**IN THE HIGH COURT OF SOUTH AFRICA**
**(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: **8473/2018**

In the matter between:

**GHALIB VAN DER ROSS** Applicant

and

**UNIVERSITY OF CAPE TOWN** First Respondent

**PROCTOR JAMES CHAPMAN** Second Respondent

**Court:** Loots AJ
**Heard:** 16 August 2018
**Delivered:** 15 November 2018

**JUDGMENT**

## INTRODUCTION

[1] The applicant, a final year student at the first respondent, seeks an order reviewing and setting aside the decision of the second respondent to refuse the

applicant external legal representation at a disciplinary hearing initiated by the first respondent.

[2] The charges relate to alleged dishonest conduct, which conduct is alleged to be in contravention of the second respondent's rules of conduct.

[3] The applicant contends that the second respondent was to have acceded to his application for external legal representation in respect of the disciplinary process.

[4] The respondents, on the other hand, contend that the matter does not warrant external legal representation, and thus that the second respondent had correctly exercised his discretion in disallowing the applicant's application. This they principally base on the contentions that it is an uncomplicated matter which does not carry a sanction of expulsion upon conviction.

## DISCUSSION

### Relevant Facts

[5] In mid-October 2017 Professor Wim Fuls became suspicious of plagiarism in relation to an assignment that had been given to his final year engineering students.

[6] On 23 October 2017 Professor Fuls notified the students concerned that he would submit the evidence to the Student Tribunal, as he was obliged to do.

[7] On 25 October 2017 Professor Fuls, as he had notified the students he would, reported multiple suspected plagiarism cases to Ms Chyanne Isaac, the first respondent's legal counsellor.

[8] Also on 25 October 2017 Professor Fuls notified the applicant, in writing, that he was suspected of having plagiarised the work of a student of a previous year.

[9] Charges were compiled in respect of 15 students.

[10] On 25 November 2017, the applicant was advised by email that he would have to appear before the University Student Disciplinary Tribunal for a disciplinary hearing on the charges of having breached RCS2.1 and RCS2.3 of the first respondent's Rules of Conduct.

[11] RCS 2.1 and RCS 2.3 read as follows:

> "RCS2.1 A student must refrain from dishonest conduct in any examination, test or in respect of the completion and/or submission of any other form of academic assessment. Dishonest conduct includes but is not limited to plagiarism.
>
> RCS2.3 A student may not submit the work of any other person in any examination, test or in respect of the completion and/or submission of any other form of academic assessment without full and proper attribution and acknowledgement."

[12] The particulars in respect of the charges were stated to be the following:

> "The student is charged in respect of RCS2.1 and RCS2.3 above and is accused of dishonest conduct in that he plagiarised certain sections of his

> Electricity supply expansion program project submission in the following course: MEC108S"

[13] A pre-hearing ("**the first pre-hearing**") was convened for 1 December 2017.

[14] On 29 November 2017 the applicant applied for external legal representation at the pre-hearing.

[15] The applicant's application for external legal representation was assigned to the second respondent, who is an attorney employed by the Refugee Rights Unit of the first respondent, and a Proctor in the University Student Disciplinary Tribunal. The second respondent would only deal with the application for external legal representation and would in no way be involved in the disciplinary hearing itself, which hearing would be presided over by a different Proctor and assessors.

[16] The first respondent objected to the application on the basis that the matter was uncomplicated and that the sentences the applicant faced did not include an adverse finding which could lead to expulsion from the first respondent.

[17] On 30 November 2017 the second respondent, having considered the submissions by both the applicant and the first respondent, found against allowing the applicant external legal representation. This decision was based on:

a. The charges (of which he had been appraised);

b. The degree of complexity of the matter;

c. The potential seriousness of an adverse finding; and

d. The availability of suitable staff and student legal representatives.

[18] *Inter alia* in respect of the potential seriousness of the matter, the second respondent also considered the representations made by both the applicant and the first respondent (through the assistant prosecutor Ms Minhaaj Ebrahim), which he summarised as follows:

> "In the applicants [sic] request for external legal representation his reasons include among others that the charges are of a serious nature and the student has 'not been given sufficient time to consult with a University student or staff member.' UCT's legal services have responded objecting to external legal representation on the grounds that the matter is not complex and that given the nature of the charges and the potential finding and sentence, *the potential adverse finding could not result in expulsion*." [Emphasis, in cursive, added]

[19] From the written reasons for the decisions denying the applicant external legal representation, it is clear that the second respondent was aware of the provisions of first respondent's General Rules and Policies under the heading "Disciplinary Jurisdiction and Procedures" (the "**DJP**"), and specifically the provisions of DJP 5.9.

[20] DJP 5.9 provides as follows:

> "A student whose conduct is the subject of [a] charge before University Tribunal is entitled to be represented by another student or staff member of the University.

A student may apply to the University Tribunal for the right to legal representation and the Tribunal has a discretion to grant such application, taking into account:

(a) The nature of the charges brought;
(b) The degree of factual or legal complexity attendant upon considering them;
(c) The potential seriousness of the consequences of an adverse finding;
(d) The availability of suitable representatives among the University's student or staff body; and
(e) Any other relevant factor.

*An application may not be refused where an adverse finding could lead to expulsion*."

[Emphasis, in cursive, added]

[21] It is common cause that the reference to legal representation, as contained in paragraph 5.9 of the DJP, refers to external legal representation.

[22] The first pre-hearing proceeded on 1 December 2017, as scheduled.

[23] Annexed to the answering papers were both the handwritten notes of Ms René Carelse (a secretary then employed at the first respondent's Legal Services Secretariat) and the minute prepared by Ms Ebrahim (which minute Ms Ebrahim, under oath, confirmed to be accurate).

[24] While Ms Carelse's note, following the entry "sanctions explained" records "final year so harsher sentence but not expulsion – first offence" the minute prepared by Ms Ebrahim does not contain a similar entry. Instead the relevant portion of the minute reads as follows:

"…

Possible sanctions were explained to the student:

(i) Expulsion – the most serious sentence where a student is disqualified but may re-apply for admission at UCT after a period of 5 years;

(ii) Rustication – the second most serious sanction –where a student is temporarily excluded from the university for a specified period of time but thereafter may continue with his studies after the period of rustication has been served;

(iii) Lenient sentence – rustication or expulsion suspended on condition that the student must complete a specified number of community service hours and is not convicted of a similar offence again. *The student was informed that he could face any of these sanctions*.

The student was informed that the tribunal decides on the verdict and the sentence and that various factors are considered.

…

Miss Ebrahim also explained that the chances of the student getting expelled is [sic] *unlikely* and that the possible sentence is rustication suspended with community service."
[Emphasis, in cursive, added]

[25] The last entry in the minute prepared by Ms Ebrahim is echoed by Ms Carelse's notes, where she wrote:

"> <u>chance</u> of expulsion > unlikely

- possible sentence - rustication suspended,

comm. serve"

[26] Following correspondence during which the applicant requested information regarding the plagiarism, to which the first respondent duly responded, the

applicant was informed that the first respondent had evidence that another student had allowed the applicant to copy his work.

[27] On 26 February 2018 a meeting followed a further email from Ms Ebrahim (sent to the applicant on 23 February 2018). During the meeting the submission of the other student was discussed, including the fact that the student had stated that that he and the applicant had worked together on the assignment.

[28] On 28 February 2018 an amended charge sheet was presented to the applicant.

[29] In terms of the amended charge sheet the charges remained the same, but the particulars changed to the following:

> "The student is charged in respect of RCS2.1 and RCS2.3 above and is accused of dishonest conduct in that he colluded with another student in respect of his Electricity supply expansion program project submission in the MEC108S course, by working together when there was a clear instruction that this was to be an individual submission."

[30] From a comparison between the particulars to the charges provided on 25 November 2017 and those provided on 28 February 2018, it cannot be argued that the essence of the charges (according to the particulars at least) have not changed from plagiarism to collusion.

[31] Following the applicant having been provided with the amended charge sheet a further pre-hearing was held on 5 March 2018 ("**the second pre-hearing**").

[32] The second pre-hearing was again attended by Ms Ebrahim, this time cited as the "Facilitator".

[33] Under the heading "**1. Purpose of the Pre-Hearing Conference**" the following is recorded:

> "Ms. Ebrahim explained the purpose of the pre-hearing conference to the student. The purpose of the pre-hearing conference is to explain the charge, discuss the right to representation of the student, whether the student will plead guilty or not guilty, explain the process of the plea chosen by the student, explain possible sanction [sic], explain endorsement of the offence on the transcript and right to appeal."

[34] The first paragraph under the heading "**5. Not Guilty Plea Process**" concludes with "The Proctor will then make a founding [sic] based on the evidence and witness statements and if found guilty, the next step would be sentencing." The second paragraph under the same heading then proceeds as follows:

> "The University will address the Proctor on aggravation and defence will address the Proctor on mitigation. The Proctor will then make an appropriate sanction. Ms. Ebrahim explained the types of Sanctions. Expulsion- Student can be expelled from the University for a period of 5 years. After 5 years, student can re-apply to the university it's not an automatic re-admission. Rustication- Student is excluded from the university for a definite period chosen by the Proctor at his or her discretion. After that period of Rustication student can continue with studies. Community service/Lenient sentence- Rustication for period decided by Proctor which is suspended, on condition that the student complete a number of hours of community service and is not found guilty the same or similar offence."

[35] On 23 March 2018 the applicant, through his attorney, again made application for external legal representation. This time in respect of the hearing itself. In the request the applicant's attorney, *inter alia*, stated that the first respondent's junior legal counsellor, Ms Kavita Kooverjee, advised the applicant that she considers this a serious matter and will ask for a 12 month rustication sentence to be imposed. The attorney also opined that a sentence of 12 months rustication could be imposed thus placing it on the brink of expulsion.

[36] The first respondent again objected to the application for legal representation, this time through Ms Isaac. Ms Isaac placed the following on record:

> "It is highly unlikely that Mr van der Ross will be excluded from the university. In all likelihood the sentence will be a suspended rustication with community service.
> Neither is this a complex matter.
> All students have their records endorsed upon conviction.
> I do not support the inconsistency where affordability of external representatives creates a higher sense of entitlement that is not ordinarily granted.
> In this same group of students referred to our office, some had applied for external representation and this was declined.
> There are no mitigating reasons to deviate in this instance. Our office will remain fair and consistent and will not be intimidated by external representatives or students in any of our matter.
> We ask your earlier decision to decline this application remain the same.
> If the parties opposing wish to appeal and then review the case outside of the USDT they still have the opportunity to do so.
> This kind of representation for a plagiarism matter is unnecessary."

[37] It is important to note that Ms Isaac's submission to the second respondent:

a. Does not refer thereto that the charge against the applicant has essentially changed from plagiarism to collusion (unless the reference to plagiarism is in addition to that of collusion, in which case the second respondent was not informed of the additional charge);

b. Reinforces the view that the matter relates to plagiarism only.

c. Does not inform the second respondent that the assistant prosecutor, Ms Ebrahim, is of the view that the tribunal, though unlikely, may impose a sentence of expulsion;

d. Does, therefore, not correct the assertion contained in the objection to the first application for external legal representation; that expulsion is not a possibility;

e. Still refers thereto that exclusion from the university is a possibility;

f. States that, in the same group of students referred to their office, some had applied for external representation which was declined. This statement was made in the absence of any context (for example, whether the other students had faced the same charges as the applicant ultimately faced, and whether in the matters involving the other students the minuted view was held that they faced the possibility of expulsion);

g. Creates the impression that the matter is exactly the same as the matters in respect of which external legal representation had been refused; and

h. Creates the impression that the applicant is motivated by a sense of entitlement, rather than by proper cause.

[38] The second respondent, having reviewed the email and representations forwarded to him on 30 November 2017, and the renewed application for legal representation and the response thereto, on 23 April 2018, again declined the applicant's application for legal representation.

[39] It is this decision ("**the decision**") the applicant seeks to have reviewed and set aside.

**The Legal-Factual Matrix**

[40] In ***Hamata and Another v Chairperson, Peninsula Technicon Internal Disciplinary Committee, and Others***,[1] which concerned a student challenging the rule limiting representation at disciplinary proceedings to fellow students or members of the Pentech Staff, the SCA (reading in the discretion, although the Pentech's rules did not provide for external legal representation) held that the law does not recognise an absolute right to legal representation.[2]

[41] A consideration of paragraphs [11] to [13] of the ***Hamata*** judgment makes it clear that the right to legal representation in fora other than courts exists only where it is truly required to attain procedural fairness.

[42] At paragraph [13] of ***Hamata***, the SCA then states that the decision whether or not to allow legal representation depends on the circumstances prevailing in the case under consideration, once the decision-making body has taken into account factors such as:

a. the nature of the charges brought;

b. the degree of legal or factual complexity attendant upon considering the charges;

c. the potential seriousness of an adverse finding;

d. the availability of suitably qualified lawyers among the student or staff body;

e. the training of the presiding officer (in ***Hamata*** the presiding officer was legally trained); and

f. any other factor relevant to confining the student to the representation for which the rule expressly provides[3].

[43] The SCA's approach in ***Hamata***, that there is no absolute right to legal representation in fora other than in courts of law (and that the discretion whether or not to allow external legal representation is essentially based on considerations of fairness) has been confirmed in a number of subsequent cases, which cases covered diverse contexts.[4]

[44] A caveat was raised in ***Fransman v Speaker of the Western Cape Provincial Legislature and Another*** [5] at paragraph [57], where the court stated the following:

> "In short, there is no absolute right to legal representation in fora other than courts of law, but it cannot be excluded as of rule; a discretion on whether to allow it must be exercised taking into account relevant factors. Having said that, *if the rules of a particular tribunal allow for an unqualified right to legal representation then it will be unqualified*, but that is not the case with rule 72. The judgment of the Legal Aid South Africa v Magidiwana and others 2015 (6) SA 494 (CC) does not take the matter any further"
> [Emphasis, in cursive, added]

[45] From the wording of paragraph 5.9 of the DJP it is clear that, where an adverse finding against the applicant *could* result in his expulsion from the first respondent, the applicant is, as of right, entitled to external legal representation.

[46] In the circumstances of the present matter the *dictum* of the court in paragraph [57] in ***Fransman***, cited above, is to be qualified to the extent that the applicant would only be entitled to as of right should the possibility exist that he may be expelled from the first respondent.

[47] From this it follows that the enquiry postulated in ***Hamata*** only becomes relevant once it appears that there is no possibility that the applicant may be expelled.

[48] In light of the abovementioned contents of the pre-hearing minutes (the correctness of which were confirmed under oath on behalf of the respondents),

and the fact that the second respondent cannot bind the tribunal hearing the matter, I do not accept the respondents' contention that there is no possibility that the applicant may not be expelled from the first respondent following a conviction on the charges he ultimately faces.

[49] From what has been stated above, it is clear that the second respondent was neither provided with the minutes of the pre-hearing of 1 December 2017 or the minutes of the pre-hearing of 5 March 2018, both of which expressly include the possibility that the applicant may be expelled from the first respondent.

[50] Since the second respondent explicitly stated (in his 30 November 2017 decision) that an application for external legal representation may not be refused where an adverse finding could lead to expulsion, I will in favour of the second respondent accept that had the second respondent been made aware thereof that the applicant faced the possibility of expulsion from the first respondent, he would have allowed the application for external legal representation.

[51] If I am wrong in my assumption, that the second applicant was unaware thereof the applicant faced the possibility of expulsion (according to the first respondent, through Ms Ebrahim), he could (given the express wording of DJP5.9) nevertheless not competently have reached the decision to deny the applicant external legal representation.

[52] In making the above findings, I am mindful of the test in respect reviews in the current context, as set out in matters such as ***Bato Star Fishing (Pty) Ltd v***

***Minister of Environmental Affairs and Others***,[6] ***Carephone (Pty) Ltd v Marcus NO***,[7] and ***Rustenberg Platinum Mines Ltd (Rusternberg Section) v Commission for Conciliation, Mediation and Arbitration***.[8] I am specifically mindful thereof that the question is not whether a court agrees with the decision made by the decision maker, but whether it was one that the decision maker could reach. As stated in ***Carephone*** at par [36]:

> "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' of the matter in some way or another. As long as the Judge determining this 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."

[53] In the premises I find that the second respondent's decision to not be rationally justifiable and one the second respondent could not reach in the circumstances of this case and that it is subject to judicial review as contemplated by section 6(2) of the **Promotion of Administrative justice Act**. [9]

**The Promotion of Administrative Justice Act**

[54] Once it is decided that a particular administrative act falls in one of the categories referred to in sub-section 6(2) of PAJA, the remedies provided for following such a finding is contained in section 8 of PAJA, the relevant portion of which is sub-section 8(1).

[55] Subsection 8(1) of PAJA provides as follows:

"(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders-

(a) directing the administrator-

(i) to give reasons; or

(ii) to act in the manner the court or tribunal requires;

(b) prohibiting the administrator from acting in a particular manner;

(c) setting aside the administrative action and-

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases-

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) directing the administrator or any other party to the proceedings to pay compensation;

(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(e) granting a temporary interdict or other temporary relief; or

(f) as to costs."

[56] In the present instance sub-section 8(1)(c), specifically, is applicable.

[57] Relevant to the present matter, in terms of subsection 8(1)(c) of PAJA, a court setting aside the administrative action is either to remit the matter to the administrator (in the ordinary course), or to substitute, vary, or correct the action (in exceptional circumstances).

[58] The applicant has only prayed for the setting aside of the second respondent's decision, without praying for any consequential relief. This raises the question of

whether the court can *mero motu* consider whether to refer the decision back to the second respondent, or whether to substitute, vary, or correct it.

[59] In terms of subsection 8(1)(c) it appears that, once a court has decided to set aside an administrative act, the decision must be accompanied either by an order referring the decision back to the administrator, or by an order substituting, varying, or correcting the decision. Following from this it would appear that, in granting an order that is just and equitable, a court can *mero motu* consider whether to make an order in terms of sub-section 8(1)(c)(i) of PAJA, or an order in terms of sub-section 8(1)(c)(ii) in any matter where an administrative action is set aside.

[60] The Constitutional Court, in ***Trencon Construction (Pty) Ltd v Industrial Development Corporation of SA Ltd***, [10] at paragraphs [34] to [54] set out the relevant test in respect of whether exceptional circumstances exist which would allow a court to substitute, vary, or correct an administrative action. I have found this reference resists precis (save for minimal redaction):

> *"Exceptional circumstances test*
>
> [34] Pursuant to administrative review under section 6 of PAJA and once administrative action is set aside, section 8(1) affords courts a wide discretion to grant "any order that is just and equitable". In exceptional circumstances, section 8(1)(c)(ii)(aa) affords a court the discretion to make a substitution order.
>
> [35] Section 8(1)(c)(ii)(aa) must be read in the context of section 8(1). Simply put, an exceptional circumstances enquiry must take place in the context of what is just and equitable in the circumstances. In effect, even

where there are exceptional circumstances, a court must be satisfied that it would be just and equitable to grant an order of substitution.

[36]…

[42] The administrative review context of section 8(1) of PAJA and the wording under subsection (1)(c)(ii)(aa) make it perspicuous that substitution remains an extraordinary remedy. Remittal is still almost always the prudent and proper course.

[43] In our constitutional framework, a court considering what constitutes exceptional circumstances must be guided by an approach that is consonant with the Constitution. This approach should entail affording appropriate deference to the administrator. Indeed, the idea that courts ought to recognise their own limitations still rings true. It is informed not only by the deference courts have to afford an administrator but also by the appreciation that courts are ordinarily not vested with the skills and expertise required of an administrator.

[44] ...

[45] Judicial deference, within the doctrine of separation of powers, must also be understood in the light of the powers vested in the courts by the Constitution…

[46] A case implicating an order of substitution accordingly requires courts to be mindful of the need for judicial deference and their obligations under the Constitution. As already stated, earlier case law seemed to suggest that each factor in the exceptional circumstances enquiry may be sufficient on its own to justify substitution. However, it is unclear from more recent case law whether these considerations are cumulative or discrete.

[47] To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an

administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.

[48] A court will not be in as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it. This would depend on the facts of each case. Generally, a court ought to evaluate the stage at which the administrator's process was situated when the impugned administrative action was taken. For example, the further along in the process, the greater the likelihood of the administrator having already exercised its specialised knowledge. In these circumstances, a court may very well be in the same position as the administrator to make a decision. In other instances, some matters may concern decisions that are judicial in nature; in those instances – if the court has all the relevant information before it – it may very well be in as good a position as the administrator to make the decision.

[49] Once a court has established that it is in as good a position as the administrator, it is competent to enquire into whether the decision of the administrator is a foregone conclusion. A foregone conclusion exists where there is only one proper outcome of the exercise of an administrator's discretion and "it would merely be a waste of time to order the [administrator] to reconsider the matter". Indubitably, where the administrator has not adequately applied its unique expertise and experience to the matter, it may be difficult for a court to find that an administrator would have reached a particular decision and that the decision is a foregone conclusion. However, in instances where the decision of an administrator is not polycentric and is guided by particular rules or by legislation, it may still be possible for a court to conclude that the decision is a foregone conclusion.

[50] …

[51] A court must consider other relevant factors, including delay. Delay can cut both ways. In some instances, it may indicate the inappropriateness of a substitution order, especially where there is a drastic change of circumstances and a party is no longer in a position to meet the

obligations arising from an order of substitution or where the needs of the administrator have fundamentally changed. In other instances, delay may weigh more towards granting an order of substitution. This may arise where a party is prepared to perform in terms of that order and has already suffered prejudice by reason of delay. In that instance, the delay occasioned by remittal may very well result in further prejudice to that party. Importantly, it may also negatively impact the public purse.

[52] What must be stressed is that delay occasioned by the litigation process should not easily clout [sic] a court's decision in reaching a just and equitable remedy. Sight must not be lost that litigation is a time-consuming process. More so, an appeal should ordinarily be decided on the facts that existed when the original decision was made. Delay must be understood in the context of the facts that would have been laid in the court of first instance as that is the court that would have been tasked with deciding whether a substitution order constitutes a just and equitable remedy in the circumstances.

[53] There are important reasons for this approach. Where a matter is appealed, delay is inevitable. Thus assessing delay with particular reference to the time between the original decision and when the appeal is heard could encourage parties to appeal cases. This, they would do, with the hope that the time that has lapsed in the litigation process would be a basis for not granting a substitution order. Where a litigant wishes to raise delay on the basis of new evidence, that evidence must be adduced and admitted in accordance with legal principles applicable to the introduction of new evidence on appeal. Ultimately, the appropriateness of a substitution order must depend on the consideration of fairness to the implicated parties.

[54] If the administrator is found to have been biased or grossly incompetent, it may be unfair to ask a party to resubmit itself to the administrator's jurisdiction. In those instances, bias or incompetence would weigh heavily in favour of a substitution order. However, having regard to the notion of fairness, a court may still substitute even where there is no instance of bias or incompetence.

[55] In my view, this approach to the exceptional circumstances test accords with the flexibility embedded in the notion of what is just and equitable. It is, therefore, consonant with the Constitution while at the same time giving proper deference and consideration to an administrator."

[61] Applying considerations set out in ***Trencon***, I am of the view that the court should exercise its discretion in favour of substituting the second defendant's decision with that of allowing the applicant external legal representation, *inter alia*, for the following reasons:

a. DJP5.9, in terms, states that where expulsion from the first respondent is a possibility, external legal representation must be allowed.

b. The first respondent's Ms Ebrahim stated unequivocally that expulsion is a possible sanction.

c. The only function of the second respondent was to decide whether to allow the applicant external legal representation (he having even raised the question of whether he may not have been *functus officio* after the 30 November 2017 decision).

d. The second respondent considering that the sanction will not be expulsion, does not bind the disciplinary tribunal hearing the matter.

e. The disciplinary tribunal may find that a sanction of expulsion is appropriate (notwithstanding the sentencing guidelines) which can be the only reason why Ms Ebrahim included the applicant's expulsion from the first respondent as a possible sanction.

f. The only possible decision that the second respondent can make in the circumstances set out above is to allow the applicant external legal representation.

g. It is in the interests of justice that the disciplinary hearing proceed as soon as possible. In this regard it must be borne in mind that the applicant is a final year student who, should he be found not guilty, is overdue in respect of graduating from the first respondent.

**COSTS**

[62] The applicant seeks costs against both respondents on the attorney client scale.

[63] While I am of the view that the applicant is entitled to the costs of the application in the circumstances of this matter:

a. Since the second respondent is employed by the first respondent, as an attorney in its refugee rights unit, and since the second respondent acted in an official capacity in the exercise of his duties as Proctor, at the behest of the first respondent (with there being no indication that he acted maliciously or dishonestly), I find no basis for holding the second respondent liable to pay the costs of the application;

b. I find no grounds for making a punitive costs order against the first respondent.

**ORDER**

[64] I, accordingly, order as follows:

a. The decision of the second respondent to refuse the applicant external legal representation in the disciplinary hearing, instituted by the first respondent under case number 17/0141/HC, is hereby set aside.

b. The decision of the second respondent is substituted therewith that the applicant is entitled to external legal representation in the disciplinary hearing, instituted by the first respondent under case number 17/0141/HC.

c. The first respondent is to pay the costs of this application.

_____

**JH LOOTS**

Acting Judge of the High Court

**Appearances:**

**For the Applicant**: M Salie SC, with him Y Abass (instructed by Rahin Johnson Attorneys)

**For the Respondents**: M O'Sullivan (instructed by Fairbridges Wertheim Becker Attorneys)

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[1] 2002 (5) SA 449 (SCA)

[2] At paragraph [5].

[3] Which includes, for example, the university's legitimate interest in dealing with the enquiry internally.

[4] See: ***Legal Aid South Africa v Magidiwana and Others*** 2015 (6) SA 494 (CC), ***CCMA and Others v Law Society of the Northern Provinces (Incorporated as the Law Society of Transvaal*** 2014 (2) SA 321 SCA, ***DE Lange v Presiding Bishop for the time being of the Methodist Church of Southern Africa and Another*** 2015 (1) SA 106 (SCA).

[5] [2016] JOL 36717 (WCC).

[6] 2004 (4) SA 490 (CC) at pars 44 and 48.

[7] 1999 (3) SA 304 (LAC).

[8] 2007 (1) SA 576 (SCA).

[9] Act 3 of 2000 ("**PAJA**")

[10] 2015 (5) SA 245 (CC). See also **Gauteng Gambling Board v Silverstar Development Ltd** 2005 (4) SA 67 (SCA).