



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

REPORTABLE

CASE NO: 24537/2015

In the matter between:

BRIAN PATRICK WILLIAMS

First Applicant

SONGEZO MAQULA

Second Applicant

and

THE UNIVERSITY OF THE WESTERN CAPE

First Respondent

THE COUNCIL OF THE UNIVERSITY OF

THE WESTERN CAPE

Second Respondent

THE CHAIRPERSON OF THE COUNCIL

OF THE UNIVERSITY OF THE WESTERN CAPE

Third Respondent

THE CONVOCATION OF THE UNIVERSITY

OF THE WESTERN CAPE

Fourth Respondent

JUDGMENT DELIVERED ON 15 NOVEMBER 2016

GAMBLE, J:

INTRODUCTION

[1] In its recent judgment in *Hotz*¹ the Supreme Court of Appeal described the unrest which has beleaguered South African university campuses over the last 18 months or so primarily around the call by students for free tertiary education. The background to this judgment are the demands of the so-called “*#Fees Must Fall*” social movement (“FMF”) as described in that judgment, this time on the campus of the University of the Western Cape (“UWC” or “the University”, as the case may be) in Bellville South during October 2015. What began as peaceful protest turned violent towards the end of that month culminating in a public meeting on Sunday 31 October 2015 on the campus dubbed “*Prayers for Peace*”. As the name suggests, this event was intended to engender a sense of calm amongst students on the campus through introspection and the intercession of religious leaders.

[2] The applicants attended, and both addressed, the gathering. The applicants claim that their intention in doing so was to make a constructive contribution towards bringing peace to the campus. Others claim that the applicants added fuel to the fire by sweeping up students and encouraging them to continue with their protest which is aimed at bringing about change to the system of funding of students at South African universities.

[3] The first applicant (“Mr Williams”) was formerly the chair of the second respondent, (“the Council”). In October 2015 both Mr Williams and the second

¹ *Hotz v UCT* 2016 ZASCA 159 (20 October 2016)

applicant (“Mr Maqula”) were ordinary members of Council. Mr Williams, it seems, was taken up by the FMF movement and supported their cause. He considered it prudent to call upon the third respondent to convene a special sitting of the Council to consider the unrest on campus and cited similar meetings of councils on other campuses to that end. The third respondent’s refusal to accede to this request was not taken lightly by Mr Williams who considered it an abdication of the Council’s responsibilities toward the University.

[4] The presence of the applicants at the “*Prayers for Peace*” meeting was seemingly in their respective personal capacities, that is to say, they did not attend at either the request of, or with the blessing of, the Council. Evidently certain members of the Students Representative Council (“the SRC”) took umbrage at the presence of the applicants at the “Prayers for Peace” gathering, claiming that they attended without the SRC’s invitation and complained to the Council in writing about their conduct at the meeting which was allegedly inflammatory and unacceptable to the SRC. The complaint was lodged on the letterhead of the SRC on 6 November 2015 but was unsigned.

[5] On 26 November 2015 the Council held one of its ordinary quarterly meetings which was attended by the applicants as they were entitled and required to do. At the meeting the applicants were confronted with an agenda item (they say added late , and therefore unprocedurally) relating to their attendance at the prayer meeting. The item was based on the SRC complaint which called for disciplinary action to be taken against the applicants. The applicants did not recuse themselves from the meeting when the agenda item was debated, choosing rather to confront

their accusers. The outcome of this agenda item (after limited debate and a secret ballot) was that both applicants were immediately suspended from Council.

[6] The suspension was accompanied by the immediate establishment of an *ad hoc* committee of the Council to probe the factual basis for the allegations made against the applicants and for a recommendation as to the appropriate response from the Council. On 30 November 2015 the Registrar of UWC wrote to the applicants informing them of a disciplinary enquiry to be held against them on 3 and 4 December 2015. However, the enquiry did not go ahead as planned because the applicants claimed that they were unable to attend. They also requested documentation relevant to the proposed enquiry to enable them to be able to prepare.

[7] The applicants lost little time in challenging the Council's decision, launching urgent papers in this Court on 18 December 2015 for orders declaring their respective suspensions from Council to have been unlawful, reviewing and setting aside those suspensions and requesting their reinstatement as full members of the Council. That application was opposed by UWC which was then required to make available its record of decision in terms of Rule 53 (1). It complied with this procedural step around 26 January 2016.

[8] In the meantime the *ad hoc* committee, under the chairmanship of Dr Raymond Patel, the vice chair of the Council, went about its business. Its invitation on 12 January 2016 to the applicants to attend its sitting on 21 January 2016 was spurned on a number of procedural grounds: they challenged the impartiality of the committee, sought a plethora of documents before they were prepared to participate in its proceedings and claimed, in any event, to be unavailable on the day. In the

result the *ad hoc* committee did not hear the applicants. It prepared a report for the Council recommending disciplinary action which was submitted to the applicants and their legal representatives for comment on 29 February 2016. The applicants elected not to comment but once again requested documentation in an obvious endeavour to filibuster the contemplated proceedings.

[9] Ultimately the applicants' attorneys undertook to make submissions to the *ad hoc* committee by 25 April 2016 but did not make good on their promise. The *ad hoc* committee accordingly finalised its report without input from the applicants and tabled it before the Council for consideration at a quarterly meeting on 30 June 2016. The recommendation remained the same. The applicants, then still under suspension, were precluded from attending that meeting which resolved, there and then, to expel Mr Williams with immediate effect. Mr Maqula, on the other hand, was suspended pending a disciplinary enquiry to follow. I shall revert to this meeting in more detail later but suffice it to say that the report of the *ad hoc* committee formed an important part of the Council's deliberations on that day.

[10] The applicants were clearly in no great hurry during the first semester of 2016. They waited for some 10 weeks after delivery of the Rule 53 record before amending their notice of motion and delivering supplementary affidavits. They took no steps to hasten the filing of any answering papers, either by correspondence to the opposing attorneys or through a chamber book application, the customary local procedure to enforce the filing of overdue affidavits.

[11] On 7 July 2016 the applicants filed a further amended notice of motion so as to further challenge the decisions of the Council of 30 June 2016, together with

further supplementary affidavits dealing with the recent events. This notice of amendment was opposed by the respondents. On 8 July 2016 the University filed its answering papers which, together with accompanying annexures, ran to more than 200 pages. On 11 July 2016 the parties took a court order by agreement enrolling the review for hearing on 5 September 2016. In that order the parties agreed that the terms of the amended notice of motion would stand. Thereafter there was a flurry of further exchanges of paper with the result that the matter was not ripe for hearing in September, the parties agreeing to a postponement to 3 November 2016. Another paper storm ensued thereafter but ultimately the matter was regarded as ready for hearing on the day.

[12] This court heard argument from the parties on Thursday, 3 November 2016. The applicants were represented by Advs. A.J. Freund SC and M.Osborne and the respondents by Advs. W.R.E.Duminy SC and N.Mangcu-Lockwood. The court is indebted to counsel for their detailed heads of argument and oral submissions which have facilitated the delivery of this judgement.

[13] It was agreed in advance that the matter would run over to Friday, 4 November 2016 if required. While addressing the court during the afternoon session on the Thursday, Mr Duminy SC requested a short adjournment to attend to an instruction from UWC. The matter stood down and the court was later informed in chambers that the parties were exploring a resolution of the dispute. The case accordingly stood over till the following day. A report in a local newspaper on the morning of Friday 4 November 2016 quoted a press statement issued by the third respondent (the chair of the Council, Mr Perry-Mason Mthunzi Mdwaba) to the effect

that the expulsion of Mr Williams had been revoked and the suspension of Mr Maqula set aside.

[14] When the matter was called in court that morning Mr Duminy SC handed up the first to third respondents' consent to a judgment being granted in the terms set out therein. At first blush this appeared to be a complete capitulation to all of the relief sought by the applicants in terms of the amended notice of motion of 10 July 2016. Included in the consent was the revocation of the expulsion and the suspension and an undertaking to bear the applicants' costs on the punitive scale. However, Mr Freund SC informed the court that the applicants were not happy with the extent of the concessions made by the respondents, pointing out that there was certain crucial relief sought in prayer 2.1 of the amended notice of motion which had not been conceded by the University. In the result, there was further argument by the parties during the course of that morning whereafter judgment was reserved.

THE ISSUE REMAINING FOR DETERMINATION

[15] That which remains for consideration will appear from the bold emphasis in prayers 2 and 2.1 hereunder, the full extent of the prayer with its subparagraphs being recorded for the sake of completeness:

*"2. It is declared that the following decisions pertaining to the Applicants taken by the Second Respondent, **and any decisions, steps or measures consequent upon aforementioned decisions**, are invalid, and are reviewed and set aside:*

2.1. Of 26 November 2015, to suspend the Applicants as members of the Second Respondents, **and to appoint a disciplinary committee to investigate certain allegations against them tabled at that meeting;**

2.2 Of 30 June 2016, to expel the First Applicant, and to suspend Second Applicant, as members of the Second Respondent.”

[16] The consent to judgement handed up by Mr Duminy SC contained the following concessions :

“1. That the following decisions of the Second Respondent are set aside-

1.1 The decisions taken on 26 November 2015 to suspend the Applicants as members of the Second Respondent; and

1.2 The decisions of the Second Respondent taken on 30 June 2016 to expel the First Applicant and to suspend the Second Applicant as members of the Second Respondent;”

[17] Mr Freund SC pointed out that it was central to the applicants’ case that the decision of 26 November 2015 to appoint the *ad hoc* committee as well as its report tabled before the Council on 30 June 2016 be set aside since the continued existence of that report would most likely form the basis of the Council’s action going

forward. Put otherwise, the question was whether the clock should be rewound to 30 June 2016 or 26 November 2015.

[18] The latest stance by the applicants necessitates a fairly detailed consideration of the relevant background facts and circumstances, notwithstanding the fact that the expulsion and suspension of the first and second applicants respectively from the Council are no longer in issue. In the process, for reasons which will become apparent as this judgment progresses, it is necessary to have regard to the substance of deliberations at the meetings of both 26 November 2015 and 30 June 2016. Central to the disharmony which exists between the parties is the role of Mr Williams at the University over the years and it is to that which I turn first. Mr Maqula's involvement is fairly peripheral to the piece.

MR WILLIAMS' INVOLVEMENT WITH UWC

[19] Mr Williams' involvement with UWC goes back a good number of years, although it is not clear from the papers precisely when it commenced. Be that as it may, in 2012 Mr Williams was the chair of the Council and Prof Brian O'Connell the Rector (or Vice Chancellor) of the University. It is common cause that "the 2 Brians" clearly did not get on well together: Prof O'Connell was unhappy with Mr Williams meddling in the day-to-day running of the University and accused him of abusing his position on the Council to micro-manage UWC. Mr Williams, clearly no shrinking violet whos is not afraid to state his position, did not take kindly to the criticism and attitude of the Rector, and openly criticized him. And so the stage was set for conflict between two leaders with competing agenda's.

[20] Various attempts were made at dispute resolution, including asking the Chancellor of UWC, Archbishop Thabo Makgoba, to intercede. His Grace agreed but soon came to the view that the relationship between the 2 men was characterised by a mutual breach of trust and irretrievable breakdown and his endeavours to achieve a truce came to nought. Matters eventually came to a head in September 2013 when Mr Williams was removed as the chair of the Council and replaced by Dr Patel. Mr Williams approached this court for redress and on 6 May 2014 Schippers J found that the removal of Mr Williams' as chair of the Council was unlawful and consequently invalid. The court restored him to that position forthwith. Although Mr Williams' attack on his removal as chair was multi-pronged, Schippers J held against the University on the basis of a limited procedural irregularity - that the motion to remove Mr Williams was not placed on the agenda of the meeting in accordance with the requisite procedure.

[21] The reinstatement of Mr Williams as the chair of the Council did not sit well with all of his erstwhile fellow council members and, importantly, did not address the fundamental problems which beset the matter. In the result, things quickly began to unravel again. Shortly after the reinstatement of Mr Williams, the University set up a so-called "Eminent Persons Panel" ("the Panel") to investigate the structural issues giving rise to what was manifestly a crisis at the University: the Panel was to adopt a "non-punitive" approach and make recommendations to the University as to the way forward. The panel comprised Emeritus Archbishop Njongonkulu Ndungane (the retired Anglican Archbishop of Cape Town), Adv Thabani Masuku, a senior member of the Cape Bar and Dr Vincent Mphahlele, a prominent and respected director of companies.

[22] The Panel went to great ends to fulfil its mandate, consulting with a broad spectrum of interested parties. It delivered a detailed report traversing all the relevant issues and embracing a number of recommendations, stressing in particular the importance of a sound relationship between the Council and its chair, and the University, its Convocation² and its management. While critical of the roles of both Prof O’Connell and Mr Williams, the Panel was at pains to point out that it did not making findings or pass judgement based upon the guilt of any of the parties. The structure of the Panel was such that it was unable to resolve any disputed issues and it made this clear in its report. And so, while Mr Williams’ continued involvement with the Council was one of the main focus areas of the Panel, it prefaced its report with the following cautionary remarks:

“A general point needs to be made at the outset. The Chair had (sic) not being confronted with these allegations, and he was also not offered the opportunity to respond to them. They may be relevant, but certainly not decisive, in assessing Mr William’s (sic) continued role on Council.”

[23] The papers before this court suggest that Mr Williams acquiesced in the findings of the Panel which concluded its detailed 17 point summary of recommendations with the following plea:

“What is required urgently at UWC is leadership that can focus on the welfare of the institution, give direction and take responsibility for all the

² The Convocation is a body established in terms of the University’s Internal Statute (“IS”) which consists of all alumni and all current members of academic staff, other than those on limited one year contracts: a constituency estimated to be of the order of 70 000 people.

short-comings and address those. Sadly, this has been lacking for sometimes (sic) as council allowed itself to be side-tracked by dubious and self-serving agendas.”

I say acquiesced, because there are passages in the papers before this court which suggest that in a meeting with the Council, Mr Williams, who was emotional and contrite, gave a solemn undertaking to his colleagues that he would address the substance of the issues raised by the Panel.

[24] During 2014 Mr Williams and Mr Maqula were elected by the Convocation to be its representatives on the Council. I should point out at this juncture that the Council is a statutory body established under section 27 of the Higher Education Act, 101 of 1997 (“the HEA”) and the IS is sourced in section 32 of that Act. The IS is intended to regulate the internal affairs and structure of the University and it contains, *inter alia*, provisions relating to the establishment of the Council. Chapter VII of the IS deals with the functions, composition, terms of office, meetings, responsibilities and the like of the Council. In terms of para 7.2.9 of the IS two persons elected by the Convocation in a separate process are required to serve on the Council. The applicants were duly elected to fill these positions and they point out that as such they represent the largest constituency at the University. The IS makes provision for other persons to serve on the Council representing various interests, including organized labour, the student body and business. The Minister of Higher Education may also appoint a maximum of 5 members of the Council

THE MEETING OF THE COUNCIL ON 26 NOVEMBER 2016

[25] As of October 2015, the chair of Council was Mr Mdwaba, the vice-chair Dr Patel, and the Rector Prof Tyrone Pretorius, Prof O'Connell having since retired. The applicants, as I have said, were ordinary members of Council representing the Convocation.

[26] Mr Williams says that by that time it had come to his attention that Mr Mdwaba had been the subject of two reported High Court judgments in Gauteng, both commercial matters, which he believed impacted directly on Mr Mdwaba's eligibility and suitability to serve on the Council.³ In the founding affidavit Mr Williams drew attention to the Msimang matter in particular because in that case the court found that Mr Mdwaba was a delinquent director of companies as contemplated in section 162(5)(c)(iv)(aa) of the Companies Act, 71 of 2008. Mr Williams accordingly requested that the continued position of Mr Mdwaba as chair of the Council be tabled as an agenda item for debate at the quarterly meeting to be held on 26 November 2015. Timeous notice having been given, the motion was placed at the end of the agenda for that day's business.

[27] Mr Maqula , for his part, had written to Mr Mdwaba in July 2015 expressing concern that an earlier matter regarding an enquiry into a tender dispute for the provision of security services at UWC (and allegedly implicating a certain Mr Manie Regal, a senior member of management) was being unduly delayed. The

³ The decisions are Multi-LinksTelecommunications Ltd v Africa Prepaid Services Nigeria Ltd; Telkom SA Soc Ltd and Another v Blue Label Telecoms Ltd and Others [2013] 4 All SA 346 (GNP) and Msimang NO and Another v Katiliiba and Others [2013] 1 All SA 580 (GSJ)

complaint was not dealt with; rather on 12 August 2015 Mr Mdwaba retaliated by accusing Mr Maqula of “*sinister motives*” and threatening him with discipline.

[28] When the Council meeting commenced on 26 November 2015, Mr Williams requested that the agenda item relating to Mr Mdwaba be brought forward, arguing that if the motion was upheld the latter could no longer chair the meeting. This did not happen but instead the meeting considered an item, which had been added to the agenda without the requisite notice⁴, entitled “*Unbecoming recent conduct of members of Council during the recent protest action on the UWC main campus... submitted for discussion, consideration and possible further action*”. Although the applicants were not mentioned by name in the agenda item it soon became clear during the meeting that it was targeted at them. The applicants claim now that this was an act of revenge for their respective personal attacks on the chair, the clear implication being that their suspensions flowing from the deliberations at that meeting were actuated by malice and/or taken for an ulterior purpose.

[29] In light of the fact that the consent to judgement by the University concedes that the decision to suspend at that meeting be set aside, it is not necessary to go into any great detail as to what transpired during the meeting. The transcript of the proceedings is a matter of record and it is clear therefrom that the applicants were not going to get a fair hearing at the meeting prior to their suspension and, further, that certain members of the council were hell-bent on taking action against the applicants. The SRC letter which was referred to earlier was placed before the meeting as was a video recording made on a cellphone of events at the “*Prayers*

⁴ Two days instead of the requisite ten.

for Peace” meeting. It was alleged that incitement of the students by, *inter alia*, the applicants was self-evident from the video clip. Indeed, the chair is recorded as having remarked as follows during the meeting with regard to the video –

“If that’s not incitement I will never know what incitement is.”

[30] Mr Williams points out that the video clip was shown to the meeting in silent form - that is without the benefit of any audio content. He claims that, while he and Mr Maqula may have gesticulated enthusiastically at the meeting, their message was at all times intended to promote peace. I should point out that, at the request of the court, the video clip was made available by UWC but counsel were informed that the Court would only view it at the request of either party, and then only in their presence. In the result, the video was never viewed by the court for, as counsel later agreed, the content thereof was indecipherable and inconclusive. It is common cause that the court would have been none the wiser by viewing or listening to the audio content of the clip.

[31] The record of proceedings at the meeting demonstrates that the chair was not alone in the quest to vilify the applicants. One of the Ministerial appointees on the Council⁵, Mr Onkgopotse “JJ” Thabane, joined in in condemning Williams in the following terms –

⁵ In terms of section 27(4)(c) of the HEA, the Minister of Higher Education must appoint not more than five persons to serve on the Council

“Conduct a church choir or to conduct a prayer... The fact that it was a [church] meeting instead of a meeting to incite people, doesn’t make a difference for Williams.”

[32] Yet, in the initial answering affidavit deposed to in these proceedings by the Rector, Prof Pretorius was at pains to point out that the suspensions at that meeting were based on a so-called “*conflict of interests*” which had arisen on the part of the applicants and not because they had been accused of incitement to violence. The alleged conflict of interest was not fully articulated in the answering affidavit, but in the heads of argument and before this court counsel for UWC relied on the provisions of sections 27(7)(d) and (e)(ii) of the HEA in support of this contention.⁶ It was suggested by Mr Duminy SC (admittedly without his customary vigour) that in calling for a special meeting of the Council the applicants had demonstrated a conflict of interest which sought to advance the interests of FMF. That argument probably requires interpretation of the provisions of the sections to be stretched somewhat but in fairness to counsel it should be observed that argument in relation to this point may have been curtailed since, when the matter stood down for Adv Duminy SC to take instructions, he was barely into his stride.

⁶ “S 27(7) A member of a council or any member of a committee of a council –

(d) may not place himself or herself under any financial or other obligation to any individual or organisation that might seek to influence the performance of any function of the council, and...

(ii) may not have a direct or indirect financial, personal or other interest in any matter to be discussed at a meeting and which entails or may entail a conflict or possible conflict of interest with the public higher education institution concerned;”

[33] In any event, just a couple of paragraphs further into the affidavit Prof Pretorius went to make the following claim, which seems to be at variance with the conflict of interest point -

“Moreover, Mr Williams’ words and gestures did not take place in a vacuum. He specifically addressed and, thereby gave credence to, a particular group of students who had caused significant damage to the property of the University and who were instrumental in shutting down the operations of the University and thwarting my attempts to reach a peaceful negotiation with the students. He was not encouraging students to the ‘FeesMustFall’ movement who were peaceful, but with a small destructive group of students who were threatening the interests of the University.”

In the absence of any reliable audio content on the video clip it is difficult to understand just how the Rector was able to depose to these facts unless he was prepared to accept the say-so of the SRC without more.

[34] In conceding that the decision of the Council to suspend the applicants at the November 2015 meeting fell to be set aside, Mr Duminy SC accepted that the provisions of PAJA⁷ were at play, and in particular that the decision constituted “*administrative action*” as defined in section 1 of that Act. Whether the University threw in the towel and consented to an order reviewing and setting aside the decision of that meeting on the basis of a failure to afford the applicants of fair hearing, ulterior

⁷ The Promotion of Administrative Justice Act, 3 of 2000.

purpose or motive, or because irrelevant considerations were taken into account or relevant considerations were not considered⁸, is neither here nor there for present purposes. What must be considered at this stage is whether the proceedings at that meeting were so fundamentally flawed (“contaminated” was the word preferred by Mr Freund SC), that they vitiated not only the suspension but the establishment of the *ad hoc* committee as well. I shall revert to this point later.

THE MEETING OF THE COUNCIL OF 30 JUNE 2016

[35] The court is in the fortunate position that it has a full transcript of the proceedings as they unfolded at the quarterly council meeting of 30 June 2016. I say fortunate because it is not often that a reviewing authority has before it the *ipsissima verba* of the proceedings which it is called upon to consider. All too often allegations of bias or ulterior purpose are made on the basis of minuted notes coupled with inferential reasoning on limited facts. In this matter the court is able to consider for itself exactly what took place. From an administrative law point of view the proceedings were a complete travesty of justice. As Mr Freund SC quite correctly said, if one wanted to provide a case study to students in the field of administrative law, one need go no further than considering the record in this matter. To be sure, the concessions handed up by Mr Duminy SC on behalf of the University in relation to the setting aside of the decisions taken at that meeting can only proceed from the premise that the meeting did not observe the basic tenets of just and fair administrative action protected under section 33 of the Constitution and, in particular,

⁸ See sec 6(2)(e) of PAJA

under the provisions of PAJA. I intend to highlight just a few of the more egregious aspects thereof. The reason therefor shall become apparent later.

[36] In the first place, neither the potential disqualification of Mr Williams from the Council or the further suspension of Mr Maqula was properly advertised in the agenda for the meeting. But even if there had been proper notice, it would have made little difference to the applicants because they were not present at the meeting to defend themselves having been unlawfully precluded from further attendance of such meetings in November 2015. To this extent, a manifestly unfair procedure was followed by the Council.

[37] The principle of *audi alteram partem* is one so entrenched in our law since time immemorial that little more need be said in that regard⁹. In Board of Education¹⁰ Lord Loreburn LC made the following trenchant observation –

“In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind... In such cases the Board... will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and listen fairly to both sides, for that is the duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think

⁹ See generally in this regard Baxter Administrative Law at 536 et seq

¹⁰ Board of Education v Rice [1911] AC 179 at 182, followed in, *inter alia*, Builders, Ltd v Union Government 1928 AD 46 at 59 - 60

best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.” (Emphasis added)

A motion which was highly prejudicial to the interests of the applicants was put, and taken, in their absence with no opportunity to controvert. Other than to observe that the notorious Star Chamber¹¹ disappeared from the English legal system in 1640 with the passing of the Habeas Corpus Act, little more need be said on this point.

[38] Then, one sees in the transcript of proceedings allegations of fact which are devoid of all truth. The charge in this regard was led by the chair with Mr Onkgopotse hot on his heels. So, with reference to the report of the Panel, Mr Mdwaba had the following to say in respect of Mr Williams:

“They found him guilty of everything. They found him guilty of every conceivable problem there was on the campus. And they also said, other than the fact that the other one [ie Prof O’Connell] is leaving, he must also leave, they also said they suggest we make sure that he exits... We then said, if he doesn’t apologise or whatever, he will be out.”

Nothing could be further from the truth: the report contains no such allegations. Indeed the authors of the report were at pains to point out that they were not able to

¹¹ [Wikipedia Online Encyclopaedia](#) sv “Star Chamber”: A special court set up in the 1500’s to try in the most arbitrary and secretive fashion, members of the upper class, as well socially and politically prominent people.

attribute culpability one way or the other for they were not a fact-finding body and they certainly did not call for Mr Williams' "exit".

[39] Seemingly seeking a further basis for its decision, a vague attempt was made to refer the Council to the report of the *ad hoc* committee. Here Mr Tabane, reflecting on past developments involving Mr Williams and UWC, had the following to say:

*".... I have been here for four or five years, but it will be a parable to a new member of Council (sic) would not even know what you are talking about. But it seems to me that the cancer continues, the cancer that although we spent months and months with the eminent people's group and the report and by the way in this Council, in last December we had to suspend two members because remember what happened when these two members were suspended, we were shown footage of people immobilizing (sic) students and so on. The matter still hangs over our heads and I'm not sure where it is going to be dealt with; I am **sure there is a report somewhere** but we are now on the second meeting of Council, next time we deal with it and if we don't deal with today then September. And that is part of the problem that we don't have a history of being decisive around [indistinct], we don't. I mean after the eminent people's report given (sic) to us, there was still six months between the time that we got the report and the time that we took action. We ignored that report and we tried to pepper (sic) over the cracks and so on right and I am saying that with all due respect to all of us, particularly those*

*who have been here for a long time; we don't have a history of being decisive to cut this cancer. And now it is coming to bite us with our CEO [Prof Pretorius] saying I can't take this; he is busy telling us in coded or uncoded form that we may wake up with a letter from him saying I quit [indistinct]. So, therefore, chair; I am suggesting the following, I am **assuming that there is a report somewhere that will tell us what has happened to the suspension of the two members....Based on that report**, I hope that we will make a decision, whatever it is that is in the report, that will take us forward.” (Emphasis added)*

[40] There were, however, some voices of reason at the meeting. Dr Patel, who had chaired the *ad hoc* committee, explained what their function was and cautioned against overhasty steps –

“So, basically, Chair, what we say then that (sic) there is enough evidence and we are now putting it to you that we are saying the University or Council has to take a decision, Chair, to institute a disciplinary procedure against the two Council members...

We did not have a DC... we had to find factual information whether it is necessary to have a disciplinary, so that is what we are presenting to you today: we are saying to you that there is enough evidence to have a disciplinary hearing... the next step is to appoint a person to contact a disciplinary hearing. I would propose in that case, Chair, we find... a Judge, a retired Judge to deal with the matter, so that it cannot be seen

as lice and rat infested at the end of the day and that should be done as in immediate (sic)."

The other members of the *ad hoc* committee, Ms X. Bam (who was present in the meeting) and Mr Lyndon Barends (who communicated his views to the chair by sms) supported the stance of Dr Patel.

[41] Prof Pretorius (who is referred to in the transcript as "VC") also expressed concern and urged caution:

"Chair, as tempting as Mr Tabane's proposal is, I think there is (sic) some real, real risks for the University because you expel someone that is guilty and the investigation has simply indicated that there is, there is (sic) grounds for a disciplinary; the investigation did not find him guilty. The investigation simply said there is (sic) grounds. You can only expel if indeed he is guilty of these things. So, there is a real risk that despite our good intentions of expelling that because of that procedural (sic), someone is presumed innocent until found guilty. And even if we can bet our lives on people being guilty, the reality is he hasn't been found guilty of anything and so procedurally there is a risk that we will have to sit with that for the foreseeable future. And so while it is tempting, I must say that the investigation report simply indicates that there are grounds for a disciplinary. The investigation report doesn't say that Mr Williams or Mr Maqula is (sic) guilty of anything."

[42] The Deputy Vice Chancellor, Prof. Vivienne Lawack, was similarly circumspect –

“I think we really definitely need to institute a DC as soon as possible and I know we are probably not going to get him out but one of the people I was thinking about is our retired Deputy Chief Justice, someone of that kind of standing in the legal community.... My understanding was not that the [ad hoc committee made]... any finding of guilt...”

She went on to caution about the risks in acting hastily and without a proper basis, particularly in light of the previous litigation in 2013/14 –

“My biggest worry is that if we do the technical thing, yes I hear it is only the legal thing, but what do we end up with? We also have the chance that he is reinstated. Look what happened last time, if I, unless I am reading the case wrong that it was purely on procedural grounds that it was found against the University and I think that really led to quite a bit of, especially for this Council, reputational damage. So, I would just caution that we don’t fall into the trap of the previous time that we lose this one in court on procedural grounds.”

[43] After the chair himself had expressed limited reservations about taking immediate action, Mr Tabane took over again, cynically preferring the expedient rather than the procedurally fair route –

“(H)e must receive a letter from us saying you are now expelled based on that report, you must go and challenge that in court but you will be out of the University, you are not allowed to come here, you are expelled from all structures of the University. You are either serious to cut the cancer or you are not. You keep him here [indistinct] he comes here, he says I need access to people, I must bring witnesses; you are giving him another chance to [indistinct] because you cannot say to him... [interrupted]...

Now, I am saying and I may be wrong, as I am not a sangoma, but come June next year we will still be dealing with the Williams matter, if not even later, right. In that period, you are giving somebody, who you don't want interfering with anybody on campus, the right, because you are trying to follow procedure and be fair, isn't it, so it means that [indistinct] I want to subpoena the eminent (sic); he is going to say that, I want to talk to students, talk to people who were there at that place, I will call witnesses and in order to do that, he can't do that sitting outside campus and each time coming here having to ask the Rector because he is going to say no that is prejudicial because I mean the Rector would know who he wants to meet, so I'm just telling you the scenario that is backed by how this fellow has behaved over the years, alright. So when you actually say DC, please be clear that you are then saying that the person has a right to prepare for the DC and have people representing him and so on and so on, a process that may drag out [indistinct]. When you expel him, he won't mess around like he messed your committee

over six months; he must go to court, you understand? And we are at this point, he must go to court and ventilate this thing in court, right, so that then the court can convene us all to come and [indistinct] then submit that report, you say forget about the case, the second case, we are just expelling on the basis of this eminent person's report, so they can go and spend money to go to court and do that, so that we can create an atmosphere where we say to him because you are expelled, you are not allowed to be on the premises of the University, full stop; he must go and fight in court...."

[44] After Dr Patel had reminded the Council that the previous litigation had cost the University more than a million Rand only for the Council to be reminded by Schippers J that the courts certainly consider procedural fairness, and again urged his colleagues not to be hasty but to "*rather do it properly*", the chair gratuitously offered his misguided understanding of some of the legal concepts being bandied about by those around the table:

"When you work on prima facie and you talk about ratio decidendi , you complicate it because the prima facie case is for a court of law, okay we are not working on (sic) a court of law test here. The test is according to our eminent person's (sic); it had nothing to do with this higher level of the court, right and at that stage we were ready to accept it as an expulsion, okay."

[45] The chair then upped the ante and pushed for an end to the debate effectively overruling the reasoned response of the Rector, suggesting that the latter

should let the Council make its decision and “*sit this one out ...so that he is not [later] blamed for the decision of Council.*” Having described the first applicant in the nastiest of terms he formulated his position thus:

“The issue for me is this, is as simple as this; the cancer that we have been referring to... equals Brian Williams, equals his protégé as Maqula who in complete disregard of the suspension have come into our environment, become a president of convocation whose territory belongs to Council, summons our people, our academics to come to them to talk to them about why they are going to look into this [Institutional] Statute that we are trying to change and whatever, whatever it is....

...Council must make its decision and Council, as risky as it might be, because this is the difference is (sic) that other people are very conventional in the way they deal with things and that is why we are sitting where we are sitting now, because unconventionally we have always chosen to go the safer route and what have you. Last time, this is not the same, I keep reminding people; it is not the same as last time, last time there was no eminent report, there was no report from eminent persons. Last time we never sat with him and got him to acknowledge that he has done wrong and therefore must apologise and desist from continuing to do wrong. Last time he did not continue to do things with students and burn our University where he was now suspended on the basis of what was happening on our campus, our resources being

looted and he was not at the time agreeing with us and said we are lice infested whatever, whatever it is. Now, for me this is very different from the last time and we followed process. How did we follow process? We laid charges, we said investigate, we called him, he refused to come, he refused to come to a council appointed body in complete disregard of what we may think and feel and want to do as this University. So he has no regard for the authority of this University. In my view therefore, I back up the JJ motion that has been backed up, so if somebody has another motion, let's hear the motion and then let's talk about it and vote on it if we want to do; me, I am happy to get to that point now to say let's vote on the motion."

After some further discussion the matter was put to the vote through a show of hands: 11 members of the Council voted in favour of the motion and there were 4 abstentions while nobody voted against the motion. The transcript does not, however, reflect the identity of those who voted, or how they voted.

[46] I am of the view that these extracts from the record demonstrate just how badly the Council got it wrong. From the outset members of the Council were actuated by bias towards the applicants, in particular Mr Williams, who was repeatedly referred to as a "cancer". Then there is the fact that the motion was debated on a false premise, namely, that the report of the Eminent Person's Panel had made findings of fact regarding Williams' earlier conduct and that this served as a basis for his later disqualification, without more. Finally, there is the obdurate refusal on the part of the majority of the members of the Council to adhere to the advice of Dr Patel

that the *ad hoc* committee's report was no more than a confirmation that a *prima facie* case had been found to exist for the institution of disciplinary action and that it did not serve as a basis for disciplinary action.

THE RELIEF NOT CONCEDED BY THE UNIVERSITY

[47] Mr Duminy SC argued that the order consented to by UWC was adequate to protect the interests of the applicants. He observed that the report of the *ad hoc* committee was a matter of "*cosmic reality*" that could not be wished away and that nothing could legally be done to set it aside. Mr Freund SC, on the other hand, questioned the University's *bona fides* in agreeing to only part of the relief claimed, calling it "*an exceedingly cynical consent*". He went on to point out that if there were to be future steps taken by the Council against the applicants the court had to do its best to ensure that these proceeded from a lawful basis. If the report was allowed to stand, said counsel, it was likely to form the basis for fresh disciplinary steps and this would place the applicants at a disadvantage from the outset. He went on to argue that if, however, the report was set aside, the Council, if so advised, could take steps to set up a fresh investigative tribunal comprised of different members who would commence their task afresh, unhindered by any preconceived ideas.

[48] The extracts from the meeting of 30 June 2016 which I have cited above clearly establish that there is great hostility towards the applicants and Mr Williams in particular, on the part of a good number of the members of the Council. As a matter of fact we do not know who the four persons were who abstained from supporting the motion, nor do we know who voted in favour thereof. There is no doubting the hostile sentiments towards the applicants of Mr Mdwaba, Mr Thabane, Ms Akhona Landu

(the SRC representative) and Mr Bahu Sogayise. It would appear also that the two members of the *ad hoc* committee also present at the meeting (Dr Patel and Ms Bam) were fundamentally indisposed towards the applicants. Ms Bam referred obliquely to “*these side evils, for lack of a better word, which are really trying to be destructive*” while Dr Patel used particularly strong language with reference to Mr Williams:

“... There is a violation of Section 27 of the Higher Education Act, there is a disregard of Council and when the Rector speaks of (sic) sustained attack on the executive, I want you to replace that; it is a sustained attack on the University. Because the Rector and his immediate, what do you call it, executive, is appointed by this University Council and therefore any attack on our Rector and any attack on the executive is an attack on the University. In other (sic) country, this would be seen as treason but we are in South Africa.”

[49] The provisions of section 27 (7D) of the HEA permit the suspension from the attendance of a single meeting or the permanent disqualification of a member of the Council if such member has contravened, *inter alia*, subsections (7)(c), (d) or (e), and then only “*after Council has followed a due process*”. Mr Duminy SC suggested that the consent to an order to set aside the decision of the meeting of 26 November 2015 to suspend the applicants was based on the procedural unfairness which took place at that meeting. However, he said that such illegality was to be distinguished from the decision to appoint an *ad hoc* committee which was not tainted by any procedural unfairness.

[50] Mr Freund SC, on the other hand, pointed to a number of passages in the transcript of the proceedings of that meeting where the suspension of the

councillors and the establishment of the *ad hoc* committee were taken as one step by the Council. *Inter alia* :

- There were two motions put to the meeting:

“Motion 1: Suspend the two Council members pending an investigation. Establish an ad hoc committee (consisting of three members) to investigate the matter, and to make recommendations to Council....

Motion 2: Rejection of Motion 1....”

- The chair characterised the motion as follows:

“The motion on the table was JJ’s motion for suspension pending an investigation.”

[51] In my view the decision in question is incapable of severability, just as the decisions in Lewis Stores¹² and Woods¹³ were held to be. In this case the Council, in its unified quest to get rid of Mr Williams in particular, would never have considered the one without the other. It follows therefore that the establishment of the *ad hoc* committee is similarly tainted by the procedural irregularities which accompanied its conception. And, its report, as the abortive product of a body without standing is of no force and effect.

¹² Lewis Stores Ltd v Greytown Town Council and Others 1964(1) SA 90 (N) at 99 A-C.

¹³ Woods v East London Municipality and Others 1974(4) SA 541 (E) at 550 B

[52] But if I am wrong on this score, there is an equally valid reason to consider the work of the *ad hoc* committee tainted by irregularity. As I have demonstrated with reference to the meeting of 30 June 2016, Mr Williams had long been a source of great irritation within the Council; so much so that he was derisively referred to as a “*cancer*” by a number of his colleagues. Based on what I have read in the transcript, I must express serious reservations about the ability of any of his fellow Council members to objectively gather and evaluate evidence against Mr Williams or to sit in judgment over him. These tasks should have been entrusted to an outside agency or individual in light of the intense, interpersonal dynamics at play here. The University is represented in this case by competent and experienced lawyers and I have little doubt that had they been consulted as the Council was urged by some of its members to do, legal advice would have cautioned strongly against the intended route.

[53] These findings in regard to the tainted appointment of the *ad hoc* committee and its still-born report render it unnecessary to deal with Mr Freund SC’s final argument that the facts before the Council in November 2015 could never have justified the alleged conflict of interest under subsections 27(7)(d) or (e). That enquiry, as interesting as it may be, must be held in abeyance for another day when a duly constituted body investigating the facts of this matter may wish to consider it.

CONCLUDING REMARKS

[54] In conclusion, I must record that more than twenty years into the constitutional State it is deeply troubling to read of the blatant disregard on the part of the majority of members of the Council for the rule of law. Chief amongst these are the chair and Mr Tabane, who chose to ignore the findings of Schippers J in regard to the Council's earlier wrongful conduct. They are certainly not alone, but they were the most vocal and they seem to have lost sight of the fact that our country is a constitutional democracy where the rule of law prevails. The courts are the final arbiters in matters such as these given that the right to fair administrative action, guaranteed by section 33 of the Constitution, has been entrenched through the provisions of PAJA. Section 3 thereof details the criteria to be considered by a court in adjudicating whether there has been procedurally fair administrative action in any given case or not.

[55] Since section 27(7D) of the HEA does not define "*due process*" in relation to the suspension and disqualification of members of the Council, it is axiomatic that a body such as the Council must, firstly, treat its members with dignity and respect affording them the rights which each member would be entitled to demand individually and in so doing be guided by the ambit of section 3 of PAJA. The concept "*due process*" when referring to decisions involving administrative action under PAJA is flexible and will vary from case to case¹⁴, but it is never without content

¹⁴ President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000(1) SA 1 (CC) at [219]

and it will at all times embody the basic tenets of the Constitution.

[56] In Janse van Rensburg¹⁵ Goldstone J remarked that –

“In modern States it has become more and more common to grant far-reaching powers to administrative functionaries. The safeguards provided by the rules of procedural fairness are thus all the more important... Observance of the rules of procedural fairness ensures that an administrative functionary has an open mind and a complete picture of the facts and circumstances within which the administrative action is to be taken. In that way the functionary is more likely to apply his or her mind to the matter in a fair and regular manner.”

[57] And in De Lange¹⁶ Mokgoro J made the following trenchant observations:

“Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because, in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance.”

¹⁵ Janse van Rensburg NO v Minister of Trade and Industry NO 2001 (1) SA 29 (CC) at [24]

¹⁶ De Lange v Smuts NO 1998 (3) SA 785 (CC) at [131]

[58] The Council is the highest decision-making and governing body of the academy, a revered institution where the search for truth is predicated on integrity, mutual respect for the views of others, the right to challenge such views, and ultimately fairness. I am left with the abiding impression that in this instance the Council fell woefully short in its obligation to uphold those ideals. I agree with the argument by Mr Freund SC that in this matter the deliberations involving the applicants were flawed from start to finish. It follows in my view that the applicants are entitled to the full extent of the relief sought and not the attenuated version belatedly put up by the University.

[59] Finally, I would be failing in my duty to the University and its funders if I did not express my concerns about the ability of Mr. Mdwaba to properly discharge the important office of chairperson of the Council. A position such as that requires leadership and equanimity. A chairperson is meant to keep the Council in check and endeavor to accommodate all views, disparate as they may be. The chair does not lead the charge to demonise and damnify members of the Council with which he does not agree.

[60] In Msimang Kathree-Setiloane J found in November 2012 that as a director of a large Black empowerment company with significant interests in the public sector, Mr Mdwaba had conducted himself with reckless disregard of his duties as a director of the company in question and that such conduct amounted to gross negligence and willful misconduct. With reference to the import of section 162, Her Ladyship said the following:

“This provision is directed at protecting companies and corporate stakeholders against company directors, who have proven themselves to be unable to manage the business of the company or have failed in, or are in neglect of, their duties as directors of a company. There is no equivalent in the old Companies Act [of 1973].”

[61] Mr Mdwaba is accordingly disqualified from assuming stewardship over any company under the Companies Act 71 of 2008 for a period of at least 7 years, possibly longer depending on the circumstances. When recently challenged in that regard by the applicants in the founding papers, Mr Mdwaba opportunistically claimed that the Msimang matter was subject to appeal. But, upon enquiry to the attorneys who acted against Mr Mdwaba in that matter, the applicants’ attorneys found that this was not true: no appeal has ever been noted and four years have passed since the judgment was delivered.

[62] It is not clear from these papers just when Mr Mdwaba was appointed to the Council, but it must have been after November 2012 given that Dr Patel succeeded Mr Williams in 2013 and Mr Mdwaba was only appointed thereafter. In observance of good corporate governance, Mr Mdwaba was duty bound to disclose the findings of the High Court against him to the Council if he was of the view that he was nevertheless a suitable person to serve on the Council. It is axiomatic that a legal impediment to someone’s right to serve on the board of a company due to corporate delinquency must raise serious questions about that person’s ability to serve in a position of governance on a statutory body which controls vast sums of public and donor finance.

[63] As to his suitability to serve on the Council, the court is not called upon in these proceedings to make a finding in that regard for it is not an issue before the court and, importantly, Mr Mdwaba has not been heard. Nevertheless, Mr Mdwaba's utterances during meetings of the Council form part of the record before this court and have not been placed in issue: an investigation is therefore warranted. In light of the decisions of the Council in this matter, UWC will once again incur significant legal costs at a time when the public purse is stretched and the clamour for a reduction in the cost of higher education is at its loudest. These legal costs would have been avoided if the chair had conducted himself in accordance with the most basic principles of good governance, taken counsel from others who acted with due diligence and enforced observance of a fair procedure. In the circumstances, it is a matter of urgent importance that consideration be given by the relevant authorities as to Mr Mdwaba's suitability to further serve on the Council.

[64] Similar concerns apply to Mr Tabane, who, although not disqualified under the Companies Act, is a long serving member of the Council who has likewise demonstrated through his utterances that he too lacks the requisite skills which the demands of membership of the Council require. His opportunism has caused the University financial and reputational embarrassment and an enquiry as to his fitness to hold office is justified. The attorneys for the applicants are accordingly requested to bring the contents of this judgment to the attention of the Minister of Higher Education for consideration of the appropriate steps to be taken against these and other members of the Council.

ORDER OF COURT :

1. The applicant's failure to abide by the Rules of Court pertaining to the time periods, as well as the filing and service of documents, is condoned, and this application is dealt with as a matter of urgency in accordance with Uniform Rule 6 (12).
2. It is declared that the following decisions pertaining to the applicants taken by the second respondent, and any decisions, steps or measures consequent upon the aforementioned decisions, are invalid and are reviewed and set aside:
 - 2.1. Of 26 November 2015 to suspend the applicants as members of the second respondent, and to appoint a disciplinary committee to investigate certain allegations against them tabled at that meeting;
 - 2.2 Of 30 June 2016 to expel the first applicant, and to suspend the second applicant, as members of the second respondent.
3. The applicants are restored as full members of second respondent and its committees, shall not be barred from participation therein, and shall receive documents and notices pertinent to its business.

4. The respondents shall pay the costs of this application, jointly and severally, the one paying, the other to be absolved, such costs to include the costs of two counsel where employed.

GAMBLE J