OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA,**
**MPUMALANGA DIVISION, MBOMBELA**
**(MAIN SEAT)**

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|---|---|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: YES |
| ..... | ..... |
| SIGNATURE | DATE |

**CASE NO: 2307/2018**

In the matter between:

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| **MCOLISI NGCAMPHALALA** | **Applicant** |
| **UNIVERSITY OF MPUMALANGA** | **First Respondent** |
| **THOKOZILE MAYEKISO** | **Second Respondent** |
| **SELLO LEGODI** | **Third Respondent** |
| **V BALOYI** | **Fourth Respondent** |

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**R E A S O N S**

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**MASHILE J:**

INTRODUCTION

[1] *On 31 October 2019, this review application in terms of Rule 53 served before this Court. The Applicant sought the following relief:*

> *"1. Declaring the decision of the fourth respondent and the procedures followed ("the decision and procedures") to permanently expel the applicant to be unlawful.*

2. *Reviewing and setting aside the fourth respondent's decision and procedures.*

3. *Ordering the respondents who oppose Part B of this application, jointly and severally, to be liable to pay the applicant's costs, including the costs of two counsel."*

[2] Following argument, the court reserved judgment and undertook to hand it down in due course. On 18 March 2020, subsequent to being approached in chambers by both parties requesting the court's decision, I granted an order in the terms sought by the Applicant and undertook to furnish reasons later. The objective of expediting the decision of the court was to resolve the dispute one way or the other such that the Applicant would either be registered or expelled by the First Respondent depending of course on the outcome. These are the reasons for the order of 18 March 2020.

FACTUAL MATRIX

[3] The background to this matter is substantially common cause insofar as it is bolstered by documentary evidence. I will, where necessary, indicate those matters that are in dispute. In consequence of the long history behind this matter, I intend to describe the factual background in more detail to place the matter in its proper perspective.

[4] On 1 August 2018, the Student Representative Council ("SRC") of the First Respondent held a Student Body General Meeting at the campus of the First Respondent in Mbombela, authorisation for such meeting having been sought and granted in terms of Clause 118 of the Constitution of the First Respondent. On 6 August 2018, the Applicant addressed an e-mail message to Dr Paul Maminza ("Dr Maminza"), the Dean of Student Affairs at the First Respondent wherein he brought out some of the issues raised at the meeting.

[5] The meeting as aforesaid directed the Applicant to schedule a meeting with Dr Maminza for 8 August 2018, which he did. Noting that he was not favoured with a reply to his e-mail message, on 10 August 2018, he followed up with another e- mail message. It was only on 12 August 2018 that Dr Maminza reverted to the Applicant with a proposition to meet on 13 August 2018 at 14:00. The SRC turned up at the proposed venue and date but Dr Maminza, without furnishing any excuse whatsoever, did not. As such, the meeting did not happen.

[6] Later that day at about 18:00, Dr Maminza sent through an e-mail message explaining that he was caught up in another meeting that detained him until 18:00 and apologised for missing his 14:00 arrangement with the SRC. According to the Applicant, the general students body had become agitated and had lost patience with the SRC members because their expectation was that on 13 August 2018 the report would either be available or would be imminent. This was so much so that rumours that there would be a student protest on 13 August 2018 had begun to go around campus.

[7] On 12 August 2018, perceiving this volatility around the campus, the SRC prepared and issued a statement on its Facebook Page disavowing any notion of a student protest having been called by it. On the same day, the SRC members also addressed a group of approximately 200 students assembling at the main entrance of the First Respondent imploring them to stay calm. On 14 August 2018, the students embarked on a boycott of lectures to coerce management to meet the SRC to discuss the student issues raised at their meeting of 1 August 2018.

[8] The long anticipated meeting between Dr Maminza and the Management Committee on the one hand, and the SRC on the other, ultimately happened on 16 August 2018. After six hours of deliberations, the meeting retired with no single accomplishment. On the same day and subsequent to the meeting, the Applicant in an e-mail message sought the intervention of Professor David Mabunda, the chairperson of the Council of the First Respondent ("Professor Mabunda").

[9] The Applicant's e-mail message elicited immediate reply from Professor Mabunda. In response on the same day, the Applicant answered Professor Mabunda and requested if an external mediator could be appointed to chair future meetings between Dr Maminza and/or the Management Committee of the First Respondent and the SRC. Another meeting between the same parties was convened on 17 August 2018 but could not take off because no external mediator was available to chair it.

[10] In his further e-mail message of 19 August 2018, Professor Mabunda acknowledges that the SRC was acting outside of the mandate of the students and accepts the suggestion that meetings between the parties be chaired by an impartial external mediator. In response, the Applicant wrote back to him stating that he would table his proposition before the SRC for discussion. The Applicant addressed a further e-mail

message to Professor Mabunda the following day, 20 August 2018 wherein, he confirms that the SRC was eager to embrace the mediation process and that the students were ready to make compromises on some issues except the one that pertained to the removal of the housing director.

[11] Notwithstanding that the parties were to meet on 21 August 2018, the First Respondent applied and was granted an interdict by this Court prohibiting the protest of the students. Upon receiving notification of the interdict on 22 August 2018, the SRC posted a statement onto its Facebook page advising the general student body of the interdict and that it respected the court order. On the same day, the Applicant wrote to Professor Mabunda to inform him that he had addressed the students instructing them to take out the barriers they had put on the road and the gates of the First Respondent.

[12 On 23 August 2018, the Applicant was placed on suspension on the basis that he had infringed the provisions of the court order of this Court dated 21 August 2018. On 27 August 2018, the First Respondent ordered all the students to vacate all its premises and student residences. The evacuation of students was halted by a court order of this Court dated 28 August 2018 following an application by the SRC. On the same day, the Applicant sent a Whatsapp message requesting a meeting with the Second Respondent and the Management Committee of the First Respondent to which she reacted positively.

[13] In consequence a meeting of the parties was convened during which the SRC raised the question of the suspension of the Applicant. The Management Committee of the First Respondent committed itself to the lifting of the suspension to allow the parties to concentrate on discussions that concerned issues raised by the students. The Management Committee went on to undertake to revert to the SRC on or before 30 August 2018. The Applicant alleges that he was staggered when he was subsequently served with a notice of a disciplinary hearing instead of the promised upliftment of the suspension.

[14] On 11 September 2018, the Applicant received a document from Dr Maminza, which he had directed at all the First Respondent's stakeholders. The document was a resolution taken at the First Respondent's meeting of 10 September 2018. When

studying it, he noted that Paragraph 3 thereof sought to review his suspension and put on hold his disciplinary hearing of 11 September 2018 but imposed conditions that:

14.1 Limited his presence at campus to the participation of formal academic activities such as attendance of lectures;

14.2 Denied him participation in or planning any SRC activities as per Section 64 of the Statute of the First Respondent;

14.3 Forbad him from calling or attending any SRC meetings;

14.4 Prohibited their presence on any of the campus residences.

[15] Additionally, the applicant was advised to rigorously observe the terms of the order of this Court of 21 August 2018 and the Disciplinary Code for Students. The resolution went on to prevail upon the SRC to set up an urgent meeting with Mbombela Campus SRC to underscore the roles of the SRC and CRC regarding campus and institutional student governance. The meeting above with the Management Committee of the First Respondent and the Second Respondent was the last that attempted to resolve the issues that were raised by the students as early as 3 August 2018.

[16] One of the most contentious issues concerned the housing director, Dr Twaise. The students had accused her of allocating unsafe accommodation to some of the off-campus students. These students had been attacked in their dormitories as a result of lack of security in the buildings to which they had been assigned. In executing her duties as she did, she placed herself in a collision path with the housing policy.

[17] On 27 November 2018, the Applicant noted an appeal against the decision of the chairperson of the disciplinary proceedings. His grounds of appeal were that:

17.1 The Applicant was not given opportunity to present his case because the hearing was heard in his absence while he was writing exams. In other words, there was no *audi alteram partem;*

17.2 The evidence presented at the hearing did not implicate him in any misconduct or wrongdoing as alleged.

[18] In terms of the provisions of the First Respondent's disciplinary code for students, it was anticipated that the Appeal Committee would hear the case within a reasonable time. When it was not, on 11 January 2019, the Applicant wrote to the First Respondent enquiring about the outcome but received no response. On further enquiry on 17 January 2019, the Applicant was advised that the Appeal's Committee was meant to sit on 18 January 2019 but would not anymore due to the non-availability of one of its committee members.

[19] It was apparent to all concerned that the outcome of the appeal ought to be available at least prior to commencement of registration for the current year. On 7 February 2019, The date on which registration began, the First Respondent released the outcome of its appeal proceedings. On 11 February 2019, the Applicant launched an application seeking interim relief that the expulsion be suspended pending Part "B" that sought to review the basis of the dismissal. This application was argued before Ndlokovane AJ on 14 February 2019. Amongst the orders that she granted was that: "2.1 The fourth respondent's decision to permanently expel the applicant is suspended and that no effect may be given thereto in any shape or form."

[20] The court on 14 February 2019 refused to grant an order 'directing the first respondents to register the applicant as a student, for the 2019 academic year with immediate effect.' That order was ultimately granted on 18 March 2019 per Mashile J. The Applicant was allowed to register for the 2019 academic year despite that the expulsion lingered. In consequence, it became necessary to set down Part "B" to review the expulsion. That application was argued on 31 October 2019 again before Mashile J.

[21] The Applicant believed that the decision of the First Respondent to expel him was reviewable on the basis of the provisions of the Promotion of Administrative Justice Act No. 3 of 2000 ("PAJA") In that:

21.1 It is irrational;

21.2 It is unreasonable;

21.3 The chairperson was biased.

ASSERTIONS OF THE PARTIES

[22] Tersely, the Applicant's contention is that he acted in his capacity as the President of the SRC. The position of the President of the SRC authorized him to engage the First Respondent on behalf of the students. Such powers to engage the First Respondent is sanctioned in the Constitution and Statutes of the First Respondent's. Accordingly, the Applicant denies that he prompted unlawful protests against the First Respondent. The disciplinary hearing that found him guilty and directed that he be expelled was chaired by a chairperson who was biased against him and that the hearing did not observe the *audi alterem partem* rule insofar as it failed to give him opportunity to present his side of events.

[23] Conversely, the First Respondent argued that the applicant stirred and brought about unlawful protests in which he participated. The Applicant has failed to make out a case for the relief sought and the allegations of bias against the Fourth Respondent are not borne out by the evidence presented before court. The Applicant's expulsion from the First Respondent, contend the Respondents, was based on proven allegations of misconduct following adherence to due process and unsuccessful appeal against the outcome of the disciplinary hearing by the Applicant.

ISSUES

[24] The issues raised here are whether the decision of the First Respondent to permanently expel the Applicant is reviewable on the basis that it is (I) irrational or (II) unreasonable or (iii) that the chairperson who presided over the disciplinary proceedings was biased against the Applicant. These are grounds that are recognized in the PAJA. Over and above these grounds, it is the understanding of this Court that the Applicant also contend that he was not afforded opportunity to present his side of the case before the disciplinary hearing that found him guilty.

LEGAL PRINCIPLES

[25] To the extent that this Court will rely largely on the provisions of the PAJA, the Constitution and the First Respondent Statute, it is sensible to make their provisions the starting point. Section 64(2) of the Statute of the First Respondent provides that:

*"In matters that may affect them, the students of the University are represented by the SRC acting in accordance with its statutory mandate and the Rules."*

[26] Section 34 of the First Respondent Statute stipulates that:

*"Notwithstanding the above the SRC may, in writing, advise the Council and the Executive of any matter affecting the interests of students, including institutional policies and procedures."*

[27] Clause 32 of the Constitution of the First Respondent directs that: "Without limiting the generality of the provision of the UMP Statute, the Council and the Executive expect the SRC:

*"- To serve the interests of students without partiality, bias, prejudice, discrimination or preference, by promoting excellence in leadership and student governance (CRC and SRC)."*

[28] Section 6 of PAJA deals with judicial reviews of administrative actions. The most pertinent sections with which this Court is directly concerned are 6(2)(f)(iii), 6(2)(h) and 6 (2)(a)(iii). Section 6(2)(a)(iii) of PAJA lays down that:

*"a court or tribunal has the power to judicially review an administrative action if the administrator who took it was biased or reasonably suspected of bias."*

[29] Section 6(2)(f)(iii) stipulates that:

*"A court or tribunal has the power to review an administrative action if the action itself is not rationally connected to:*

*(aa) the purpose of which it was taken;*

*(bb) the purpose of the empowering provision;*

*(cc) the information before the administrator; or*

*(dd) the reasons given for it by the administrator."*

[30] Section 6(2)(h) of PAJA provides that:

> *"A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function."*

[31] There is a plethora of case authority around all the grounds raised by the Applicant. Insofar as irrationality is concerned, the court in **Trinity Broadcasting (Ciskei) v ICA of SA**[1] said: "In the application of that test, the reviewing Court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at."

[32] Regarding reasonableness, Froneman JA at Paragraph 36 of **Carephone (Pty) Ltd v Marcus NO**[2] said:

> *"In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' in some way or another. As long as the judge determining [the] issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order."*

[33] The test for determining bias is reasonable suspicion of its existence. Apprehension of probability that the arbiter will be biased is no requirement in our law[3].

ANALYSIS

AUDI ALTERAM PARTEM RULE

[34] This rule has been with our law for as long as one can remember. The essence of it is that a party against whom an adverse decision is likely to be made is entitled to

[1] 346 (SCA) at 354H - 355A
[2] 1999 (3) SA 304 (LAC)
[3] BTR Industries SA (Pty) Ltd v Metal & Allied Workers Union 1992 (3) SA 673 at 693 I-694B.

present his side of the case. The rationale behind the rule is apparent – a fair and just decision cannot be reached without both opposing parties presenting their respective versions before a decision maker. It follows that an outcome based on one version presented by one of the parties to a dispute, its correctness or in exactitude notwithstanding, cannot be countenanced.

[35] It is the First Respondent's case that the date of the hearing, 27 November 2018, was arranged with and confirmed by the Applicant and his legal representatives. The Respondents argue further that it cannot be that the Applicant and his legal representative arrange and simply ignore to commit to dates that they have scheduled. In consequence of this attitude, the First Respondent held the view that it would proceed with the hearing notwithstanding that the Applicant was not in attendance.

[36] It is often stated that most people are wiser with hindsight. It is not helpful for the Respondents to state that the Applicant failed to take specified measures to ensure that the message reached the panel that was to hear his disciplinary case. The Applicant was assisted by attorneys and the two sides had established a practice of how they communicated. That method of communication was by way of e-mail messages, which is as effective as a telephone or a mobile phone. Of course if the intended recipient is not available at the time when contacted, the message would not be communicated, as was the case here.

[37] The point though is that an effort was made to alert Mr Tsietsi Masilo ("Mr Masilo") on 27 November 2018 at 10:03 that the Applicant would be sitting for his examinations on both 27 and 28 November 2018. The significance of the matter merited the First Respondent to make every effort to understand why the Applicant was not before it for the hearing of the disciplinary hearing. This included checking whether or not he had communicated in whatever manner, the most obvious being e-mail or mobile phone. I refer to e-mail messages because that was what the parties had used in the past for communication.

[38] At Paragraph 7.7 of the result of the appeal, the chairperson states that the disciplinary hearing commenced at 13:50 instead of 13:00. The disciplinary committee in the whole fifty minutes of waiting never thought of finding out why neither the Applicant nor his legal representatives were before it for the presentation of his case. The

impression that one gets is that the disciplinary committee was just too eager to proceed and finalise the matter because the Applicant was probably regarded as a thorn in the flesh.

[39] Could the Applicant have done more than he did? With retrospection. The answer is of course, yes. It is possible that when the Applicant and his legal representatives scheduled the dates, they did so without properly ascertaining their availability on the dates. This is not uncommon because Dr Mamindza promised to meet the SRC on 13 August 2018 at 14:00 but attended another meeting that endured for more than he had anticipated. More exasperating in his case is that it was not until after his meeting, six hours later, that he advised the SRC of his predicament. Had he been confronted, he probably would have said he could have planned better.

[40] Accordingly, it was unfair and unjust, especially when the First Respondent was to adopt an extreme measure such as expulsion, which would adversely affect the life of the Applicant, to exercise more patience to make certain that he attended the hearing. I say this mindful that the situation may have been fairly frustrating to the Respondents but that comes with the territory and one ought to have the stamina and strategy of engaging with students. This is even more material in circumstances where the students had used recognised student bodies such as the SRC to convey their legitimate complaints to the First Respondent.

[41] I am at loss by the message the Second Respondent is conveying at Paragraphs 44, 45 and 46 where she says:

> *"44. One finds it difficult that the Applicant would not have informed his legal representative that he was writing on 27 November 2018. There is a clear and intended distortion as to the facts surrounding the writing of examinations by the Applicant. By all accounts, this corroborates what I have stated in my answering affidavit that it is not true that the Applicant was sitting for examinations.*
>
> *45. It is telling that, despite attaching University exams time-table, he did draw the Court's attention to the modules that he wrote on those two days.*

*46. Assuming that he was only writing on 28 November 2018, nothing prevented him and his representative from appearing at the disciplinary inquiry to ask for its rescheduling. They would have been able to show to the chairperson the timetable and the module(s) that he was going to write."*

[42] I have already engaged with Paragraph 46 of the Second Respondent's answering affidavit above. One would have thought that the First Respondent would have verified the veracity of the allegations of the Applicant regarding the dates on which he wrote. I remain befuddled whether or not the Second Respondent admits that the Applicant was writing on both dates because the time table and the modules confirm his claim. If the time table and modules confirm his claim, then the discrepancies between his answering and replying affidavits are dispelled for both cannot reside together.

[43] The conclusion on the *audi alteram partem* rule must be that the First Respondent ought to have given the Applicant opportunity to present his case before the disciplinary hearing. The decision that ensued has huge implication on the life of the Applicant that it cannot be adopted in circumstances where he was not present. Tolerance of such blatant violation of the *audi alteram partem* rule must be discouraged at all cost.

IRRATIONALITY

[44] The First Respondent, like all other learning institutions, recognises the legitimacy of a student body such as the SRC to represent students. The First Respondent further acknowledges that the SRC in the execution of its valid mandate as a representative of the larger student body 'may in writing, advise the Council and the Executive of any matter affecting the interests of students, including institutional policies and procedures.' See Sections 64(2) and 32 of the Statute of the First Respondent.

[45] The SRC as a democratic student campus structure would operate on properly elected members. The first citizen of that body is its president, who at all relevant time had been the Applicant. In articulating the complaints of the students, he was fulfilling his role as the president of the SRC. That role is appreciated by the First Respondent and one finds finger prints of its recognition in the Statute and Constitution.

[46] It is therefore somewhat disquieting that the First Respondent would single out a recognized student leader for expulsion when its own Statute and Constitution allows for it. I note that the First Respondent does not have policy on student protests and that it is acknowledged that where such a lacuna exists, the Constitution of the country would prevail. This means that the provisions of Section 17 of the Constitution of this country applies. The action that it has taken against the Applicant appears to be in keeping with its allegation that the Applicant single-handedly instigated the student protest and then took part in it. Evidence before this Court suggests otherwise and one just have to look at those instances when the Applicant had to go against what the students were doing.

[47] On 12 August 2018, the SRC published a statement onto its Facebook Page denying that it had called for a strike by the students. Again, on the same day, the Applicant states that he addressed students at the gate of the First Respondent in an effort to calm them down. On 22 August 2018, following receipt of notice of a court interdict, the SRC issued a statement and published it onto its Facebook Page wherein it stated that it respected the court order. It is notable that Professor Mabunda also remarked that the SRC was in some instances acting outside of the mandate of the general student body and that it was indeed necessary for the parties to approach an impartial arbiter to conduct their meetings.

[48] To believe the Respondents' version would entail that the Applicant alone and independently duped all the students including his fellow SRC leadership to protest. This cannot be true because the protest was not concentrated at the campuses of the First Respondent only. It is against that background that there is no rational objective basis justifying the connection made by the First Respondent between the material made available and the conclusion arrived at. See the Trinity Broadcasting case supra. The decision to expel the Applicant must be irrational and as such, stands to be reviewed and set aside.

[49] In view of this Court's conclusion on the *audi alteram partem* rule and irrationality it will be superfluous to proceed to consider bias and whether or not the chairperson of the disciplinary hearing admitted evidence that she should not have. In the premises, I find that:

49.1 The Respondents by proceeding with the disciplinary hearing in the absence of the Applicant had contravened the *audi alteram partem* rule; and

49.2 The decision is both irrational and unreasonable as contemplated in the PAJA.

ORDER

[50] Against that background, I direct that:

1. Declaring The decision of the Fourth Respondent and the procedures followed to permanently expel the Applicant from the First Respondent to be unlawful;

2. The decision of the Fourth Respondent and procedures followed are reviewed and set aside;

3. The Respondents are, jointly and severally, the one paying the other to be absolved, liable for the costs of the Applicant.

**B A MASHILE**
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**
**MPUMALANGA DIVISION, MBOMBELA**

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| **DATE OF HEARING:** | **31 October 2019** |
| **DATE OF ORDER:** | **18 March 2020** |
| **Counsel for the Applicant:** | **T Ngwenya** |
| **Instructed by:** | **JF Shabangu Attorneys** |
| **Counsel for the Respondent:** | **M Makoti** |
| **Instructed by:** | **Mzuzu Attorneys** |