context.

Against this backdrop, this article considers the legal basis upon which HEIs (specifically public universities) may retain degree certificates, marks or academic transcripts within the South African legislative framework, and compares this with legislative developments in the United Kingdom and the United States (with reference to the states of New York, Connecticut, Colorado, California, Washington, Illinois and Maine); thus the different approaches to student debt recovery processes within these jurisdictions are contrasted. This article places a specific focus on the retention of degree certificates, marks and academic transcripts with reference to the legal profession, and developments in South African case law. The tension

---

<sup>13</sup> Ndlovu 2023 *De Rebus* 23.

between equality, social justice and the ethical considerations of fulfilling contractual obligations by repaying outstanding student debts is illustrated, and the author argues that legislative intervention is needed for the development of a more equitable model for student debt-collection practices within the South African context.

## 2 THE RIGHT OF RETENTION IN HEIs

### 2.1 The legislative position in South Africa

A public university's power to act derives from the Higher Education Act (HEA).<sup>14</sup> However, the HEA does not expressly state that degree certificates, marks and academic transcripts may be retained in the event of outstanding student debts. The HEA provides two express conditions for when certificates or diplomas may be withheld. The first is where a person was not registered at the public university for the prescribed period,<sup>15</sup> and the second is where a student did not complete the work required for the qualification and failed to pass the prescribed assessments successfully.<sup>16</sup> The HEA also provides that the award of certificates and diplomas is subject to the internal statute of a public university.<sup>17</sup> In so providing, the HEA allows the council of a public university to establish an internal statute to regulate matters that are not expressly dealt with in the HEA.<sup>18</sup> In addition, rules may be established to give effect to the internal statute.<sup>19</sup> The internal statutes of public universities must be approved and gazetted by the Minister, and where there is no internal statute, then the standard institutional statute that the Minister has gazetted is applicable to the public university.<sup>20</sup> This means that the right to withhold degree certificates, marks and academic transcripts for outstanding student debts is not found directly within the provisions of the HEA; rather, the source of this right is the internal statute of a public university, which, in turn, may set out rules to give effect to the internal statute.

Under the standard institutional statute, a student's ability to register for another year of study may be subject to the payment of fees.<sup>21</sup> However, the term "may" in section 59(6) is indicative of the fact that such a condition would be subject to the rules of the council of a public university. There does

<sup>14</sup> 101 of 1997.

<sup>15</sup> S 65B(2)(a) of the HEA.

<sup>16</sup> S 65B(2)(b) of the HEA. See also discussion in Van der Walt and Havenga "Governance Failures in South African Public Higher Education Institutions – Lessons to be Learnt From Company Law" 2023 *TSAR* 647 649.

<sup>17</sup> S 65B of the HEA. See also Ndlovu 2023 *De Rebus* 23.

<sup>18</sup> S 32(1)(a) of the HEA; Van der Walt and Havenga 2023 *TSAR* 649.

<sup>19</sup> S 32(1)(b) of the HEA.

<sup>20</sup> S 33 of the HEA.

<sup>21</sup> Standard Institutional Statute GN 377 in GG 23065 (27 March 2002) issued under s 33 of the HEA. See also s 59(4)–(6) of the HEA. Other internal statutes include, for example, s 75(4) and (6) of the Amended Institutional Statute of Wits GG 41445 (16 February 2018) <https://www.wits.ac.za/media/wits-university/about-wits/documents/Amended%20Wits%20Statute%20-%20GG%20No.%2041445%20-%2016%20February%202018.pdf> (accessed 2024-03-25).

not appear to be a provision in the standard institutional statute that expressly permits the withholding of degree certificates, marks or academic transcripts in the event of outstanding student debts. However, some public universities have their own institutional statutes that address this. For example, the internal statute of the University of Witwatersrand expressly permits the withholding of the conferral of a degree in the following circumstances:

“A Student who otherwise qualifies for the conferment of a Qualification may be deemed not to have done so unless and until ... all unpaid fees, levies, disbursements, fines and any other monies lawfully owing to the University are paid by the Student.”<sup>22</sup>

Similar rights of retention in other public universities are found not in the internal statute but rather in the rules, regulations, or policies of the university. For instance, the University of the Free State includes a right of retention within its general academic rules and regulations, noting that a student with debts from the previous academic year would not be entitled to register until outstanding fees had been paid,<sup>23</sup> and also that an academic record, qualification certificate or certificate of conduct may be retained until outstanding fees have been paid.<sup>24</sup> Similarly, the University of Pretoria has incorporated a right of retention in its rules and regulations, noting that if there are any tuition fees outstanding or library materials not returned, then exam results will be withheld until payment is made and the library materials are returned.<sup>25</sup> The University of Johannesburg has placed its right of retention within the framework of a policy document, which provides: “[c]ertificates (digital and paper format) will be withheld for students who are not in good financial standing with the University.”<sup>26</sup> Of interest is the far-reaching impact of the right of retention found in the structures of Nelson Mandela University. Here, the right of retention is found in a document titled *Student Accounts Guide 2024*, which provides:

“The academic records and examination results of all students who fail to settle their accounts by the payment dates will not be released, diploma/degree certificates will not be issued and the viewing of examination scripts will not be permitted until all outstanding financial obligations have been met in full and the settlement payment reflects on the student account.”<sup>27</sup>

<sup>22</sup> S 77(6)(a) of the Amended Institutional Statute of Wits.

<sup>23</sup> University of the Free State (UFS) “General Academic Rules and Regulations” (2022) [https://www.ufs.ac.za/docs/default-source/policy-documents-documents/2022-general-academic-rules.pdf?sfvrsn=d2e37520\\_0](https://www.ufs.ac.za/docs/default-source/policy-documents-documents/2022-general-academic-rules.pdf?sfvrsn=d2e37520_0) (accessed 2024-03-26) Rule A7(j)(i).

<sup>24</sup> Rule A7(j)(ii) of UFS General Academic Rules and Regulations.

<sup>25</sup> University of Pretoria “General Academic Regulations and Student Rules” (2022) <https://www.up.ac.za/yearbooks/2022/rules/document/general-academic-regulations-and-student-rules-2022> (accessed 2024-03-26) General Student Rules B1.6.3.

<sup>26</sup> University of Johannesburg “Policy on Academic Certification and Related Matters” (2006) <https://www.uj.ac.za/wp-content/uploads/2023/02/policy-academic-certification-and-related-matters-senate-approved-16-march-2023-pdf> (accessed 2024-03-26) par 5.2.2.

<sup>27</sup> Nelson Mandela University “Student Accounts Guide 2024” <https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwikj9--4pKFAXWq7LslHSETB6YQFnoECB4QAQ&url=https%3A%2F%2Fwww.mandela.ac.za%2Fgetmedia%2F678bb7c-eb77-4c9d-bf8a-47cda18b53ff%2FSTUDENT-ACCOUNT->

Outstanding student debt thus implies not only the HEI's right to retain degree certificates but also prevents students from viewing examination scripts.<sup>28</sup> From these examples, it is clear that public universities do not employ uniform governance approaches (found in a variety of governance documents) to the right to retain degree certificates, marks and academic transcripts for outstanding student debt. Each public university's internal statute and specific rules determine whether the university is entitled to withhold degree certificates, marks and academic transcripts for the non-payment of student debts. The practice has become common within public universities in South Africa and is a popular debt-collection mechanism employed to recover outstanding student debt. This position may be contrasted to that in the United States, as is discussed below.

## 2.2 Legislative interventions in the United States

The United States has, in the past, employed similar student debt-collection practices by withholding degree certificates, marks or academic transcripts. However, several states have either proposed or introduced legislative protections to prevent HEIs from withholding degree certificates and transcripts as a student debt-collection tactic. These include, for example, the states of New York,<sup>29</sup> Connecticut,<sup>30</sup> Colorado,<sup>31</sup> California,<sup>32</sup> Washington,<sup>33</sup> Illinois<sup>34</sup> and Maine.<sup>35</sup> The outlier here is Maine, which sets certain monetary thresholds for the right to withhold a degree certificate or an academic transcript.<sup>36</sup> In contrast, in California, the Educational Debt Collection Practices Act<sup>37</sup> describes withholding degree certificates as a practice that can "cause severe hardship by preventing students from pursuing educational and career opportunities, and it is therefore unfair and contrary to public policy".<sup>38</sup> In fact, the view is that such student debt-

---

[GUIDE-2024%3Fdisposition%3Dattachment&usq=AOvVaw1tNvDglgBcvhFOt3-kuTxv&opi=89978449](#) (accessed 2024-03-26) par 2.12.

<sup>28</sup> It is questionable whether this is justifiable, in the context of both the right to education and social justice. However, this consideration is outside the scope of this article.

<sup>29</sup> State of New York Senate Bill S5924C.

<sup>30</sup> State of Connecticut General Assembly Senate (2022) File No. 209 Substitute Senate Bill No 17.

<sup>31</sup> Colorado House Bill 22-1049.

<sup>32</sup> California Assembly Bill No 1313.

<sup>33</sup> Washington Second Substitute House Bill (HB) 2513.

<sup>34</sup> Illinois General Assembly Bill SB3032 (known as the Student Debt Assistance Act).

<sup>35</sup> An Act to Improve Student Access to Postsecondary School Transcripts and Diplomas of 2022 (ISAPSTD).

<sup>36</sup> §10015(1) of the ISAPSTD sets the monetary threshold for an institution being able to withhold a degree certificate or an academic transcript from a student at a debt of "\$500 or more at a 2-year postsecondary educational institution or \$2,500 or more at a 4-year postsecondary educational institution".

<sup>37</sup> S 1(1788.90) of Ch 518 of Assembly Bill No. 1313 of 2019 (known as the Educational Debt Collection Practices Act).

<sup>38</sup> S 1(1788.91)(a) of Ch 518 of the Educational Debt Collection Practices Act. See also s 1(b)(1) State of Connecticut General Assembly Senate (2022) File No 209 Substitute Senate Bill No 17 (Connecticut Senate Bill).

collection processes are effectively a barrier to graduates securing gainful employment, and have the opposite consequence to the intended effect, ultimately resulting in a delay or an inability to repay the student debt.<sup>39</sup> In 2022, the Consumer Financial Protection Bureau described blanket policies that allow the withholding of transcripts from students in relation to extending credit for student debt as “abusive”.<sup>40</sup> Put differently, the Consumer Financial Protection Bureau indicated that certain HEIs “did not release official transcripts to consumers that were delinquent or in default on their debts to the school that arose from extensions of credit”.<sup>41</sup> The withholding of transcripts in this context was said to be disproportionate to the actual underlying debt.<sup>42</sup>

For this reason, several states (such as New York, Connecticut, Colorado, California, Washington, Illinois and Maine) have limited the use of student debt-collection processes and share many commonalities with each other. The common principles that they have adopted in legislation and which prohibit HEIs from collecting debt by withholding degree certificates and academic transcripts may be summarised as follows:

The HEI may not—

- (i) refuse to provide a degree certificate or an academic transcript on the grounds that a student owes a debt;<sup>43</sup>
- (ii) attach a condition to providing a degree certificate or an academic transcript that requires either the payment of the outstanding debt or charging the student a fee;<sup>44</sup>
- (iii) employ differential treatment between students who owe the HEI money by charging a higher fee for the provision of a degree certificate or an academic transcript;<sup>45</sup> and
- (iv) use the withholding of a degree certificate or an academic transcript as a debt-collection tactic.<sup>46</sup>

<sup>39</sup> S 1(1788.91)(a) of ch 518 of the Educational Debt Collection Practices Act. See s 1(b)(2)–(3) of the Connecticut Senate Bill.

<sup>40</sup> Consumer Financial Protection Bureau “Supervisory Highlights Student Loan Servicing Special Edition” (2022) [https://files.consumerfinance.gov/f/documents/cfpb\\_student-loan-servicing-supervisory-highlights-special-edition\\_report\\_2022-09.pdf](https://files.consumerfinance.gov/f/documents/cfpb_student-loan-servicing-supervisory-highlights-special-edition_report_2022-09.pdf) (accessed 2024-03-25) 8: “An act or practice is abusive if it, among other things, takes unreasonable advantage of the inability of a consumer to protect the interests of the consumer in selecting or using a consumer financial product or service.”

<sup>41</sup> Consumer Financial Protection Bureau [https://files.consumerfinance.gov/f/documents/cfpb\\_student-loan-servicing-supervisory-highlights-special-edition\\_report\\_2022-09.pdf](https://files.consumerfinance.gov/f/documents/cfpb_student-loan-servicing-supervisory-highlights-special-edition_report_2022-09.pdf) 8.

<sup>42</sup> Consumer Financial Protection Bureau [https://files.consumerfinance.gov/f/documents/cfpb\\_student-loan-servicing-supervisory-highlights-special-edition\\_report\\_2022-09.pdf](https://files.consumerfinance.gov/f/documents/cfpb_student-loan-servicing-supervisory-highlights-special-edition_report_2022-09.pdf) 9.

<sup>43</sup> S 1(1788.93)(a) of ch 518 of the Educational Debt Collection Practices Act; s 10(1) & 15(1) of the Illinois General Assembly Bill SB3032 (known as the Student Debt Assistance Act); s 1(2)(a) of the Washington Second Substitute House Bill (HB) 2513 (Washington House Bill).

<sup>44</sup> S 1(1788.93)(b) of ch 518 of the Educational Debt Collection Practices Act; s 10(2) & 15(2) of the Student Debt Assistance Act; s 1(2)(b) of the Washington House Bill.

<sup>45</sup> S 1 (1788.93)(c) of ch 518 of the Educational Debt Collection Practices Act; s 10(3) & 15(3) of the Student Debt Assistance Act; s 1(2)(c) of the Washington House Bill.



The State of Illinois has also introduced a “Physical or Financial Hardship Policy”, which requires HEIs to implement policies to allow students under physical or financial hardship to withdraw from their studies and, in so doing, limit the debt they would owe the institution.<sup>47</sup> Such hardships include, for example, serious illness or injury of the student,<sup>48</sup> chronic illnesses,<sup>49</sup> medical issues of a family member where the student becomes the primary caregiver,<sup>50</sup> a mental-health condition,<sup>51</sup> a sudden or consistent lack of transport,<sup>52</sup> and a significant cost-of-living expense.<sup>53</sup> Added to this, in a bold move, the Department of Education in 2023 proposed a new rule that will ban the withholding of transcripts for student debts as a result of administrative errors in an HEI.<sup>54</sup>

These legislative interventions clearly indicate an intention to limit student debt-collection processes that involve retention of degree certificates, marks and academic transcripts. South Africa does not currently have similar interventions, and students have little legislative protection in this regard.

### 2 3 Consumer protection perspectives in the United Kingdom

The United Kingdom differentiates between academic debts (such as tuition fees) and non-academic debts (such as accommodation costs).<sup>55</sup> The Competitions and Market Authority (CMA) notes that non-academic debts should not attract academic sanctions, including the withholding of degree certificates, marks or academic transcripts. The CMA also points out that normal commercial debt practices should be used where HEIs attempt to recover non-academic debt, thus effectively prohibiting the retention of degree certificates, marks and academic transcripts under these circumstances.<sup>56</sup> What is of interest is that the CMA recognises that students, as consumers, have the right to use consumer legislation to challenge unfair contractual terms with the HEI, including provisions that allow academic sanctions for the recovery of non-academic debt.<sup>57</sup> The CMA

<sup>46</sup> S 1(1788.93)(d) of ch 518 of the Educational Debt Collection Practices Act; s 10(3) & 15(3) of the Student Debt Assistance Act; s 1(2)(d) of the Washington Second Substitute House Bill (HB) 2513. See also s 1(b)(4) of the Connecticut Senate Bill.

<sup>47</sup> S 20(a) of the Student Debt Assistance Act.

<sup>48</sup> S 20(a)(1) of the Student Debt Assistance Act.

<sup>49</sup> S 20(a)(2) of the Student Debt Assistance Act.

<sup>50</sup> S 20(a)(3) of the Student Debt Assistance Act.

<sup>51</sup> S 20(a)(4) of the Student Debt Assistance Act.

<sup>52</sup> S 20(a)(5) of the Student Debt Assistance Act.

<sup>53</sup> S 20(a)(6) of the Student Debt Assistance Act.

<sup>54</sup> § 668.14(b)(33) Federal Register Vol 88 No 209 (31 October 2023) “Rules and Regulations” <https://www.govinfo.gov/content/pkg/FR-2023-10-31/pdf/2023-22785.pdf> (accessed 2024-03-25) 74671.

<sup>55</sup> See Competitions and Market Authority (CMA) “Consumer Law Compliance Review Higher Education Undergraduate Sector Findings Report” (2016) 29.

<sup>56</sup> CMA “Consumer Law Compliance Review Higher Education Undergraduate Sector Findings Report” 55.

<sup>57</sup> CMA “Consumer Law Compliance Review Higher Education Undergraduate Sector Findings Report” 55.

highlighted that the protections afforded to consumers would apply equally to students. These rights may include protections found under the Unfair Trading Regulations 2008, Consumer Contracts (Information, Cancellation, and Additional Charges) Regulations 2013, and the unfair terms found in Part 2 of the Consumer Rights Act of 2015.<sup>58</sup>

From a South African perspective, little distinction is made between academic and non-academic debts owed to HEIs. In reading the internal status, rules and regulations of public universities (referred to under heading 2.2 above), it appears that many institutions consider student debt to include both academic and non-academic debts. However, as the relationship between students and HEIs is arguably contractual in nature, students have the possibility of using the protections of the Consumer Protection Act (CPA).<sup>59</sup> Here, the withholding of degree certificates would have to be considered in relation to the substantive fairness of the provisions of the university-student contract.<sup>60</sup> Section 48 of the CPA is of particular importance as it precludes unfair, unreasonable and unjust terms.<sup>61</sup> Terms that are “so adverse to the consumer as to be inequitable” would be considered unfair, unreasonable and unjust under section 48.<sup>62</sup> Van Eeden and Barnard note that section 48(2)(b) relates to the one-sidedness of the terms and the so-called adverseness of the terms to the consumer.<sup>63</sup> When considering the nature and development of student debt-collection practices that involve withholding degree certificates, marks and academic transcripts, and the possible negative impact on a graduate’s ability to secure gainful employment, there may be an argument that an HEI’s right of retention is an unfair, unreasonable and unjust term under section 48 of the CPA. This has, however, not yet been judicially tested or decided upon in a South African context.

### **3 ADMISSION INTO THE LEGAL PROFESSION: MISSING CERTIFICATE AND OUTSTANDING STUDENT DEBT**

#### **3 1 Historical position**

Withholding degree certificates owing to outstanding student debts is not something new<sup>64</sup> and, from the discussion under heading 2.1, it is clear that such a right of retention is part of normal debt-collection practice in public university structures in South Africa. Unfortunately, South Africa has not yet

<sup>58</sup> CMA “UK Higher Education Providers – Advice on Consumer Protection Law Helping You Comply With Your Obligations” (2023) [https://assets.publishing.service.gov.uk/media/64771faeb32b9e0012a95f30/Consumer\\_law\\_advice\\_for\\_higher\\_education\\_providers\\_.pdf](https://assets.publishing.service.gov.uk/media/64771faeb32b9e0012a95f30/Consumer_law_advice_for_higher_education_providers_.pdf) 20–23.

<sup>59</sup> 68 of 2008.

<sup>60</sup> Van Eeden and Barnard *Consumer Protection Law in South Africa* (2017) par 10.6.

<sup>61</sup> S 48(1)(a)(ii) of the Consumer Protection Act 68 of 2008.

<sup>62</sup> S 48(2)(b) of 68 of 2008.

<sup>63</sup> Van Eeden and Barnard *Consumer Protection Law in South Africa* (2017) par 10.6.1.

<sup>64</sup> See, for example, *Makhubele v Vice Chancellor and Principal University of the Witwatersrand* [2023] JOL 60006 (GJ).

recognised the need for investigation and judicial intervention in such practices to avoid the dire consequences that such practices may have on graduates, society and the economy. These debt-collection practices have also impacted the admission of law graduates into the legal profession since candidate legal practitioners<sup>65</sup> have, in the past, been required to produce an LLB degree certificate as part of their admission application.<sup>66</sup> The courts have generally been of the view that the personal circumstances of an individual should not be a factor to persuade the court in condoning a deviation from the court rules, as this would not only create confusion but also be unfair towards other applicants.<sup>67</sup> Therefore, retention of degree certificates owing to outstanding student debt should not generally be a valid excuse for presenting incomplete or defective paperwork in an admission application.

In certain instances, applicants have been permitted to resubmit their applications upon correction of the defect in their court papers.<sup>68</sup> For instance, in *Ex Parte Haddad*,<sup>69</sup> the court rejected an application for admission as an advocate on the basis that the applicant did not have the degree certificate conferred in accordance with the requirements. The applicant was invited to make their application anew by supplementing it with the degree certificate.<sup>70</sup> Also, in *Ex Parte Feetham*,<sup>71</sup> the applicant had met the requirements for the LLB degree, but the certificate had not yet been conferred.<sup>72</sup> Holmes J explained that originally the rules allowed the court to admit an advocate, but this had been changed with specific requirements embodied in legislation, specifically the Admission of Advocates Amendment Act<sup>73</sup> (which was relevant at the time of the matter was heard), and not the rules of court.<sup>74</sup> Section 1 of the Admission of Advocates Amendment Act was interpreted in *Ex Parte Addleson*<sup>75</sup> as requiring that the degree had to have been conferred and was therefore a prerequisite for admission into the profession.<sup>76</sup> Pittman JP, in *Ex Parte Addleson*, highlighted that despite passing all the requirements for a degree, there may be some other factor to inhibit conferral of the degree.<sup>77</sup> A clear distinction was thus made between passing the requirements for a degree and conferral of a degree. In *Ex Parte Ormonde*,<sup>78</sup> Van Zyl JP confirmed the principle that the degree must be obtained and simply meeting the requirements of a degree was not

<sup>65</sup> S 1 of the Legal Practice Act 28 of 2014 defines a candidate legal practitioner as “a person undergoing practical vocational training, either as a candidate attorney or as a pupil”.

<sup>66</sup> The rule regulating this requirement has, however, been found to be inconsistent with the Constitution in *Ex Parte Makamu* [2021] ZAMPMBHC 1.

<sup>67</sup> *Ex Parte Kotze* 1951 (1) SA 777 (O) 779B.

<sup>68</sup> *Ex Parte Kotze* supra 779C.

<sup>69</sup> 1954 (2) SA 568 (T).

<sup>70</sup> *Ex Parte Haddad* supra 571 D–E.

<sup>71</sup> 1954 (2) SA 468 (N).

<sup>72</sup> *Ex Parte Feetham* supra 469F.

<sup>73</sup> 39 of 1946.

<sup>74</sup> *Ex Parte Feetham* supra 469H.

<sup>75</sup> 1948 (2) SA 16 (E).

<sup>76</sup> *Ex Parte Addleson* supra 470 B–C.

<sup>77</sup> *Ibid.*

<sup>78</sup> 1940 CPD 287.

sufficient.<sup>79</sup> However, Holmes J, in *Ex Parte Feetham*, held that meeting the requirements of the LLB degree and conferral of the degree is a distinction without a difference, thereby placing importance on “the applicant's passing of the [LLB] examination, and not the extraneous act of the university in conferring the degree”.<sup>80</sup>

The distinction between having passed the requirements for a degree and conferral of the degree has again become a point of contention in the modern setting, considering the socio-economic conditions of law graduates that may result in non-payment of student debt, which, in turn, may result in the university withholding degree certificates.

### 3 2 Movement toward social justice, equity and fairness

Holmes J, in *Ex Parte Feetham*, set the tone for differentiating between meeting the requirements for a degree and conferral of a degree,<sup>81</sup> but it was only three decades later in *Ex Parte Tlotlego*<sup>82</sup> that the court moved decisively to address the inherent prejudice of enforcing such a distinction in admission applications. Here, the court considered the requirements for admission under the Admission of Advocates Act<sup>83</sup> and noted that the Act did not expressly require the degree certificate to be handed to the court.<sup>84</sup> However, the Practice Manual of the Gauteng Provincial Division, Pretoria, and the Gauteng Local Division, Johannesburg (at the time) mentioned that if:

“[p]rovision is made that where a degree certificate evidencing that a LLB degree certificate is absent due to failure to pay the tuition fee, an applicant for admission as an advocate must provide proof of a debt-payment arrangement entered into with the university to effect payment of outstanding amounts.”<sup>85</sup>

This rule, the court found, was unnecessary.<sup>86</sup> Much of the reasoning was predicated on the fact that the practice rules may be prejudicial to students from poor socio-economic backgrounds.<sup>87</sup> Victor J noted that the court should not regulate the relationship between a student and a university,<sup>88</sup> and further stated that a law graduate should not be prejudiced by not being admitted into the legal profession simply because they and the university

<sup>79</sup> *Ex Parte Ormonde supra* 290–291. The best evidence for proving that one has a degree is the certificate. See *Ex Parte Van der Bergh* 1925 TPD 117; *Ex Parte Seward Brice*, K.C 1902 TS 2; *Ex Parte Lange* 1920 CPD 221; *Ex Parte Stratford* 1924 TPD 644. See also *Ex Parte Pearce* 1946 NPD 172; *Ex Parte Potgieter* 1944 OPD 109.

<sup>80</sup> *Ex Parte Feetham supra* 470E.

<sup>81</sup> *Ex Parte Feetham supra*.

<sup>82</sup> 2017 JDR 1989 (GJ).

<sup>83</sup> 74 of 1964.

<sup>84</sup> *Ex Parte Tlotlego supra* par 5.

<sup>85</sup> *Ibid*.

<sup>86</sup> *Ex Parte Tlotlego supra* par 15.

<sup>87</sup> *Ex Parte Tlotlego supra* par 8.

<sup>88</sup> *Ex Parte Tlotlego supra* par 9.

could not come to a payment plan for the outstanding student debt.<sup>89</sup> To do so would effectively “punish, prejudice or [dis]regard the student who is in a state of poverty as blameworthy”.<sup>90</sup> For the court to act as gatekeeper would effectively result in perpetuating a cycle of poverty; there were other avenues to recover the outstanding debt.<sup>91</sup>

This was followed by the matter of *Ex Parte Makamu*,<sup>92</sup> in which the applicant had, for similar reasons, also not attached a copy of a degree certificate – *inter alia* because there were outstanding student debts and the degree certificate was withheld by the university.<sup>93</sup> The application included a certified copy of the transcript, signed by the registrar of the university, confirming that the requirements for the LLB degree had been fulfilled.<sup>94</sup> Put differently, the degree certificate would have been conferred if the outstanding fees had been paid.<sup>95</sup> The court was again faced with the decision whether an applicant could be admitted without a degree certificate, but this was now considered under rule 17.6.3 of the Final Rules of the Legal Practice Act,<sup>96</sup> which requires a degree certificate to be attached to such an application.<sup>97</sup> The court found that legislation must be interpreted in light of the Bill of Rights and that rule 17.6.3 was unconstitutional as it did not provide the court with any discretion in the matter and unfairly discriminated against a person who could not have their degree attached to an admission application owing to outstanding student debts.<sup>98</sup> Although the applicant was admitted into the profession, the court noted that it would be necessary to include the reason why the student debt had not been paid and also how the student debt would be paid in order to meet the requirements of “honesty and integrity” required in the legal profession.<sup>99</sup> The court’s rationale for this was premised on protecting the image of the legal profession.<sup>100</sup> In other words, the court required some sort of undertaking to make good on the payment of the outstanding student debts;<sup>101</sup> otherwise a candidate legal practitioner may be admitted into the profession and then never repay the outstanding student debts.<sup>102</sup> It is noted that this position is in direct conflict with the views of Victor J in *Ex Parte Tlotlego* about the courts not functioning as gatekeepers in the relationship between law graduates and universities.<sup>103</sup> Although *Ex Parte Makamu* found rule 17.6.3 to be unconstitutional, the comments ensuring that there is an undertaking for the

---

<sup>89</sup> *Ex Parte Tlotlego supra* par 10.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ex Parte Tlotlego supra* par 14.

<sup>92</sup> *Supra.*

<sup>93</sup> *Ex Parte Makamu supra* par 25.

<sup>94</sup> *Ex Parte Makamu supra* par 26.

<sup>95</sup> *Ex Parte Makamu supra* par 27.

<sup>96</sup> Final Rules as per sections 95(1), 95(3) and 109(2) of the Legal Practice Act, 28 of 2014 (as amended) GN 401 in GG 41781 of 2018-07-18.

<sup>97</sup> *Ex Parte Makamu supra* par 23.

<sup>98</sup> *Ex Parte Makamu supra* par 62.

<sup>99</sup> *Ex Parte Makamu supra* par 59.

<sup>100</sup> *Ex Parte Makamu supra* par 60.

<sup>101</sup> *Ex Parte Makamu supra* par 61.

<sup>102</sup> *Ibid.*

<sup>103</sup> See *Ex Parte Tlotlego supra*.

repayment of outstanding fees have opened the door to return to the position established in *Ex Parte Tlotlego*.

### 3.3 One step forward, two steps back

Much of the progress made towards social justice with regard to degree certificates not being attached to an admission application owing to outstanding student debt was undone in *Ex Parte Galela*.<sup>104</sup> The facts of the matter are similar to previous cases; here, the application for admission as an attorney in terms of the Legal Practice Act<sup>105</sup> (LPA) was under scrutiny owing to outstanding student debts. The application included a statement that the applicant complied with the requirement of having completed a BA (Law) and LLB degree.<sup>106</sup> The application, however, did not include the LLB degree certificate but included only a copy of the academic record as confirmation of receipt of such a qualification.<sup>107</sup> In response, the Legal Practice Council (LPC) requested clarification as to why the LLB certificate was not attached, and the applicant advised in a supplementary affidavit that the university did not issue degree certificates to graduates who have outstanding student debts.<sup>108</sup> Among other concerns related to the applicant's appointment as a director of a company during the period of articles (not relevant for purposes of this discussion), the court found the lack of detail on the reasons for not paying the outstanding student debts problematic.<sup>109</sup> Although *Ex Parte Makamu* found rule 17.6.3 to be inconsistent with the Constitution, the court in *Ex Parte Galela* noted that "it is in our opinion irresponsible for any person, let alone a person who wants to become a lawyer, to blatantly ignore [their] responsibilities without good reasons to do so".<sup>110</sup> The application was dismissed. Although the rationale of the court was not solely premised on the lack of a degree certificate,<sup>111</sup> the court did seem to indicate a need to make good on outstanding student debts, failing which it appears the court perceived this would be an ethical issue barring a person from entry into the legal profession.

Sentiments that endorse ensuring that candidate legal practitioners pay their outstanding debts are echoed in both *Ex Parte Makamu* and *Ex Parte Galela*. However, it was this very issue that *Ex Parte Tlotlego* attempted to overcome by nullifying similar requirements found in the Practice Manual of the Gauteng Provincial Division, Pretoria, and the Gauteng Local Division, Johannesburg, by noting that the courts cannot act as gatekeepers for outstanding student debts between law graduates and universities.<sup>112</sup> In order to understand the position of the *Ex Parte Makamu* and *Ex Parte*

<sup>104</sup> *Ex Parte Galela* [2023] JOL 60686 (GP).

<sup>105</sup> 28 of 2014.

<sup>106</sup> *Ex Parte Galela supra* par 2.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ex Parte Galela supra* par 5.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ex Parte Galela supra* par 18.

<sup>111</sup> Among the issues was whether the applicant had been gainfully employed in another capacity while serving as an articled clerk without notifying the LPC.

<sup>112</sup> See *Ex Parte Tlotlego supra*.

*Galela* cases, it is necessary to consider the ethical standards of the legal profession in more detail.

#### 4 SOCIAL JUSTICE, FAIRNESS AND ETHICAL CONSIDERATIONS

From the cases discussed under heading 3, there appear to be two general approaches to outstanding student debts for law graduates. On the one hand, there is a need to address situations where candidate legal practitioners do not have the financial means to repay their student debts owing to socio-economic conditions. In this regard, *Ex Parte Tlotlego* stated that the courts cannot be gatekeepers ensuring outstanding student debts are paid; there are other forms of debt-collection methods to collect outstanding student debts. On the other hand, there is also a perception that candidate legal practitioners must honour their contractual commitments, especially when applying to join the legal profession. On this basis, the *Ex Parte Makamu* and *Ex Parte Galela* cases indicate that there is a need to provide some sort of assurance that outstanding student debts will be paid. Whether it is the court's role to function as an adjudicator of the candidate legal practitioner's outstanding student debts in an admission application is questionable; however, such an approach may hold merit in determining a candidate legal practitioner's character as a "fit and proper" person as required under the LPA.<sup>113</sup> However, this approach is questionable if the assessment of a person's character in relation to payment of outstanding student fees is only made upon application to becoming an admitted legal practitioner and not on registration as a candidate legal practitioner; there appears to be an inconsistency in the expected standards of conduct and character of candidate legal practitioners and legal practitioners respectively.

Be that as it may, section 24(2)(c) of the LPA requires an applicant to be a "fit and proper person" to be admitted into the legal profession.<sup>114</sup> One of the requirements to determine whether an individual is a "fit and proper" person is the standard of honest conduct.<sup>115</sup> In this context, there is a requirement to place all available evidence before the court so that the court may make a decision based on the facts.<sup>116</sup> The question is well posed in *Ex Parte Makamu* in the context of outstanding student debts:

"[I]s a person who owes a debt to a university (as in this instance) and who does not show that debt is going to be purged and how he or she intends to purge the debt a fit and proper person for admission in that ... is [such] a person of complete 'honesty, reliability and integrity'?"<sup>117</sup>

<sup>113</sup> S 24(2)(c) of the LPA.

<sup>114</sup> See also *Ex Parte Makamu supra* par 58.

<sup>115</sup> See, for example, *Ex Parte Mdyogolo* [2018] JOL 40601 (ECG) par 22, where it was held that dishonesty is not part of being a "fit and proper" person and therefore precluded the applicant from entering the legal profession. See also *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA) 656.

<sup>116</sup> See *Ex Parte Gawula supra*.

<sup>117</sup> *Ex Parte Makamu supra* par 59.

In *Ex Parte Makamu*, the answer to this question was “no”; the court was of the view that it was necessary to include the reason why the student debt had not been paid and also how the student debt would be paid before the legal profession’s requirements of “honesty and integrity” would be met.<sup>118</sup> This position is supported by the legal profession’s bedrock value of honesty. Honesty as a value is embraced by the Code of Conduct<sup>119</sup> –specifically, paragraph 3.1 of the Code of Conduct, which requires that all legal practitioners and candidate legal practitioners “maintain the highest standards of honesty and integrity”.<sup>120</sup> In this regard, Allie J noted:

“Attorneys are officers of the court and a high standard of honesty and integrity is expected of them because they are the people in whom the public ought to have sufficient confidence to trust them with their affairs and with their funds.”<sup>121</sup>

Although Allie J makes reference to the use of client trust funds, the principle applies equally in the context of legal practitioners fulfilling their legal obligations. Outstanding student debt is premised on a contractual undertaking between university and student. Contracts, in themselves, are highly ethical endeavours and rely on the principle of honesty and the keeping of contractual promises and undertakings. The contractual promise of a student is to pay the university the amount due to the institution. Failure to fulfil the promise allows contracting parties to force compliance with contractual undertakings and to claim damages; many universities have also used academic sanctions (retaining degree certificates, marks and academic records) as a means to motivate students to pay outstanding student debts.

Unfortunately, the failure to fulfil a contractual obligation is often not viewed as a serious ethical infraction; however, when examined closely, meeting a contractual obligation clearly falls within the realm of a person’s integrity. In *Hayes v The Bar Council*,<sup>122</sup> Baron JA noted that a legal practitioner’s integrity relates primarily to their client but also to the court.<sup>123</sup> Paraphrasing the words of Baron JA, a person must be able to trust a legal practitioner in their dealings with them.<sup>124</sup> This was said in the context of a legal practitioner’s conduct towards the court, but it is not an unwarranted extension to state that a legal practitioner’s integrity (or, put differently, trustworthiness) extends also to a legal practitioner’s engagement with third parties. There is some, but limited, support for this notion of trust and integrity towards third persons in paragraph 18.18 of the Code of Conduct, which requires legal practitioners to:

“pay timeously, in accordance with any contractual terms or, in the absence of contractual terms, in accordance with the standard terms of payment, the

<sup>118</sup> *Ibid.*

<sup>119</sup> *Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities* GN 168 in GG 42337 of 2019-03-29 (Code of Conduct).

<sup>120</sup> Par 3.1 of the Code of Conduct.

<sup>121</sup> *Law Society of the Cape of Good Hope v Roodt* [2010] JOL 25792 (WCC) par 11. See also *Kekana v Society of Advocates of South Africa* *supra* 656.

<sup>122</sup> 1981 (3) SA 1070 (ZA).

<sup>123</sup> *Hayes v The Bar Council* *supra* 1088E–G.

<sup>124</sup> *Ibid.*



---

reasonable charges of any legal practitioner, whether an advocate or an attorney, whom he or she has instructed to provide legal services to or on behalf of a client.”

The Code of Conduct does not, however, speak of payment of monies outside the scope of providing legal services.<sup>125</sup> Nonetheless, fulfilling contractual obligations is (at its core) an ethical consideration. Breaching a contract by simply failing to pay (without any good reason) is a failure to fulfil a person’s contractual promises, which, in turn, can be described as an act of dishonesty. A legal practitioner’s conduct (whether it relates to a client, the court, or arguably a third party) rests upon the values of reliability, responsibility, trust, integrity and honesty.<sup>126</sup> These values play an important role in the manner in which legal practitioners (and consequently, candidate legal practitioners) conduct themselves. Non-payment of outstanding student debt places the legal practitioner (or candidate legal practitioner) in breach of their contract with the HEI. Here, it is important to make the distinction between law graduates who do not have the financial means owing to socio-economic conditions to pay their outstanding student debts (thus having a reason for being in breach of contract) and law graduates who have the ability to pay their outstanding student debt (either wholly or in part) but have no intention or willingness to pay their student debts on time or at all. It is this latter group of law graduates who could find themselves on precarious ethical grounds as candidate legal practitioners.

There is a clear need to protect those law graduates who are prevented from paying their outstanding student debts by reason of poor socio-economic conditions. Legislative protections should be afforded, and developments in the United States and United Kingdom (discussed under headings 2.3 and 2.4 above) are good examples of how law graduates may be protected in this context. After all, being poor and consequently unable to repay outstanding student debts cannot be an ethical issue but is rather a social-justice issue. Our courts would do well to make a distinction between candidate legal practitioners who can but will not pay (in certain circumstances, an ethical consideration) and those candidate legal practitioners who want to pay but cannot do so owing to their socio-economic conditions. Such candidate legal practitioners must be afforded the opportunity to be admitted into the profession to allow them the financial means, through gainful employment, to repay their outstanding student debts and to meet their contractual and ethical obligations.

## 5 CONCLUSION

The legal profession generally rests on two broad categories of requirements for its members. The first is the technical competence of legal

---

<sup>125</sup> It may be noted that par 18.11 of the Code of Conduct does allow for the payment of third parties on behalf of a client as a disbursement. However, strictly speaking, this does not relate to a legal practitioner’s individual indebtedness.

<sup>126</sup> Adapted from *Hayes v The Bar Council supra* 1088E–G.

practitioners,<sup>127</sup> which is evidenced by the LLB degree and various skills and competency requirements to join the legal profession.<sup>128</sup> The second relates to the moral suitability of the individual legal practitioner,<sup>129</sup> which is reflected in a legal practitioner and candidate legal practitioner being a “fit and proper” person, and also complying with the expected standards of conduct found in, for example, the Code of Conduct.<sup>130</sup>

Both the technical competence and the moral suitability of candidate legal practitioners (or law graduates) are relevant when considering the retention of degrees, marks and academic transcripts. A candidate legal practitioner’s technical competence is reflected in the degree certificate, marks and academic transcripts that are necessary, among other things, to enrol for further studies at an HEI (which in turn gives effect to the right to further education under section 29(2) of the Constitution) and admission into the legal profession, as well as securing employment.<sup>131</sup> Yet, the current student debt-collection practices (withholding degree certificates, marks or academic transcripts) are commonly used by HEIs in South Africa to encourage repayment of outstanding student debts. Nevertheless, there have been developments that indicate that such debt-collection practices have the opposite effect – not only stifling HEIs from collecting outstanding student debt but also a graduate’s ability to secure employment, and hampering further study opportunities, which, in turn, impacts economic growth.<sup>132</sup> Such debt-collection practices have been a barrier to law graduates being admitted into the legal profession owing to their failure to pay their outstanding student debts.<sup>133</sup>

In the contemporary economic climate, the withholding or furnishing degree certificates, marks and academic transcripts can be the difference between gainful employment and perpetuating cycles of poverty, and consequently elevates student debt-collecting processes from being a purely commercial endeavour to a social-justice issue. In the words of Victor J:

“Their promise of hope to enter the legal profession is dashed. It would seem therefore that our courts must recognise that an individual graduate’s poverty may result in grave prejudice at a personal level and prevent entry in the labour market in their chosen profession. The dignity of the legal graduate is impaired and results in a situation where the poverty of the individual results in a form of culpability of that individual or a form of blameworthiness because the person is too poor to pay. In my view this results in unequal treatment of a

<sup>127</sup> The term “technical competence” is adapted from *Kaplan v Incorporated Law Society, Transvaal* 1981 (2) SA 762 (T) 782E–F, referencing *Lasersohn v The Magistrate, Johannesburg* 1928 WLD 18 27.

<sup>128</sup> S 24 of the LPA requires that all the requirements for an LLB be satisfied, practical vocational training as a candidate legal practitioner undergone, and a competency-based examination passed.

<sup>129</sup> The term “moral suitability” is adapted from *Kaplan v Incorporated Law Society, Transvaal* supra 782E–F, referencing *Lasersohn v The Magistrate, Johannesburg* supra 27.

<sup>130</sup> See, for example, the requirement in s 24(2)(c) of the LPA.

<sup>131</sup> See Metzger “The Bankrupt Student-Debtor v. the Educational Institution: The Struggle for Academic Transcripts Under Chapter of The Bankruptcy Code” 1995 *Western Reserve Law Review* 957 957–958.

<sup>132</sup> New York Senate Bill S5924C.

<sup>133</sup> See, for example, *Ex Parte Davidson* (1904) 21 SC 594.

student too poor to pay and amounts to a form of victimising those graduates who are too poor to pay.”<sup>134</sup>

Both our courts and HEIs should be mindful not to be the stumbling block to law graduates being admitted into the legal profession. On the one hand, legal candidate practitioners must have the moral fibre suitable for the legal profession, which reflects the values of reliability, responsibility, trustworthiness, integrity and honesty, which includes honouring contractual obligations. The fulfilment of contractual promises is ethical and foundational to the maintenance of ethical standards within the legal profession.<sup>135</sup> However, a distinction must be made between those legal candidate practitioners who cannot repay their student debts owing to socio-economic conditions and those legal candidate practitioners who can (or would be in a position in the future) to repay student debts but simply choose not to do so. This latter group’s conduct is not only a flagrant breach of contractual promises but also constitutes questionable ethical conduct. On the other hand, where a legal candidate practitioner’s socio-economic conditions prevent them from making payment, this is of utmost relevance.<sup>136</sup> Victor J notes that, in these circumstances, there is a need for a flexible approach.<sup>137</sup> In this regard, the court in *Jasat v Natal Law Society*<sup>138</sup> points out that “[a]s important as the requirements of honesty, reliability, and integrity are, each case must undoubtedly be examined in the light of its own facts and circumstances”.<sup>139</sup> Therefore, the reason for non-payment of outstanding student debt is an important consideration in assessing candidate legal practitioners and graduates alike.

In this context, it is perhaps helpful to consider developments in the United States and the United Kingdom, which generally protect graduates from the retention by HEIs of degree certificates, marks and academic transcripts as a student debt-collection practice. The focus is rather on fostering environments to allow graduates the opportunity to secure gainful employment, with the aim that graduates would repay such outstanding debts upon securing employment. It appears that South Africa has yet to consider these international developments. There is an urgent need for the legislature to intervene and for HEIs to develop alternative and creative debt-collection mechanisms to avoid widening the inequalities within higher education and the legal profession, but also to prevent the looming social-justice crises within the country stemming from these student debt-collection practices. Failure or delay in this regard will only be to the detriment of our students and the greater economy.

---

<sup>134</sup> *Ex Parte Tlotlego supra* par 8.

<sup>135</sup> *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA) 656A.

<sup>136</sup> *Ex Parte Tlotlego supra* par 14.

<sup>137</sup> *Ibid.*

<sup>138</sup> 2000 (3) SA 44 (SCA).

<sup>139</sup> *Jasat v Natal Law Society supra* par 12.