

**IN THE HIGH COURT OF SOUTH AFRICA
{EASTERN CAPE LOCAL DIVISION, MTHATHA}**

Case No. 3621/2019

In the matter between:

ZANDISE MBUTHUMA

First Applicant

ZUKOLWETHU MBHOZA

Second Applicant

And

WALTER SISULU UNIVERSITY

First Respondent

THE VICE CHANCELLOR – WALTER SISULU
UNIVERSITY

Second Respondent

THE DIRECTOR OF STUDENT AFFAIRS

Third Respondent

DR PS JACA – THE ACTING CAMPUS RECTOR
MTHATHA CAMPUS, WALTER SISULU
UNIVERSITY

Fourth Applicant

JUDGMENT

TONI AJ

Introduction

[1] The relief sought by the applicants in this application is four-fold. In the main the applicants seek an order setting aside the decision of the first respondent, (“the University”) penned by the fourth respondent on 24 September 2019, suspending

them from attending their academic activities on the basis that same is unlawful, unconstitutional and a nullity. Both applicants are registered third year students of the first respondent and are student activists who have been elected as President and Deputy President, respectively, under the aegis of the African National Congress Youth League (“ANCYL”).

[2] The applicants also seek that their suspension as students of the first respondent be uplifted so that they could be allowed to attend their academic activities pending the final determination of this application and that the first respondent and / or anyone acting in concert with it be interdicted from instituting any disciplinary hearing against them as a sequel to the events emanating from the festival and / or event which was hosted at the Auditorium hall of the Nelson Mandela Drive campus of the first respondent. An order for costs is also sought on a punitive attorney / client scale.

[3] The whole conundrum emanates from an event allegedly held without permission on 21 September 2019 in which the applicants are alleged to have facilitated the slaughtering of a cow within the first respondent’s campus. The applicants are also alleged to have broken into the Auditorium without permission and in breach of the University rules.

[4] The application is opposed by the respondents and the fourth respondent has deposed to an affidavit in pursuit thereof. The opposition pivots on an allegation that the application falls foul of rule 53 of the Uniform Rules of court and the provisions of sections 6 and 7 of Promotion of Administrative Justice Act (“PAJA”) and is, therefore, incompetent. In support thereof the respondents contend that the applicants have not shown such exceptional circumstances within the meaning and contemplation of section 8 (c) (ii) of PAJA as to allow the court to substitute its decision for that of the first respondent.

[5] It is common cause that the applicants were suspended by means of letters dated 23 September 2019 and 25 September 2019, respectively. The issue lying for determination is whether the applicants have, on papers before the court, made out a proper case for the review of the decision to suspend and discipline.

The facts

[6] The dispute at hand was instigated by a letter pencilled by the Acting Rector of the first respondent, Dr P.S. Jaca, dated 22 September 2019, notifying the applicants of their contemplated suspension pending '*possible disciplinary action*'. Embedded in the letter are four allegations of misconduct against the applicants. Whist brevity is the soul of wit¹, it is perchance, apposite to append hereunder in full the content of the said letter in order to juxtapose it against its outcome. Such is thus:

"22 September 2019
Mr Zandisile Mbuthuma
MTHATHA CAMPUS
Walter Sisulu University

Dear Mr Z Mbuthuma

Contemplation to suspend pending possible Disciplinary Action

This letter serves to notify you, that in terms of the WSU Student Disciplinary Code of Conduct, the Campus Rector may order your suspension if it is alleged that you are involved in misconduct.

In this case it is alleged that you:

1. Brought and facilitated the slaughtering of a live animal, a cow, inside the University premises and thereby violating a University Rule. Pg 111 in the University Prospectus states: It is a rule of WSU not to allow any slaughtering of animals in any form on any of our campuses. This is a serious misconduct as it not only violated the University Rules but is also violated the Abattoir Hygiene Act of 1992 that states: No person shall slaughter or cause to be slaughtered any animal in the municipal area anywhere else other

¹ This adage was used by William Shakespeare in *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK*, 1974 London, Edward Arnold Publishers (Ltd) (Edited by Michael Davis Marlborough College Wiltshire).

than at the Abattoir, except as may be provided by the Minister of Agriculture by regulation in terms of Section 3 (2) of the Act.

2. Following the death of students at the Mthatha Campus during the Fresher's Braai in early June 2019 a directive was issued by the office of the Vice Chancellor suspending all social events. In special cases where this has to be allowed clearly outlined proper procedures had to be followed. It is alleged that you organised an event without following the University procedures. The event on 21 September 2019 was organised without necessary permission from relevant authority and there was no proper and relevant security arrangements. The act you are alleged to have committed is viewed as direct defiance of the Vice Chancellor's circular and directive. This is serious misconduct in that organising any event without proper and relevant security arrangements put the lives of students and other university personnel in danger.
3. Used the University facility, the Auditorium, without applying and receiving permission from relevant authority and in so doing you breached the provisions of Rule 6.2: 2019 WSU Prospectus, pg 100).
4. Broke-into the Auditorium, vandalising the locking system of that facility and threatening the security personnel are viewed as serious misconduct that cannot be tolerated by the University.

You are therefore requested to respond in writing to the Campus Rector by 10:00, 23 September 2019 to show cause why the suspension should not be enforced. For this purpose, please use the following email address: pjaca@wsu.ac.za. A failure to respond I will assume that you have no representation to make and I will therefore make a decision accordingly.

Dr PS Jaca, Acting Rector"

[7] Receipt of letter is not in issue between the parties as the first applicant conceded having been telephonically contacted by the security personnel of the first respondent to uplift the letter and so he did. On the first applicant's own saying, he collected the letter from the campus security, not so timeously, as he was not contactable which is the reason why he only responded in making written representations to the fourth respondent's email address at 19:47 on 23 September 2019.

[8] I do not understand it to be the applicants' case that they were not afforded adequate opportunity to make representations, the bone of contention only being that they were not afforded a hearing before they were suspended. This contention was pursued with vigour by Mr Maliwa, for the applicants, during his oral presentations. Inevitably, the court is enjoined to make a finding as to whether as a matter of law the applicants are entitled to a pre-suspension hearing. Put otherwise, the issue is whether the first respondent bears legal obligation to invite the applicants to a hearing before suspension.

[9] In summation, three contentious allegations stem from the fourth respondent's aforesaid letter which are ancestral to the applicants' suspension and these are that:

- “9.1 the applicants brought and facilitated the slaughtering of a cow in the University campus in contravention of the University rules and the Abattoir Hygiene Act of 1992;
- 9.2 the applicants organised an event on 21 September 2019 without seeking permission from authorities and without proper and relevant security arrangements; and
- 9.3 the applicants used the University facility, the Auditorium, which they broke into without permission.”

[10] Upon receipt of the notice of the contemplated suspension, the first applicant responded by means of an email on 23 September 2019 at 19:47 in terms whereof he set out quite succinctly the reasons why he should not be suspended. It is not

decipherable from the papers what explanation the second applicant proffered. The sum up of the first applicant's response is thus:

- “10.1 there is no SRC program that was held on the day and as such he was unable to account for activities and festivities of structures he is not in charge of;
- 10.2 he did not slaughter a cow and does not have capacity to do so;
- 10.3 the first respondent's security personnel, as custodians of campus security, should account and have a duty to ensure that the University directives are observed; and
- 10.4 he required evidence placing him at the scene where either the cow was slaughtered or where the event was conducted.”

[11] The above contentions are a summarised version of the first applicant's email response wherein he also states that he was not even aware of the slaughtering of the cow on the day in question. The first applicant further casts a dim view on the competence of the campus security which he says were dereliction of their duties by failing to arrest whoever was involved. It was their duty to arrest whoever was involved to ensure protection of students. Their failure to preserve campus security was in breach of their duty, so the applicants say. In a nutshell, the applicants contend that they are the victims of circumstance and are presumed guilty by association.

[12] The first applicant's response notwithstanding, the fourth respondent proceeded with the suspension. The letters of suspension *mutatis mutandis* regurgitate the same allegations made in the letter of contemplated suspension. In the letters of suspension the fourth respondent states that he considered the applicant's representations but found them wanting in that the representations do not correlate with the facts before him, the applicants have a case to answer and their presence on campus will be detrimental to further investigation and campus stability. The letter of suspension in conclusion contemplates a disciplinary hearing which it said would commence as soon as possible.

[13] In approaching this court the applicants placed reliance on the principle of legality, contending that their suspension is illegal, unlawful and unconstitutional and falls to be set aside on the grounds that it is irrational, unreasonable and arbitrary. The applicants also contend that their suspension was not preceded by a hearing, is an abuse of authority and is in violation of the Constitution. They have already been found guilty, so they say and that in suspending them the fourth respondent placed reliance on facts that are at his disposal which he failed to disclose. Their further complaint is that their disciplinary hearing has no definite date and thus they will not be able to participate in their schooling activities pending an unspecified uncertain event in violation of their right to education.

[14] On urgency the applicants contend that their suspension is disrupting their learning process and schooling activities. They are unable to do revision in preparation for final examinations. It is not in dispute that the matter is urgent, the respondents having conceded in their answering affidavit that '*the matter must be disposed of as speedily as possible*'. I also take the view that the matter deserves to be disposed of as urgently as possible.

[15] Two grounds were advanced by the respondents in opposition and these are that the application should have been formulated in two parts with the first part being the interim relief pending the finalisation of an application to review and set aside the decision to suspend the applicants. The second ground is that the application should have been for a review of the decision to suspend the applicants in terms of the Promotion of Administrative Justice Act in accordance with Rule 53 of the Uniform Rules of Court. By seeking a declarator, the applicants are avoiding the provisions of Rule 53 and the provisions of sections 6 and 7 of the PAJA. The relief sought is, therefore, incompetent on this basis.

[16] The pinnacle of the respondents' contention is that even if the applicants were correct in their quest for the review of the first respondent's decision to suspend, they have not shown any exceptional circumstances as required by section 8 (c) (ii) of the PAJA such as to entitle this court to substitute its decision for that of the first respondent.

[17] The first respondent contends that it has sufficient evidence at its disposal not only placing the applicants directly in the scene where the wrongdoing was committed but also implicating them in the actual wrongdoing. In proof thereof, the respondents attached documents are extract from the police occurrence book ("OB") and affidavits of certain security officers, namely; Siyabulela Buyeye, "Buyeye", Somelele Madolo, "Madolo" and Mokgoba Sereka, "Mokgoba". An extract from the OB, states: "... GOODMAN FARM HOUSE 083 242 8074 receipt no. 81656. Its where they bought a cow from President of anc youth league Mr Mphika (Mabhoza)".

[18] An entry posted in the OB by Mr Dwakisa is to the effect that he saw students carrying a big pot and big knives at the back of the teaching hall. The students were busy slaughtering a cow and Messrs Xuma and Guquka called the police. Mokgoba in his affidavit, alleges to have seen Mabhoza among a group of students who arrived at the University campus on 20 September 2019 at 19:08 on a bakkie which had a cow on it. Mokgoba's affidavit further alleges that Mabhoza approached the security guards at the gate and told them that he wanted to show the cow to the comrades and it is then that the bakkie was allowed to the campus. Buyeye in his affidavit states that on 21 September 2019 at about 09:00 Mbuthuma Zandisile and another SRC member came to the campus control offices and asked that they open the Auditorium for them and after they were refused entry, they left.

[19] Mr Mlandu, ("Mlandu"), called Madolo to go and investigate after receiving a report that there was a group of students near the Auditorium. Madolo corroborates Mlandu in his affidavit and states that he went to the Auditorium and saw Mbuthuma and a group of other students breaking the lock of the Auditorium with a bush knife and thereafter pushed the door open. The above implicates the first applicant in the wrongdoing even though, nothing implicates him in the slaughtering of the cow.

[20] The fourth respondent also contends that the applicants were afforded an opportunity to state reasons why they should not be suspended and having considered their written reasons and evidence at his disposal, he found that they deserve to be suspended pending the outcome of a disciplinary proceedings to be instituted. The applicants would then be given an opportunity to present their side of

the story before a determination was made. The respondents deny that the applicants were entitled to a hearing before they were suspended.

[21] The fourth respondent conceded he may have referred to an incorrect legislation when he sought to place reliance on the Abattoir Hygiene Act of 1992 but retorted that the slaughtering of any animal outside of an abattoir remains an offence in terms of section 7 (1) (a) of the Meat and Safety Act.

[22] The respondents also averred that the applicants are entitled to and may write their final examinations should the disciplinary process not be finalised and alternative remedies are available. The respondents did not mention what those alternative remedies are. The above is contradicted by the respondents' later contention that the applicants are not only suspended from writing final examinations but are also suspended from all University activities and may not enter the University campus. However, this allegation was not disputed by the applicants in their replying affidavit. Neither was it raised as an issue during the hearing.

[23] Reference was also made in the answering affidavit of the second applicant's disruptive behaviour of calling mass meetings on 24 and 25 September 2019 in the face of the intended suspension and the contemplated disciplinary hearing and despite an agreement between the University management and all political formations in the campus detailing certain protocols to be followed when organising campaigns in the campus. Such were done without the permission of the management as required. As a result an unauthorised mass meeting was held and disruptions were experienced at the delivery sites of the first respondent. An investigation report relative to the above disruptions was compiled which evinces instances of fighting between the ANC Youth League students and SASCO members.

[24] The second applicant's response to the above pertinent allegations is less than satisfactory. The second applicant's response to allegations that directly implicate him is as follows:

“The contents of these paragraphs are largely irrelevant for the purpose of this application and therefore warrant no reply. Anything ...”

The above knee-jerk response to such serious allegations which are said to be some of the reasons for suspension leaves much to be desired. An innocent litigant who is desirous of being re-instated to academic activities would have rejected such allegations outright if they were not true. Lack of outright rejection of such allegations might lend credence to the respondents’ version that the second applicant’s conduct was indeed disruptive.

Submissions

[25] Both parties presented substantive arguments at the hearing of this matter. In his oral submissions which are foreshadowed in the applicants’ heads of argument Mr Maliwa conceded that the matter should proceed on the basis of a final relief. According to Mr Maliwa four issues falling for determination by the court are whether: (a) rule 53 of the Uniform rules of court was applicable, (b) PAJA was applicable, (c) employing the principle of legality, in case where the court finds that PAJA is not applicable, was fatal to the applicants’ case, and (d) the applicants have made a case for the relief sought.

[26] Mr Maliwa ruled out the application of rule 53 on two grounds, namely; that when taking the decision to suspend, the respondents were not performing an administrative function and that the suspension itself was not as a result of any proceedings and it could, therefore, not be expected of the respondents to produce any record of proceedings. PAJA was also not applicable as, according to Mr Maliwa, the decision to suspend was not taken in the exercise of public power and because of the contractual nature of the relationship between the parties, the respondents were not performing a public function in terms of an empowering legislation. For one to rely on PAJA in an application, so submitted Mr Maliwa, one must rely on an empowering legislation and it was not competent for the respondents to rely on the Prospectus to suspend the applicants. Reliance should have been placed on the empowering legislation.

[27] He further argued that because of the contractual nature of their relationship, the review application was correctly located under the principle of legality as the suspension was not in keeping with the University Code of Conduct. He further submitted that even if there were two parallel courses of action, it was not open to the court to prescribe to a litigant which course of action to follow. To sum up his argument, Mr Maliwa referred the court to *Klein v Dainfem and another*, *Calibre Clinical Consultants v National Bargaining Council Freight Industry* which are also referred to in the applicants' heads of argument. Mr Maliwa further referred the court to *Brink and others v Diocesan School for Girls and others*, a judgment of this Division by Roberson J where the learned Judge said:

“In the present case, I have difficulty in seeing how DSG is publicly accountable for its decisions in disciplinary matters. The disciplinary code is there for the benefit of the school, the learners and the parents. Learners are not obliged to enrol at DSG and if they are expelled, they are not prevented from obtaining further education elsewhere.”²

[28] Another point that was strenuously argued by Mr Maliwa is that the first respondent's decision is irrational, it being the applicants' case that before suspending them, the fourth respondent should have afforded the applicants a hearing. For the decision of the fourth respondent to be rational, he was under obligation to weigh two rights, namely; the right of the applicants to education and the power to suspend. The fourth respondent does not have authority to suspend and the suspension is not in keeping with the first respondent's code of conduct.

[29] In argument Mr Hobbs, for the respondents, submitted that a distinction should be drawn between the reviews under the PAJA and those based on the principle of legality and that the application at hand should have been brought in terms of section 6 of the PAJA. According to Mr Hobbs the decision to suspend the applicants is an administrative action as defined in section 1 of the PAJA and the applicants have no

² (1072/2012) [2012] ZAECHC 21 (1 May 2012)

choice as to the pathway to the review. It is only when other species of public power are at play that the principle of legality can find application.

[30] Mr Hobbs further submitted that the issues at play are governed by the first respondent's domestic rules which are embodied in the Prospectus which derives its authority from its institutional statute, the Higher Education Act 101 of 1997, which gives the first respondent legal status. In turn the Council of the first respondent makes rules which are binding on both the applicants and the respondents.

[31] Instead of basing their application on the PAJA, the applicants elected to invoke the principle of legality as their pathway to review and on that basis the application is ill-conceived. Even if they could be found to be entitled to legality review, they have not made a case and their application should be dismissed. The submission of a contractual relationship between them and the first respondent was not pleaded in the founding affidavit and so their argument that the Rector did not have the power to suspend them is irrelevant. Mr Hobbs also referred to a plethora of cases to illustrate his point and submitted that the facts of *Makhanya*³ are distinguishable from the facts of the case at hand.

[32] Navigating through the respondents' heads of argument, Mr Hobbs submitted further that the applicants cannot cry foul of the suspension process as they were given an opportunity to make representations which they made. Their representations are in conflict with indisputable facts at the fourth respondent's disposal that the applicants were part of the gathering that committed the wrongdoing. He further submitted that the suspension was not indefinite as the Rector contemplated a disciplinary hearing soon. In conclusion Mr Hobbs submitted that the applicants are not entitled to the relief sought even though he conceded that the relief sought was final.

[33] In sum total Mr Hobbs submitted that the applicants only have a right to education and have no right to interdict the disciplinary hearing. The applicants have not made a case on papers that decision to institute the disciplinary action is irrational. Their application should be dismissed with costs.

³ *Makhanya v University of Zululand* (218/08) ZASCA 69 (29 May 2009)

Discussion

[34] A judicial review is a species of judicial intervention employed by the courts to keep the repository of public power under judicial scrutiny in order to prevent arbitrary exercise of power and curb its abuse. The import of the judicial intervention in the administrative justice arena finds expression from the well-founded axiomatic expression which stipulates that the exercise of public power is only legitimate where lawful⁴. *Wade and Forsyth* put it more lucidly when the learned authors say:

“Judicial review is thus a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law.”⁵

[35] The bifurcation of judicial review into two *genera*, namely; the review under the PAJA and the review under the principle of legality has long been a subject of rigorous debate by all the different courts of the land, including the Supreme Court of Appeal and the Constitutional Court. The application of each of the above two review pathways has slowly and incrementally evolved into a minefield of seemingly arduous and contradictory judgments. The issue of which review pathway is appropriate and should be followed in each case is what always occupies the uppermost echelons of each conscientious debate.

[36] Whilst the above two types of review appear to be conjoined twins in form in that they are both the cornerstone of our hallowed and time honoured principle of the rule of law, they are in substance not. The real difference between the two review types lies in the fact that the review under the PAJA is sourced from the Constitution and is purpose-built whilst the legality review has long been regarded as self-standing review mechanism.

[36] Adverting to the case at hand, it is apposite to observe that the real tug of war in this application is which of the above two review types, both of which are fundamental in the process of judicial scrutiny of those in the exercise of public

⁴ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17, 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) ('Fedsure') at para 59.

⁵ *William Wade and Christopher Forsyth Administrative Law* (10th ed) at 29

power, should have been used by the applicants. The question to be asked is whether the decision to suspend the applicants falls within the complex definition of 'administrative action' as defined in section 1 of the PAJA, Mr Hobbs says it is and Mr Maliwa says it is not, or is located within the broader framework of the legality principle, Mr Maliwa says it is and Mr Hobbs says it is not.

[37] The question of whether or not the PAJA is applicable *in casu* must surely turn on an interpretation of section 33 of the Constitution to which the PAJA owes its origin. Section 33 provides:

“(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and

(2); and

(c) promote an efficient administration.”

[38] Administrative action is defined in section 1 of the PAJA as:

take “(i) “administrative action” means any decision taken, or any failure to
decision, by—

(a) organ of state, when—

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms

of any legislation; or

(b) a natural or juristic person, other than an organ of state,

when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include...”

[39] A primary indicator used by the courts in determining the nature of power to be exercised by a repository of public power is the source of the power. In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[199]⁶, the Constitutional Court (per Kampempe J) held that ‘where a power flows directly from the Constitution, one could deem the power to be executive in nature. When a power is sourced in legislation, it is likely to be administrative in nature. Substantial constraints on the power would be an indication that the power is administrative in nature. Finally, the court stated that the nature of the power can be determined with reference to the appropriateness of subjecting the power to the stricter form of judicial scrutiny represented by the edifice of administrative law contained in the PAJA.’

[40] In *Minister of Home Affairs v The Public Protector*⁷, Plasket J said:

“[27] Review in terms of both the PAJA and the principle of legality stems from the rule of law. Section 33(1) and (2) of the Constitution as well as the PAJA gives effect to the rule of law in respect of only administrative action. The principle of legality gives effect to the rule of law in relation to all other exercises of public power, such as executive power. Woolf, Jowell and Le Sueur make this point when they say that as a general principle, the rule of law ‘has provided the major justification for constraining the exercise of official power, promoting the core institutional values of legality, certainty, consistency, due process and access to justice (foot note omitted).”

[41] At para 28 the learned Judge opined:

“ [28] An applicant for judicial review does not have a choice as to the ‘pathway’ to review: if the impugned action is administrative action, as

⁶ ZACC 1, 200 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) (‘SARFU’) at para 143

⁷ (308/2017) [2018] ZASCA 15 (15 March 2018)

defined in the PAJA, the application must be made in terms of s 6 of the PAJA; if the impugned action is some other species of public power, the principle of legality will be the basis of the application for review.

[42] What immediately preoccupies one's mind is whether the first respondent is an organ of state within the meaning and contemplation of section 1 (a) (i) and (ii) of the PAJA. If the answer to the above question is no, which it should be, then the next question to be asked is whether the first respondent is a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect within the meaning and contemplation of section 1 (b) of the PAJA. Methinks this where the answer to the problem at hand lies.

[43] In paragraph 15 of the applicants' heads of argument, Mr Maliwa mawkishly argues that:

“For the reasons stated above, the decision sought to be impugned in these proceedings does not fall under PAJA even if the Court was to find that the 1st Respondent is an organ of state.

One of *‘the reasons stated above’* referred to by Mr Maliwa is what is stated in paragraph 12.1 of his heads of argument, stating that: *‘at the time the respondents took the decision to be impugned in these proceedings, they were not performing judicial, quasi-judicial and/or administrative functions; and...’*

[44] I agree fully with Mr Maliwa that the first respondent is not an organ of state. However, Mr Maliwa did not take the matter further in his analysis of section 1 of the PAJA to also deal with section 1 (b). I think that this is where Mr Maliwa misses the target. Section 1 (b) clearly refers to a ‘natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.’

[45] By parity of reasoning and in a sheer coincidence Mr Hobbs also trashed out the same issue in paragraph 15 of the respondents' heads of argument. Ironically, it seems that by design paragraphs 15 of the learned gentlemen's heads of argument is what is the nub of the whole problem. Mr Hobbs argued that '*the decision to suspend the applicants is administrative action as defined in section 1 of PAJA...*'. Mr Hobbs was referring to section 1 (b) of the PAJA.

[46] The above leads to a further question that says: what then is the source of the power that was exercised by the first respondent when it sought to suspend the applicants? Mr Hobbs argued this point very succinctly in paragraph 16 of the respondents' heads of argument and so in his oral submissions. He argued that when suspending the applicants, the first respondent did not source its power from the first respondent's prospectus but 'from the rules promulgated in terms of its institutional statute', the Higher Education Act 101 of 1997, "(the Act")⁸.

[47] Mr Hobbs took the matter further to argue that section 83 of the Act accords the first respondent legal status. Shouldn't the first respondent be the juristic person referred to in section 1 (b) of the PAJA then? I think it is. In sum total I agree with Mr Hobbs' analysis of section 1 (b) of the PAJA. Does this not then resolve the current imbroglio? I think it does.

[48] In view of the foregoing debate, I am in agreement with Plasket J's sentiments that an applicant for judicial review does not have a choice as to the 'pathway' to review. This, in my view, is where the buck stops. I am of the view that the applicants should have followed the provisions of the PAJA in challenging both their suspension and the disciplinary hearing. For this reason this application should fail.

[49] However and lest I am wrong in my above conclusion, I will briefly discuss the two pertinent issues in what follows hereafter. The issues are, firstly, whether the applicant has a right to have their suspension reviewed and set aside and, secondly, their disciplinary hearing. Mr Maliwa argued that the applicants' suspension and disciplinary hearing should be reviewed and set aside on the ground that the decision to suspend and discipline was irrational, unlawful and unconstitutional. I am not in agreement with Mr Maliwa's submission.

⁸ See para 16 *op cit et seq*

[50] The right of a litigant who wishes to permanently interdict a disciplinary hearing is circumscribed and this should best be explained by interrogating a cautionary word of advice from Snyman AJ. He cautioned:

“Litigants seeking to permanently interdict disciplinary proceedings from taking place need to be warned. The Labour Court will only entertain such applications in truly exceptional circumstances and if material irremediable prejudice or injustice is shown to exist. As a matter of principle, that which is provided for the processes under the LRA, in the normal course, must be allowed to run its course...”⁹

[51] The learned Judge’s above enunciation echoes the sentiments expressed by the Labour Court in *Zondo and Another v Uthukela District Municipality and Another*¹⁰ and *Jiba v Minister: Department of Justice and Constitutional Development and Others*¹¹. In *Zondo* the court remarked:

“The first hurdle the applicants must successfully clear in this regard is to show that exceptional circumstances exist. The reason for this is that the Labour Court has been consistent in its approach that the court will only intervene in uncompleted disciplinary proceedings if such exceptional circumstances are shown to exist”

[52] In *Jiba* the Court held:

“Although the court has jurisdiction to entertain an application to intervene in uncompleted disciplinary proceedings, it ought not to do so unless the circumstances are truly exceptional. Urgent applications to review and set aside preliminary rulings made during the course of a disciplinary enquiry or to challenge the validity of the institution of the proceedings ought to be discouraged. These are matters best dealt

⁹ In *Moroenyane v Station Commander of the South African Police Service, Van der Bijl Park*, Case no. J 1672/2016, a decision of the Labour Court, Johannesburg (16 August 2016)

¹⁰ (2015) 36 ILJ 502 (LC at para 38)

¹¹ (2010) 31 ILJ 112 (LC) at para 17

with in arbitration proceedings consequent on any allegation of unfair dismissal, and if necessary, by this court in review proceedings ...”

[53] In *casu* the issue is whether the applicants have satisfied the exceptional circumstances’ requirement that would enable this court to review and set aside the contemplated disciplinary hearings. I agree with Mr Hobbs that the applicants have not made out a proper case for the review and setting aside of the contemplated disciplinary hearing. The applicants’ attack against the respondents on this leg would and should in any event fail. This then leave this court with one last consideration which is whether the applicants are entitled to an order uplifting their suspension.

[54] In paragraph 5 of his judgment, the learned Judge also dealt with the issue of the unlawfulness of a suspension when he referred to *Manamela Nnana Ida v Department of Co-Operative Governance, Human settlements and Traditional Affairs Limpopo Province and Another*¹² in which the court said:

“A suspension would be unlawful in instances where the right or power of an employer to effect a suspension is prescribed by specific regulation and these regulations are not complied with by the employer. The unlawfulness is founded in the employer not complying with its own rules. This regulation (rules) can be done in the form of a disciplinary code and procedure, collective agreement, statutory provisions, or other regulatory provisions. This kind of regulation is prolific in the public service”

[55] It seems to me that even with the suspension the threshold is too high for the applicants to jump over. Mr Hobbs argued in the present case that the right to suspend is sourced from the regulations promulgated under the Act. It has not been shown that in deciding to suspend the first respondent did not comply with its regulations.

[56] For the sake of completeness, it is well worth to mention something on the principle of rationality, the so-called ‘means to an end principle, as a ground of

¹² [2013] ZALCJJHB 225 dated 5 September 2013 at para 20

attack. Unfortunately, the applicants have not presented a formidable ground of attack even on the principle of irrationality. It is hard to believe that the conduct of the first respondent in suspending the applicants is not rationally connected to the purpose. The purpose is the disciplinary hearing. Certain allegations that are yet to be tested in a formal disciplinary hearing have been levelled against the applicants and it is incumbent upon them to trash out these allegations in the disciplinary hearing to prove their innocence. Even on this ground the application should fail.

Costs

[57] Even though the determination of which party pays the costs is in the discretion of the court, the general rule is that costs follow the result. This is the time honoured 'winner takes all' rule and it has been followed in a number of decisions by all the courts. However, an interesting and binding jurisprudence has been developed over time that this principle is not always applicable in all cases. This was the case in *Biowatch Trust v Registrar Genetic Resources*¹³ where the Constitutional Court refused to apply 'the costs follow the result' rule for reasons stated therein.

[58] It is my view that the applicants in this case, even though they are not successful in their case, should not be mulcted with a costs order. The reason therefor is that the applicants are student political activists who approached this court to protect what they perceived as their right to education. It cannot be said by any stretch of imagination that they were either frivolous or mischievous in their conduct. They might have genuinely believed that their suspension, and so their disciplinary hearing, were unlawful but it did not turn out to be.

[59] In *Niekara Harrielall v University of KwaZulu-Natal*¹⁴ the apex court followed the same principle when it held:

¹³ [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (Biowatch) at paras 26-7; See also *Limpopo Legal Solutions and Others v Vhembe District Municipality and Others* [2017] ZACC 14

¹⁴ [2017] ZACC 38

“Accordingly, the High Court and the Supreme Court of Appeal should have followed and applied the Biowatch principle in determining costs. Their failure to do so warrants intervention by this Court.”

[60] In my view it would be just and equitable that there be no order as to the costs.

Order

[61] In the result, the following order shall issue:

1. The application is dismissed.
2. There shall be no order as to costs

H. S. TONI
JUDGE OF THE HIGH COURT (ACTING)

Appearances

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HEARD ON : 15 October 2019
DELIVERED ON : 21 November 2019