

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

CASE NO: 11766/2015

In the matter between:

CHUMANI MAXWELE

Applicant

And

UNIVERSITY OF CAPE TOWN

First Respondent

MAX PRICE N.O

Second Respondent

KARIN VAN HEERDEN

Third Respondent

HEARD : TUESDAY 25 AUGUST 2015

DELIVERED : TUESDAY 15 SEPTEMBER 2015

JUDGMENT

Nuku, AJ

Introduction

[1] This application concerns the following issues, namely: (a) an application to review the Third Respondent's decision to issue a provisional suspension order as well as a final suspension order; (b) an order declaring Rules

DJP3.2 and DJP3.3 of the First Respondent to be unlawful; (c) an order interdicting the Respondents from proceeding with the disciplinary proceedings against the Applicant, pending the finalisation of these proceedings and (d) an order interdicting the Respondents from issuing any further suspension orders against the Applicant arising from the same facts that gave rise to this application.

- [2] The Applicant is a registered student at the University of Cape Town, the First Respondent in these proceedings. The Applicant is studying towards a bachelor's degree in political science. The Applicant is presently subject to a final suspension order for a period of 100 days, which lapses on 24 September 2015. The Applicant was represented in these proceedings by Mr Masuku who appeared with Ms Long.
- [3] The First Respondent is the University of Cape Town, a higher education institution as defined in the Higher Education Act 101 of 1997. The Second Respondent is Max Price, the Vice Chancellor of the First Respondent and has been joined in these proceedings in his official capacity as such. The Third Respondent is Karin Van Heerden who is cited in these proceedings in her official capacity as the nominee of the Second Respondent. The Respondents were represented in these proceedings by Mr Jamie who appeared with Ms O'Sullivan.

- [4] The Application was brought on an urgent basis and was opposed by all the Respondents. On 30 June 2015 the matter was postponed by agreement between the parties to 21 July 2015. On 21 July 2015 the matter was again postponed by agreement between the parties to 3 August 2015. The terms of the final suspension order issued by the Third Respondent on 19 June 2015 were varied by agreement between the parties. On 3 August 2015 the matter was removed from the roll and was enrolled for hearing on 25 August 2015.

The facts

- [5] The material facts giving rise to this application can be summarised as follows: On 1 May 2015 the Applicant went to the Mathematics Building for the purposes of studying. As the Applicant was approaching the South entrance of the building he saw Ms Kirova who was leaving the building. The Applicant requested Ms Kirova to open for him. Ms Kirova asked the Applicant some questions and also asked him to produce identification which the Applicant did by producing his student card. Ms Kirova advised the Applicant that security had become a serious issue as there was a Head of Department who had been killed in that building a few years ago. Ms Kirova, in her statement also refers to two separate incidents in the previous year where she was attacked by a young man in her office. The young man had pretended to be a student when in fact he was not. The Applicant puts this slightly different to how Ms Kirova puts it, in that in the Applicant's version is that Ms Kirova said ***“the reason for demanding my identity was because she had previously been***

attacked by a savage black man who had entered the building pretending to be a student and that a lecturer had been killed in the building also by a barbaric black man". Ms Kirova escorted the Applicant into the building in order to show him that there were no open spaces which the Applicant could use to study. The Applicant did not take kindly to the questions that he was asked by Ms Kirova and the fact that she escorted him into the building. The Applicant felt that he was being racially profiled and raised this with Ms Kirova. An argument ensued which resulted in the intervention by two students and Dr Ebobisse.

- [6] Ms Kirova reported the incident referred to above to the First Respondent. In her statement she explained how she felt physically threatened when the Applicant had raised his voice making reference to the fact that the statue of Rhodes had fallen, that he was not interested in the opinion of whites and that whites should be killed.
- [7] On receiving the report the Third Respondent, acting as a nominee of the Second Respondent, issued the first provisional suspension order which was delivered to the Applicant on 7 May 2015. In terms of the University rules a provisional suspension order is valid for 72 hours and as such the first suspension order lapsed on 10 May 2015. On 13 May 2015 the Applicant attended a suspension hearing when, despite the fact that the first provisional suspension order had lapsed on 10 May 2015, the Third Respondent issued the first final suspension order.

[8] The Applicant appealed against the first final suspension order and on 10 June 2015 the appeal tribunal upheld the appeal and the first final suspension order was set aside.

[9] On 16 June 2015 the Applicant received the second provisional suspension order arising from the same incident described above. A suspension hearing was scheduled for 18 June 2015 and after the hearing the Third Respondent issued the second final suspension order. The Applicant then instituted these proceedings.

Issues for determination

[10] In these proceedings the Applicant has challenged the decision of the Third Respondent on the basis that:

10.1. The Third Respondent was biased or there was a reasonable suspicion that she was biased, as envisaged in Section 6(2) (a) (iii) of the Promotion of Administrative Justice Act 4 of 2000 (hereinafter referred to as "PAJA")

10.2. The decision of the Third Respondent is not rationally connected to the purpose for which it was taken and/ or the information before her and /

or the reasons given for it by her, as envisaged in Section 6 (f) (2) (ii) of PAJA.

10.3. The decision of the Third Respondent is so unreasonable that no reasonable person could have taken the decision that the Third Respondent took.

[11] In addition to opposing the review on the merits, the Respondent also opposed the review on the basis that the Applicant had failed to exhaust internal remedies as required in terms of Section 7(2) of PAJA.

[12] The Applicant also challenged Rules DJP 3.2 and 3.3 on the basis that they are unlawful in that they are vague, overbroad and arbitrary in violation of Section 33 of the Constitution of the Republic of South Africa, 1996. The Respondents, in addition to opposing the challenge on the merits, also opposed it on the basis that the making of rules constitutes an administrative action for the purposes of PAJA and as such the Applicant is required to base his cause of action on PAJA and not to resort directly to section 33 of the Constitution.

[13] The Applicant has also applied for two interdicts. The first interdict is to prevent the Respondents from proceedings with the disciplinary hearing against the Applicant, pending the finalisation of these proceedings. The Second interdict is to prevent the Respondents from issuing any further

suspension orders arising from the incident of 1 May 2015 which has given rise to these proceedings.

The test for bias

[14] Bias or reasonable suspicion of bias, as a ground for the review of an administrative action is dealt with in Section 6(2) (a) (iii) of PAJA which provides that:

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

[15] The Applicant's case was that he had reasonable suspicion that the Third Respondent was biased. At common law the test for reasonable suspicion of bias was laid down in ***BTR Industries SA (Pty) Ltd v Metal & Allied Workers Union*** 1992 (3) SA 673 (SCA) at 693 I-694B where Hoexter JA stated it as follows:

“I conclude that in our law the existence of a reasonable suspicion of bias satisfies the test; and that an apprehension of a real likelihood that the decision maker will be biased is not a prerequisite for disqualifying bias. In my opinion the statement in the Full Court judgment (at 879A-B) that ‘... provided the suspicion is one which might reasonably be

entertained, the possibility of bias where none is to be expected serves to disqualify the decision maker...’ fairly reflects the recent trend in South African judicial thought, and I approve of it.”

- [16] In **President of the RSA v South African Rugby Football Union** 1999 (4) SA 147 CC at paragraph 39 the Constitutional Court preferred the term “*apprehension of bias*” rather than the term “*suspicion of bias*”. The Court, at paragraph 37 also referred, with approval to the following passage in **BTR Industries SA (Pty) Ltd v Metal & Allied Workers Union** 1992 (3) SA 673 (A) at 649I-550:

“The law does not seek ... to measure the amount of his [the judicial officer’s] interest. I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a lay litigant. Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing Court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is apprehended, then that is an end of the matter.”

- [17] The test was further clarified in **S v Roberts** 1999 (4) SA 915 (SCA) at 924, paragraph [32] where Howie JA stated it as follows:

“Thus far, the requirements of the test thus finalised are as follows as applied to judicial proceedings:

- (1) *There must be a suspicion that the judicial officer might, not would, be biased;*
- (2) *The suspicion must be that of a reasonable person in the position of the accused or litigant.*
- (3) *The suspicion must be based on reasonable grounds.”*

[18] In ***Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee, and Others*** 2000 (4) SA 621 (C) at para 67 the court explained the difference between holding certain tentative views about a matter and prejudging the matter which constitutes bias as follows:

“It is our view that it is not bias per se to hold certain tentative views about a matter. It is human nature to have certain prima facie views on any subject. A line must be drawn, however, between mere predispositions or attitudes, on the one hand, and pre-judgment of the issues to be decided, on the other. Bias or partiality occurs when the tribunal approaches a case not with its mind open to persuasion nor conceding that exceptions could be made to its attitudes or opinions, but when it shuts its mind to any submissions made or evidence tendered in support of the case it has to decide. No one can fairly decide a case before him if he has already prejudged it. Thus pre-judgment of the issues to be decided (which is in a sense prejudice) constitutes bias. The entire proceedings become tainted with bias.”

The test for rationality

[19] Rationality, as a ground for the review of an administrative action is dealt with in Section 6(2) (f) (ii) of PAJA which provides that:

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

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator.”

[20] The test for rationality was stated as follows by Chaskalson P, in ***Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others*** 2000 (4) SA 674 (CC) at page 708; paragraph 86:

“The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith

believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.”

[21] In ***Trinity Broadcasting (Ciskei) v ICA of SA*** 2004(3) SA 346 (SCA) at 354H- 355A, Howie P stated the rationality test as follows:

“In the application of that test, the reviewing Court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at.”

The test for reasonableness

[22] Reasonableness, as a ground for the review of an administrative action is dealt with in Section 6(2) (h) of PAJA which provides that:

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

- [23] In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others** 2004 (4) SA 490 CC at 512, para 44 O'Regan J approved the reasonableness test which was stated as follows by Lord Cooke in **R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd** [1995] 1 All ER 129 (HL) at 157:

“The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock [1976] 3 All ER 665 at 697, [1977] AC 1014 at 1064 as ‘conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt’. These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers. ... Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the chief constable has struck a balance fairly and reasonably open to him.”

- [24] In **Carephone (Pty) Ltd v Marcus NO** 1999 (3) SA 304 (LAC) at 316, para 36 per Froneman JA, stated the test as follows:

“In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the ‘merits’ in some way or another. As long as the judge determining [the] issue is aware that he or she enters the merits not in order to substitute his or her own

opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.”

The duty to exhaust Internal Remedies

[25] Section 7(2) PAJA provides that:

“(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this act.

(c) A court or any tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.”

[26] In **Koyabe and Others v Minister of Home Affairs and Others** 2010 (4) SA 327 (CC) at 343, Mokgoro J stated the following regarding the duty to exhaust internal remedies:

“[38] The duty to exhaust internal remedies is therefore a valuable and necessary requirement in our law. However, that requirement should not be rigidly imposed. Nor should it be used by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny. PAJA recognises this need for flexibility, acknowledging in s 7(2) (c) that exceptional circumstances may require that the court condone non-exhaustion of the internal process and proceed with judicial review nonetheless. Under s 7(2) of PAJA, the requirement that an individual exhaust internal remedies is therefore not absolute.”

[39] What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/ or where its pursuit would be futile, a court may permit a litigant to approach the court directly.”

[27] Dealing with the meaning of ‘exceptional circumstances’ in **Nichol v Registrar of Pension Funds** 2008 (1) SA 383 (SCA) at 390 para 16 per Van Heerden JA stated the following:

“Counsel for the registrar and the FSB submitted that, while there is no definition of ‘exceptional circumstances’ in PAJA, these must be

*circumstances that are out of the ordinary and that render it inappropriate for the court to require the s 7(2) (c) applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the courts rather than resort to the applicable legal remedy. I agree with this contention. In the words of Sir John Donaldson MR in **R v Secretary of State for the Home Department, Ex parte Swati** [1986] 1 All ER 717 (CA) at 724a-b: By definition, exceptional circumstances defy definition, but where Parliament provides an appeal procedure, judicial review will have no place unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.”*

The test whether the rules are overbroad

- [28] **Rex v Jopp and Another** 1949 (4) SA 11 (N) established the test for vagueness at common law where it is claimed that a by-law or regulation is void for uncertainty: *“In that case the Court must first construe the by-law or regulation, applying the usual canons of construction with no bias towards ‘benevolence’. Having ascertained the meaning, the Court must then ask itself whether the by-law or regulation, so construed, indicates with reasonable certainty to those who are bound by it the act which is enjoined or prohibited. If it does, it is good; if it does not, it is bad; that is the end of the matter.”*

[29] In **Dawood v Minister of Home Affairs** 2000 (3) SA 936 (CC) at 966, para 47, the Constitutional Court stated that:

[47] *It is an important principle of the rule of law that rules be stated in a clear and accessible manner... Moreover, if broad discretionary powers contain no express constraints, those affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision...*

[30] Again in the **Dawood** case the Constitutional Court stated that:

“Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times they will be broad; particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made.”

- [31] In Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) Ncgobo J confirmed the decision in Dawood and stated further at para 34):

“However, the delegation must not be so broad or vague that the authority to whom the power is delegated is unable to determine the nature and the scope of the powers conferred. For this may lead to the arbitrary exercise of the delegated power. Where broad discretionary powers are conferred, there must be some constraints on the exercise of such power so that those who are affected by the exercise of the broad discretionary powers will know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. These constraints will generally appear from the provisions of the empowering statute as well as the policies and objectives of the empowering statute.” (See also Dawood (supra) at para 47)

The requirements for the interdictory relief

- [32] The requirements for a final interdict are well established: a clear right, an injury actually committed or reasonably apprehended, and no other satisfactory remedy. (See **Setlogelo v Setlogelo** 1914 AD 221 at 227.)

Application of the requirements of Section 7(2) of PAJA

[33] The Applicant did not apply for the exemption as required in terms of section 7(2) (c) of PAJA. In his founding affidavit, however, he stated the following in his founding affidavit, namely:

“I submit that I have no alternative remedy available to me than to approach this Honourable Court for relief. I do not consider the option of an appeal against the finding of the Third Respondent as an alternative remedy in that it has been made abundantly clear that the University wants me removed from the University precincts by all means necessary. Furthermore, the University has failed to consider the findings made by Professor Leman in the appeal ruling of the first suspension order. Despite the fact that pertinent points relating fairness was raised and despite the finding that the University rules should be rewritten, the University still elected to suspend me. I am convinced that regardless of the outcome of yet another appeal, the University will issue another suspension order against me and it is on this basis that I seek the Court’s intervention.”

[34] This issue was raised by the Respondents as the basis for the review to be dismissed. In response to this the Applicant, in his reply stated that:

“There is no point in exempting to exhaust internal remedies in circumstances where the University appeal body cannot give me any

relief. The appeal body of the University has expressed clear reservations about the fairness of the process followed by the University. It cannot, having expressed those comments, be expected to grant me any relief in the context of the rules it says should be revised and rewritten to inject in them the requirements of fairness. The University has elected to ignore this ruling. This case presents very clear exceptions to the principle requiring the exhaustion of internal remedies. There is no remedy I can be offered by appealing to the same body that has expressly given its views on the nature of the rules permitting suspensions.”

[35] The above should be understood in the context that the Applicant had been suspended previously in respect of the same incident. He had lodged an appeal which was upheld resulting in the suspension order being set aside. The appeal ruling setting aside the suspension order was made on 10 June 2015 and on 12 June 2015 it was already reported in the Cape Times that “UCT is set to issue a new provisional suspension order on Maxwele on 15 June 2015.” This is confirmed in the Respondent’s answering affidavit that the Third Respondent had decided already on 11 June 2015 that she was going to issue a provisional suspension order.

[36] The pursuit by the Applicant of the internal remedies previously resulted only in the process of his suspension being repeated and in my view he was justified in concluding that the *internal remedy would not be effective and/ or*

its pursuit would be futile as was stated in *Koyabe* case referred to above. I am therefore of the view that exceptional circumstances exist, justifying the exemption of the applicant from first having to exhaust the internal remedies.

Application of the test of reasonable suspicion of bias

[37] It is the Third Respondent who had issued the first provisional order and the first final suspension order. She issued the first final suspension order after having heard the representations from the Applicant. At this stage she would have heard to consider the matter fully before coming to her decision to issue the first final suspension order. This is the suspension order which was set aside on the basis that by the time the suspension hearing was conducted the provisional suspension order had lapsed and as such it could not be converted into a final suspension order. During the second suspension hearing the Applicant applied for the recusal of the Third Respondent on the basis that the Third Respondent could not be impartial or fair in dealing with the matter as she had issued the first final suspension order that had been set aside on appeal. The Applicant also called into question the fairness and impartiality of the process as the First Respondent had, after the setting aside of the first suspension order, announced in the media that another suspension order would be issued. The Third Respondent refused to recuse herself holding that the Applicant had not made out a case for her recusal.

[38] In these proceedings it was argued on behalf of the Applicant that there was a basis for the Applicant to have a reasonable suspicion that the Third Respondent would be biased as she had dealt with the first suspension order. It was also argued that what created a reasonable suspicion of bias on the part of the Applicant was the fact that the First Respondent had issued a media statement on 12 June 2015 stating that it was set to issue another suspension order on 15 June 2015. It was argued on behalf of the Respondents that “the fact that a decision maker has already considered the matter once, is not a bar to the decision-maker considering the matter afresh and in this regard I was referred to section 8(1) (c) (ii) (aa) of PAJA which permits a court to substitute or vary the administrative action or to correct a defect resulting from the administrative action only in ‘exceptional circumstances’. I was also referred to the **Hamata** case where it was stated that it is not bias to hold certain tentative views about a matter.

[39] The reference to section 8(1) (c) (ii) (aa) of PAJA does not, in my view, support the submission that “*the fact that a decision maker has already considered the matter once, is not a bar to the decision-maker considering the matter afresh*”.

[40] The **Hamata** case, in my view, supports the Applicant’s case in that the Third Respondent not only held tentative views about the matter but had in fact made a decision, on the same facts to issue the first final suspension order. In the answering affidavit it appears that already on 11 June 2015, a day after

the first final suspension order was set aside she had already made up her mind that she was going to issue the second provisional suspension order. In addition to this the Third Respondent issued a media statement stating that another provisional suspension order was to be issued on 15 June 2015. This, in my view, would give rise to a suspicion on the part of the Applicant that the hearing would be a mere formality. As stated in the **Hamata** case “*no one can fairly decide a case before him if he has already prejudged it. Thus pre-judgment of the issues is to be decided (which is in a case prejudice) constitutes bias. The entire proceedings had become tainted with bias.*”

[41] Considering that the Third Respondent had dealt with the first suspension order, the fact that a day after the first suspension order was set aside she decided to issue another provisional suspension order and the fact that this was communicated to the media the Applicant’s apprehension of bias on the part of the Third Respondent is not unreasonable. I am therefore satisfied that there were grounds requiring the Third Respondent to recuse herself from the second suspension hearing and that her failure to do so must have given rise to the Applicant’s reasonable suspicion of her bias. The second suspension hearing was thus tainted with bias.

[42] It was argued on behalf of the Respondents that the matter had become moot as the terms of the final suspension order had been varied by agreement between the Applicant and the Third Respondent. This argument misses the point that the final suspension order that was issued by the Third Respondent

is still in place and it is only its terms that have been varied. The fact that the terms of the suspension order have been varied cannot cure a suspension order that stands to be set aside.

- [43] The Applicant, having succeeded to establish reasonable suspicion of bias, I do not deem it necessary to deal with the grounds of review based on rationality and reasonableness.

The unlawfulness of Rules DJP3.2 and 3.3

- [44] In respect of the challenge to Rules DJP3.2 and 3.2 on the basis that they are overbroad, the Applicant appears to have based his challenge on the following passage from the ruling of the University appeal tribunal, namely:

“However, it is further of the view that the SO rules and process need to be revisited in light of the concerns that have arisen in the course of the suspension hearing and this appeal. The Tribunal is of the view that, having regard to the potential seriousness of the consequences flowing from the imposition of a SO, the process should be infused with an overriding concern for fairness to all the parties and compliance with good practice. A rewrite of the rules would also provide an opportunity to remove uncertainties in formulation.”

[45] These rules confer upon the Second Respondent or his nominee the power to issue suspension orders and they read as follows”

“DJP3.2 If the Vice-Chancellor has reason to believe that the matter justifies the execution of a suspension order he or she may make a provisional order prohibiting the student from:

- (a) attending lectures and classes; and/ or*
- (b) participating in specified activities of the University; and/or*
- (c) entering the precincts of the University or any such part thereof as may be indicated by him or her; and/or*
- (d) residing in a student housing unit; and/or*
- (e) making contact, directly or indirectly, with one or more than one specified person/s while on campus;*

As may be appropriate for the elimination of a particular threat to good order and for a period not exceeding 72 hours.

DJP3.3 The Vice-Chancellor may impose any further conditions at the time of issuing the preliminary order or at any time thereafter.”

[46] The Respondent submitted, correctly in my view, that the making of the rules constitutes an administrative action for the purposes of PAJA, and as such the Applicant is required to base his cause of action in PAJA. The Applicant seeks an order that Rule DJP3.2 and 3.3 are unlawful in that they are vague, overbroad and arbitrary in violation of section 33 of the Constitution of the Republic of South Africa, 1996. Although the Applicant basis his challenge of the Constitution unlawfulness is a ground of review under section 6(2) (i) of PAJA. Thus, although the Applicant has not made specific reference to PAJA, he cannot be non-suited in instances where the ground for the challenge falls under PAJA. To do so would be to elevate form over substance.

[47] Although the Applicant has argued that “*The Third Respondent may essentially issue a series of suspension orders on a subjective belief that does not serve the objective purpose of the rules*”, the reading of the rules do not support this submission. The rules appear to be designed to give the Second Respondent discretion to issue a provisional suspension order which is operative only for 48 hours. Before he can issue such provisional suspension order he has to have reason to *believe* that the matter justifies the execution of a suspension order, which involves an objective test.

[48] The power conferred on the Third Respondent can also be exercised after receipt of a report from a member of the University staff or a student who has reason to believe that the continued presence of the student against whom

there is an allegation of breach of Student code is likely to pose a threat to the maintenance of good order within the University.

[49] There are thus jurisdictional requirements that have to be met before a provisional suspension order can be issued.

[50] In respect of Rule DJP3.3 it merely provides for the Vice-Chancellor with the power to impose further conditions at the time of issuing the preliminary order or at any time thereafter.

The Interdictory Relief

[51] The Applicant sought two interdicts, namely:

51.1. The interdict to operate pending the finalisation of these proceedings;
and

51.2. The interdict to prevent the Respondents from issuing further suspension orders in terms of Rule DJP3.2 in relation to the incident of 1 May 2015 on the basis that it is irrational and unreasonable.

[52] The first interdict has become moot as these proceedings have now been concluded and as such it is not necessary to consider this matter any further.

[53] In respect of the second interdict it has been submitted on behalf of the Respondents that the final suspension order is only valid for 100 days and that it cannot be extended beyond 100 days unless there are pending criminal proceedings arising from the same incident that gave rise to the suspension order. The suspension order would, thus have expired on 24 September 2015 and cannot be extended beyond the 100 days as there are no criminal proceedings arising from the same incident that gave rise to the suspension order. For that reason it does not appear that it is warranted to consider an interdict preventing the Respondents from issuing further suspension orders arising from the same incident as if they were to issue further suspension orders they would be acting against the University rules.

Costs

[54] It was submitted on behalf of the Applicant that in the event of the Applicant being successful the costs to be awarded should include the costs of two counsel. The Respondents were also represented by two counsel and I cannot find any reasons why the Respondents should not be ordered to pay costs including costs of two counsel.

In the circumstances I make the following order:

- 1. The decision of the Third Respondent to issue the final suspension order on 15 June 2015 is reviewed and set aside;**
- 2. The Respondents are ordered to pay costs including costs of two counsel.**

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NUKU, AJ