



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

CASE NUMBER.: EL743/2023

In the matter between:

MVELO ABENTA

Applicant

And

WALTER SISULU UNIVERSITY

Respondent

JUDGMENT

Beshe J

[1] During April 2023, the applicant approached this court on an urgent basis seeking an order in the following terms:

1. Dispensing with the forms and the service provided for uniform rules of the court and directing that, this application be heard on urgent basis in terms of Rule 6 (12) (a).

2. That the rule *nisi* issue with immediate effect calling upon the first respondent to show cause on **25 April 2023 at 09h30** why the following orders should not be granted.

2.1 Reviewing and setting aside the Respondent's failure to apply its own rules correctly when deciding to initiate disciplinary proceedings against the Applicant.

2.2 Reviewing and setting aside Respondent's dismissal of Applicant's application to the appeal tribunal that the Respondent incorrectly applied its own rules when instituting disciplinary proceedings against the Applicant.

2.3 Reviewing and setting aside the respondent's internal appeal structure's decision that the previous Walter Sisulu University Student Disciplinary Code of Conduct Policy is not applicable.

2.4 Reviewing and setting aside the Respondent's decision to refuse to consider postponing the disciplinary proceedings pending the outcome of the criminal case investigation that had been opened at a South African Police Service (SAPS) station.

2.5 Further, reviewing and setting aside the decision by internal appeal body of the Respondent of failing to overturn the decision to refuse to postpone the disciplinary hearing pending the outcome of the criminal investigation opened by the SAPS.

2.6 Reviewing and setting aside the decision not to exercise the discretion to advise the Applicant right to external legal representation.

2.7 Reviewing and setting aside the standard of proof that the disciplinary tribunal applied when deciding to expel the Applicant on allegations of a very serious criminal offence.

2.8 Reviewing and setting aside the decision by the internal appeal body of confirming the standard of proof applied by the disciplinary tribunal.

2.9 Reviewing and setting aside the decision to expel the Applicant.

2.10 Additionally, reviewing and setting aside the decision supporting the expulsion of the Applicant.

2.11 Declaring invalid, reviewing and setting aside the decision to deregister the Applicant.

2.12 Reviewing and setting aside the decision by the disciplinary tribunal and the appeal tribunal of failing to allow Applicant right to external legal representation.

3. That paragraphs numbered: 2.1; 2.2; 2.3; 2.4; 2.5; 2.6; 2.7; 2.8; 2.9; 2.10; 2.11 shall operate as interim order pending the finalization of this application.

4. That the Applicant resume all academic activities at the University of Walter Sisulu University including access to campus, campus residence and student allowance with immediate effect pending the conclusion of this application.

5. Costs of this application.

6. Alternative relief as the above Honourable Court may deem fit.

Having heard applicant's legal representative (Mr Mageleni) on 13 April 2023 Norman J issued a rule in terms of the notice of motion. The rule was returnable on the 25 April 2023. When the matter served before me on the extended return date, there was no appearance by and/or on behalf of the applicant. No heads of argument had been filed by the applicant either. The matter had previously been on the court roll on the 9 May 2023.

[2] At the commencement of the proceedings, counsel for the respondent intimated to court that applicant's attorney addressed an email to them on 27 August 2023 requesting that they consent to a postponement of the matter. Stating that he was busy with arrangements for his mother's funeral. This was approximately three days before the date of hearing of the application. He was advised that the respondent was not amenable to consenting to a postponement of the matter and would like the matter to proceed. No substantive application has been filed by the applicant. Respondent maintained its stance as communicated to applicant's legal representative, that they were ready to argue the matter having also filed their heads without sight of applicant's heads. I have already pointed out that none have been filed to date. I made a ruling that the matter should proceed in the absence of a substantive application for a postponement. Given also the fact that the applicant had done very little to ensure that the matter was ready to proceed. The applicant had sought and obtained a rule nisi on an ex parte basis. There was a lengthy period between the previous postponement and the date when the matter served in front of me. The file was last updated in April. It is not properly indexed and paginated. No heads of argument have been filed by the applicant which should have been the case at least 15 court days before the

hearing of the application.¹ The respondent filed its heads as well as its practice note timeously.

[3] The applicant is described as an adult male student who was previously registered with Walter Sisulu University (WSU) and as being in his final year of study towards a Diploma in Analytical Chemistry at the University's satellite campus in East London.

[4] As the appellation shows, respondent is the Walter Sisulu University.

[5] The main issue is whether the applicant has made out a case for the judicial review of the respondent's impugned decisions and therefore entitled to the confirmation of the rule nisi.

[6] It is not clear whether the review is sought under the common law or under the Promotion of Administrative Justice Act (PAJA).² So too are the grounds upon which the decisions are sought to be reviewed. As it appears from the notice of motion, applicant seeks the setting aside of inter alia, respondent's failure to apply its own rules correctly. He also seeks the setting aside of the appeal body's confirmation of the standard of proof applied by the disciplinary tribunal. Be that as it may, I will be alive to the principle that courts have the power to scrutinize administrative decisions that adversely affect the rights of others or legitimate expectations of any person to see if such a decision is procedurally fair.

[7] Urgency does not seem to be in issue. The matter was in my view urgent.

[8] The genesis of the dispute stems from disciplinary proceedings that were initiated by the respondent against the applicant. It being alleged that the applicant

¹ Rule 8(e) of the Joint Rules of Practice of this Court.

² Act 3 of 2000.

breached the Respondent's Student Disciplinary Code of Conduct by allegedly raping a fellow student.

[9] At the conclusion of the proceedings on 11 February 2022, the Presiding Officer rendered his finding and found the applicant guilty as charged. On the 22 May 2022 the Presiding Officer imposed the following sanction:

‘Article 11 sub article 11.6

Expulsion from the University in which event the respondent shall not be readmitted to the University, except as provided for in article 17 sub-article 17.1 of the WSU Student Disciplinary Code of Conduct Policy.

The respondent has a right to appeal the sanction through the Student Disciplinary Appeal Committee in terms of Article 13.’

[10] The applicant availed himself of this avenue by lodging an appeal against the decision of the Presiding Officer as well as the sanction imposed. He filed a notice of appeal on 2 March 2023. The said appeal was dismissed.

[11] The difficulty in these proceedings is that I do not have the record of proceedings sought to be reviewed and set aside.

[12] In terms of Rule 53(b) of the Uniform Rules of this court, a party seeking the review of a decision or proceedings of court, tribunal, or board etc, is required to call upon the Chairperson or Presiding Officer as the case may be, to show cause why the proceedings or decision concerned should not be reviewed and set aside. In addition, thereto, the party seeking a review shall call upon the Chairperson/Presiding Officer to dispatch, within 15 days of receipt of the notice of motion, to the Registrar, the record of proceedings sought to be reviewed.

[13] No such request was made to the Presiding Officer of the Disciplinary Hearing and or the Appellate Body. I have not been furnished with any reasons

why this was not done. All that I have are the findings and conclusions of the Presiding Officers in both Disciplinary Hearings and the Appeal proceedings.

[14] It is so that the subrule is designed for the benefit of the applicant and that it is up to him to waive the requirements of the subrule. But the record also enables the court to fully assess the lawfulness or otherwise of the decision-making process.

[15] The applicant did however provide the following:

Two documents containing the University's Disciplinary Code of Conduct Policy.

The findings of the Presiding Officer's. (Both in respect of Disciplinary Hearing and the Appeal.)

The Presiding Officers' findings are very comprehensive and paint a clear picture of what occurred during the hearings. In that way, in my view, they compensate for the lack of a record.

[16] Coming to applicant's ground for review as can be gleaned from his papers: It is common cause that the applicant was charged with acts of misconduct, it being alleged that he contravened articles 3.1, 3.7, 3.8 and 3.43 of the WSU Disciplinary Code of Conduct Policy. These acts were in connection with an allegation that the applicant wrongfully, intentionally and unlawfully had sexual intercourse with a certain Ms Ndlovu without her consent. It is also common cause, it would seem that Ms Ndlovu was a fellow student at WSU.

[17] Applicant complains that he only learnt of the charges on the day of the hearing. Respondent contends that applicant signed for the charge sheet on the 11 November 2021. The first day of the disciplinary hearing was 18 November 2021. Annexed to applicant's papers as annexure MA7 is a notice to attend a

disciplinary hearing that is addressed to him.³ He confirms that he received it on 11 December 2021. He also annexed a document entitled Disciplinary Charges as Annexure 6. According to the respondent, the document containing the charges was attached to the notice to attend disciplinary hearing. Respondent also makes the point that to show that it is not accurate to say he learnt of the charges on the first day of the hearing, applicant did not raise this issue on the first day of the hearing.

[18] I am of the view that there is no merit to this complaint.

[19] Failure by the respondent to initiate a preliminary investigation: Article 7 of the Code outlines the procedure to be followed in the case of a complaint of misconduct coming to light. Article 7.2 provides for a preliminary investigation for which the Registrar will appoint a person to conduct one or conduct one himself or/herself. No preliminary investigation was conducted in this matter.

[20] The respondent asserts that there was no need to do so. Article 7.1 provides that:

‘7.1 NOTIFICATION OF MISCONDUCT

A student will not be formally charged with misconduct until a written and signed statement containing an accusation, complaint or allegation made against the student has been submitted to the Registrar or a person authorised by him/her to receive such complaint, provided that nothing contained herein will prevent the Registrar from laying a complaint of misconduct against a student.’

This sub article in my view disposes of applicant’s complaint in this regard.

[21] Failure to exercise a discretion in favour of requiring proof beyond doubt by the Presiding Officer instead of proof on a balance of probabilities in view of

³ At the bottom of the document is a subheading: Return of Service.

the seriousness of the charges. This is dealt with under Article 6.6 where it is provided that “A finding of guilt will only be returned if:

‘6.6.1.1 the misconduct charged has, in the opinion of the committee, been proved **on a balance of probabilities.**’

[22] Failure to avail the applicant an opportunity to be represented by an external legal representative. I presume a practising attorney or advocate. No such request was made as far as I can glean from the Presiding Officers’ findings. Besides, Article 8.3(ii) of the Code makes it plain that a student may personally conduct his defence but may not be legally represented by a lawyer/attorney who is not a student. So too, this complaint seem to be bereft of merit. Be that as it may, Section 3 (3) (a) of PAJA states that: “(3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to—

(a) obtain assistance and, in serious or complex cases, legal representation.”

This may have been such case where the Presiding Officer could have exercised his discretion in favour of giving the applicant an opportunity to obtain the assistance of a legal representative.

[23] Respondent’s refusal to consider a postponement pending the outcome of criminal investigation.

[24] Nowhere, as can be gleaned from the Presiding Officer’s findings, does it appear as though applicant applied for postponement pending the criminal investigation of the matter. What does loom large however is that applicant through his representative, in refusing to open their case, made it clear that this would prejudice him in respect of the criminal case. It is apposite to quote from the Presiding Officer’s finding in this regard who records that:

‘61. On 12 April 2022, the matter resumed with all the parties present including the representative of the respondent. Both parties indicated that they were ready to proceed.

62. The representative of the respondent indicated that they were electing not to open their case. put differently they were not going to call the respondent nor any other witness come and ventilate their version in rebuttal of the complainants version. Stating that, that is because a criminal case has been reported to the police and is pending against the respondent.

63. The representative stated further that giving evidence before this tribunal will have a negative effect on the respondents person when he has to testify before a court of law and in closing he stated that, as such the respondent took a conscious decision to exercise his right to remain silent before this tribunal.

64. As the chairperson presiding, of course vested with the power to advise particularly those who are not well versed with the legalities pertaining to complexities of law and potential prejudice in the exercise of any right. I took time and advised the respondent and his representative and further urged them to consult further on the exercise of this right, pointing out the potential prejudice that might culminate when findings are made at the end of the matter, which on their own, if findings are against the respondent, would have far negative effect on his part owing to failure to ventilate his case even though accorded an opportunity to do so.

65. Advising further that, the tribunal will be left with no other option but to consider the case on the basis of the version of the evidence tendered on behalf of the complainant. Further that the indication on their part was to ventilate their case, in that, they cross examined witnesses of the complainant and as such giving an impression that they were going to present their case and disclose their defence., which in my view did not even manifest itself during the cross examination of any of the complainant’s witnesses.

66. Despite my advice, the respondent continued and confirmed on record that the submissions made by his representative were an execution of his instructions to him.

67. I provisionally adjourned the proceedings for about 30 minutes stating that I was giving the respondent and his representative enough to consult on their intended course of action.

68. On resumption after the lapse of a 30 minutes indulgence. The representative of the respondent placed it on record that they were still maintaining their earlier position., that, they

were not going to open their case and as such they were closing their case. The respondent confirmed the said instructions as he did before the adjournment. That then meant that, the respondent's case is closed.

At this stage both parties indicated that they were ready to deliver their closing arguments in the matter, however they just needed a 30 minutes indulgence in order to thoroughly prepare and same was granted. On resumption, the parties delivered their closing arguments which I capture hereunder starting with the complainants closing arguments followed by those of the respondent.'

[25] In my view, the concern raised by the applicant was valid. The Presiding Officer should have heeded it rather than be concerned only with applicant's stance not to testify in his defence, based on a valid concern in my view. In this way, the applicant was deprived of a reasonable opportunity to present his defence. The decision to proceed with the hearing amid applicant's revelation that a criminal charge had been laid against him and how testifying during the disciplinary hearing might prejudice him at a later stage, was in my view unjust and falls to be reviewed and set aside.

[26] In the circumstances, I am of the view that the applicant has made out a case for review in terms of Section 3 (1) and 3 (3) (b) of PAJA. Namely, that the Presiding Officer failed to give the applicant an opportunity to present his case and dispute information placed before the tribunal on behalf of the complainant. Applicant made it clear that the only reason he did not want to testify was his apprehension that this might be prejudicial to him in the criminal case in view of the fact that criminal charges had been laid against him. Nothing stopped the Presiding Officer from referring the matter back to the Registrar to consider the summary procedure outlined under Article 5 of the Code and holding the proceedings in abeyance. Article 5 provides that:

'5.1 Where a charge of having committed an offence as defined in these Rules is pending against a student or when in the opinion of the Registrar such a charge ought to be instituted

against a student or when a student has been charged with a serious crime, as listed in Schedule 1 of the Criminal Procedure Act 51 of 1977, (as amended) in a court of law, the Registrar may order that, until the final disposition of the charge, the student shall:

- i. Cease attending lectures or tutorials.
- ii. Cease participating in such other activities of the University.
- iii. Not enter the premises of the University.
- iv. Not bring any motor vehicle onto the grounds of the University.
- v. Cease to reside in any University residence (including privately owned residences).
- vi. Cease to hold any leadership position in any university recognised structures.

5.2 The Registrar shall not make any order in terms of Article 5.1 above unless:

- i. The student has been allowed to appear before the Registrar to show cause why the order should not be made and;
- ii. The Campus Rector considers it to be in the interest of the student community or employees or the University to make the order.’

The impact of applicant not testifying in his defence for the reason stated is that the Presiding Officer took a decision without considering his side of the story. Based only on the evidence tendered in support of the complaint or charges that were the subject of Disciplinary proceedings.

[27] It stands to reason that the finding of guilt with the resultant sanction falls to be set aside by reason of being procedurally unfair.

[28] Accordingly, the following paragraphs of the rule nisi issued on the 13 April 2023 are hereby confirmed:

1. Dispensing with the forms and the service provided for uniform rules of the court and directing that, this application be heard on urgent basis in terms of Rule 6 (12) (a).
2. Reviewing and setting aside the respondent’s decision to refuse to consider postponing the disciplinary proceedings pending the outcome of the criminal case

investigation that had been opened at a South African Police Service (SAPS) station.

3. Reviewing and setting aside the decision by internal appeal body of the respondent of failing to overturn the decision to refuse to postpone the disciplinary hearing pending the outcome of the criminal investigation opened by the SAPS.

4. Reviewing and setting aside the decision to expel the applicant.

5. Costs of the application.

N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant	:	No Appearance
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Date Heard : 31 August 2023

Date Reserved : 31 August 2023

Date Delivered : 8 February 2024