IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION, GRAHAMSTOWN] *[NOT REPORTABLE]*

CASE NO: 1604A/18

Heard through Virtual Court on: 07 and 11/09/20

Delivered on: 17/09/20

In the matter between:

YOLANDA DYANTYI	Applicant
And	
RHODES UNIVERSITY	First Respondent
SIZWE MABIZELA N.O.	Second Respondent
WAYNE HUTCHINSON N.O.	Third Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

NHLANGULELA DJP

[1] This judgment concerns an application for leave to appeal the judgment that was delivered on 26 March 2020 dismissing an application for reviewing of decisions made by the first respondent in terms of the Students Disciplinary Code of Rhodes University. It also deals with attacks against the integrity of this Court and defaming of the first respondent emanating from a media statement dated 04 September 2020, and the interruption of the court proceedings on 11 September 2020.

[2] I will first deal with the application for leave to appeal (in paragraphs 3 – 19), followed by the attacks and interruption against the Court and first respondent (in paragraphs 20 – 25). Lastly, an order will be made in a usual manner (in paragraph 26).

[3] On 10 November 2017 the third respondent sitting as the chairperson of the disciplinary tribunal convened by the first respondent convicted the applicant of kidnapping, insubordination, assault and defamation. Pursuant thereto, on 17 November 2017 a sanction was issued in the following terms:

> (1) Ms Dyantyi is excluded permanently from Rhodes University, forthwith as of the date of this order;
>
> (2) No credit/s that Ms Dyantyi may obtain at any other institution during any period that she was excluded from Rhodes University will count towards any qualification issued by Rhodes University.
>
> (3) Ms Dyantyi's academic transcript shall be endorsed to read "Conduct Unsatisfactory – Student permanently excluded for: Kidnapping; Assault; Insubordination; Defamation."
>
> (4) Ms Dyantyi must vacate Rhodes University premises by close of business on the date of this order and may not attend on the Rhodes University campus for the duration of her exclusion.
>
> (5) The order set out in paragraph 4 specifically prohibits Ms Dyantyi from attending the Rhodes University campus for any academic, administrative, social or any other purpose whatsoever, including, but not limited to, the writing of any outstanding examinations;
>
> (6) Any examinations, practical or any other means of assessment that Ms Dyantyi may have written or done during the November 2017 examination period, which have not been finalised in terms of the Rhodes University Institutional Rules as at the date of this order, shall be regarded as *pro non scripto.*

[4] The grounds upon which leave to appeal in sought, with supplementation, are set out in full below. They read:

> **"Failure to isolate and decide the material issues**
>
> 1 The Court erred in failing to isolate and decide the issues placed before it for resolution. Those issues were –

1.1 Whether the third respondent's ("Mr. Hutchinson's") decision to postpone the disciplinary inquiry to a date on which Ms. Dyantyi's representatives were unable to attend was procedurally unfair;

"1.1.1 Mr Hutchinson failed to weigh the prejudice to Ms Dyantyi of continuing with the inquiry on a date upon which her counsel could not attend against the University's contention that the continuation and conclusion of the inquiry was urgent;

1.1.2 Mr Hutchinson failed to appreciate that Ms Dyantyi had a right to be represented by the same counsel at every stage of the hearing as this was essential to the fair and effective presentation of her case."

1.2 Whether Mr. Hutchinson's failure to give any reasons for that decision was procedurally unfair and/or irrational; 1.3 Whether Mr. Hutchinson was reasonably suspected of bias by reason of –

1.3.1 His utterance of the words "I am the University" in the course of chairing Ms. Dyantyi's disciplinary enquiry;

1.3.2 His ex parte conversation with the first respondent's Prosecutor on 26 June 2017 in which he re-arranged the dates on which the inquiry would sit without the knowledge, input or consent of Ms. Dyantyi's legal representatives; and

1.3.3 His unquestioning and unreasoned acceptance of the first respondent's demand, on 11 October 2017, that Ms. Dyantyi's disciplinary inquiry be scheduled on a date on which Ms. Dyantyi's legal representatives would not be able to attend.

Errors relating to the issue of procedural fairness

2 The Court erred, at paragraph 34 of its judgment, in holding that Ms. Dyantyi and her legal representatives "failed to attend the hearing" on 26 October 2017. Ms. Dyantyi and her representatives did not "fail to attend" the hearing. Their attendance at the hearing was made impossible by Mr. Hutchinson's irrational decision to proceed with the inquiry on that date.

3 The Court erroneously failed to record-

3.1 the reason for Mr. Dyantyi's absence: that Ms. Dyantyi's counsel were professionally required to be in court elsewhere;

3.2 the fact that a written postponement application was advanced prior to 26 October 2017 setting out that Ms. Dyantyi's counsel would be unable to attend the hearing on 26 October 2017, because they were required to be in Court elsewhere; and

3.3 that this was the reason given for their resistance to the postponement of the inquiry to 26 October 2017 throughout.

4 The issue placed before the Court for decision was whether Mr. Hutchinson's postponement of the inquiry to a date on which it was impossible for Ms. Dyantyi's counsel to attend was procedurally unfair. The Court erred, with respect, in failing to draw any conclusion whatsoever on this issue.

5 The Court erred in failing to consider or determine Ms. Dyantyi's argument that Mr. Hutchinson's refusal to give any reasons whatsoever for his decision to continue with the inquiry on 26 October 2017 was procedurally irrational, contrary to the decisions of the Constitutional Court in National Energy Regulator of South Africa v PG Group (Pty) Ltd 2019 (10) BCLR 1185 (CC) paras 48 to 50, and Psychological Society of South Africa v Qwelane 2017 (8) BCLR 1039 (CC), para 31

6 **The Court ought to have held that –**

6.1 the postponement of the inquiry to a date on which Ms. Dyantyi's counsel could not attend denied her of the benefit of legal representation, which she had enjoyed up until that point, deprived her of any effective opportunity to lead her case; was grossly procedurally unfair; and vitiated the outcome of the inquiry; and, in any event, that

6.2 the absence of reasons for Mr. Hutchinson's plainly prejudicial decision to postpone the inquiry to a date on which Mr. Dyantyi's counsel were unable to attend rendered that decision procedurally irrational, and vitiated the outcome of the inquiry.

7 At paragraph 31 of its judgment, the Court records that Mr. Hutchinson uttered the words "I am the University" in the course of the inquiry. The Court erred, however, in failing to evaluate whether that utterance was 6 capable, whether on its own, or in combination with other conduct alleged against Mr. Hutchinson, of creating a reasonable apprehension of bias.

8 At paragraph 33 its judgment, the Court records that Mr. Hutchinson "did not view the arrangements of 28 June 20171 as being an ex parte postponement designed by him to exclude the involvement of the applicant". The Court went on "I am not persuaded that this postponement . . . deprived the applicant of her right to legal representation"

9 **The Court erred in failing to consider the following –**

9.1 The test for a reasonable apprehension of bias is an objective one. It does not matter whether Mr. Hutchinson thought his ex parte conversation with the University Prosecutor was improper. The question is whether a reasonable person would have thought it indicative of bias.

9.2 The evidence of Mr. Hutchinson's ex parte conversation with the University Prosecutor was not tendered as evidence of a conspiracy to exclude Ms. Dyantyi or her representatives from the hearing. It was tendered as an occurrence which gave rise to a reasonable apprehension that Mr. Hutchinson was biased. 1 This appears to be an error. The ex parte conversation Ms. Dyantyi complained of took place on 26 June 2017. 7

10 The Court ought to have held that the cumulative effect of (i) Mr. Hutchinson's utterance of the words "I am the University" (ii) Mr. Hutchinson's ex parte conversation with the University Prosecutor of 26 June 2017 (iii) Mr. Hutchinson's postponement of the inquiry to 26 October 2017 – a date on which he knew for a fact that Ms. Dyantyi's counsel could not attend because they had to be in court elsewhere and (iv) Mr. Hutchinson's failure to give reasons for that decision, despite being given multiple opportunities to record them, gave rise to a reasonable apprehension that he was biased in favour of the first respondent.

11 The Court accordingly erred in failing to conclude that Mr. Hutchinson was reasonably suspected of bias, and that this vitiated the outcome of the inquiry. Errors relating to the evaluation of the evidence led at the inquiry

12 The Court erred in making final factual findings about the events that were the focus of the disciplinary inquiry, in circumstances where the inquiry was plainly unfair, and Ms. Dyantyi had been given no reasonable opportunity to lead her case.

13 **In particular –**

13.1 The Court erred, at paragraph 7 of its judgment in finding that Ms. Dyantyi removed Mr. Manyenyeni from his room on 17 April 2016, in circumstances where –

13.1.1 Ms. Dyantyi had not been permitted to lead a version of what happened on 17 April 2016 at the inquiry; and

13.1.2 The objective video evidence of Mr. Manyenyeni leaving his room contradicts the first respondent's version that Ms. Dyantyi was involved in removing Mr. Manyenyeni from his room. That video did not show Ms. Dyantyi present at Mr. Manyenyeni's room. Nor did it show her coercing him to leave it.

13.2 The Court erred in failing to record that Ms. Dyantyi denies Mr. Manyenyeni's testimony that she pointed at him, called him an animal, a vile beast or a rapist, grabbed him by the collar kicked him, spat on him or pushed him. Much of this conduct was said to have been portrayed in video evidence that did not show Ms. Dyantyi present at all.

13.3 The Court erred in finding that Ms. Dyantyi "shoved" Mr. Manyenyeni. The video evidence relied upon for this allegation does not show Ms. Dyantyi shoving Mr. Manyenyeni. It shows a two-second clip of her tapping him on the shoulder. It is the only part of the extensive video evidence led before the inquiry that discloses any footage of Ms. Dyantyi at all.

13.4 The Court erred in failing to record that the conduct set out in paragraphs 7 and 8 of its judgment took place at the centre of a 9 substantial crowd of protestors. Some people in the crowd participated in the conduct, but most did not. Many did not know that it was happening. Ms. Dyantyi's defence at the disciplinary inquiry, which the Court also erred in failing to record, was that she was part of the protest at various times, but did not participate in, or associate herself with, any unlawful conduct.

13.5 The Court erred in finding that Ms. Dyantyi "was present in the crowd at all times". This was not established at the inquiry.

13.6 The Court erred in finding that Ms. Dyantyi "was present when the protestors formed a human chain around Mr. Manyenyeni during the morning of 18 April 2016". While this was part of the evidence led by the University, it was hotly disputed at the inquiry, and would have been disproved had Ms. Dyantyi been given an opportunity to lead her case.

13.7 The Court erred in taking into account the conduct alleged against Ms. McFall and Ms. Mashishi in paragraph 9 of its judgment. This conduct had nothing to do with Ms. Dyantyi. There was no link, established at the inquiry, between Ms. Dyantyi and this conduct.

13.8 The Court erred in uncritically adopting the evidence of Mr. Gcakasi, at paragraph 10 of its judgment, in circumstances where

13.8.1 Ms. Dyantyi denied Mr. Gcakasi's version.

13.8.2 Mr. Gcakasi had failed to mention Ms. Dyantyi at all in an affidavit prepared contemporaneously with the events to which he testified, and only mentioned her, for the first time, during his testimony at the disciplinary inquiry, well over a year later.

13.8.3 Ms. Dyantyi was given no reasonably opportunity to lead evidence to rebut Mr. Gcakasi's version.

13.9 The Court erred in uncritically recording, and in attaching any significance to, the evidence of Mr. Mlandeli at paragraph 10 of its judgment, in circumstances where Ms. Dyantyi disputed it, and was given no reasonable opportunity to rebut it at the inquiry.

13.10 The Court erred in relying on Mr. Mlandeli's evidence in circumstances where that evidence, at least in respect of Ms. Dyantyi's involvement, was manifestly inconsistent with the evidence of Mr Manyenyeni.

13.11 The Court erred in attaching any significance, at paragraph 11 of its judgment, to the allegation that Ms. Dyantyi was on a stairway when Ms. Smailes (who did not testify at the inquiry) issued various warnings to the protestors. These facts ought not to have 11 been evaluated in isolation from the fact that Ms. Dyantyi was given no reasonable opportunity to rebut them at the inquiry.

13.12 The Court erred in attaching any significance to the evidence led by Ms. Dyantyi's co-accused, recorded in paragraph 12 of its judgment. That evidence tended neither to prove nor disprove the case against Ms. Dyantyi.

Other errors of fact and of law

14 The Court erred in finding that the charges were delivered to Ms. Dyantyi "without delay". There was indeed a very substantial delay, of almost a year, between the conduct alleged and the formulation of the charges.

15 The Court erred in finding, at paragraph 13 of its judgment, that Ms. Dyantyi "decided not to take part" in the inquiry on or after 11 October 2017. Ms. Dyantyi did not "decide" not to take part. She was denied the assistance of counsel by Mr. Hutchinson's arbitrary decision to postpone the inquiry to a date on which Ms. Dyantyi's counsel could not attend. To characterise this as a "decision" is erroneous. Ms. Dyantyi's hand was forced by Mr. Hutchinson's unfair and irrational decision.

16 The Court erred, in paragraphs 14 to 16 of its judgment, in failing to note that Mr. Hutchinson evaluated the evidence of the University without having regard to Ms. Dyantyi's evidence, which he gave Ms. Dyantyi no reasonable opportunity to lead. In circumstances where Mr. Hutchinson 12 had effectively deprived himself of the opportunity to hear Ms. Dyantyi's case, it cannot reasonably be concluded that the evidence was evaluated in a fair and reasonable manner.

17 The Court erred, at paragraph 17 of its judgment, insofar as it found that Ms. Dyantyi's case based on sections 6 (2) (f) (ii) (dd) and 6 (2) (h) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") was an attack on the evaluation of the evidence at the inquiry. Ms. Dyantyi's case was that she was deprived on any effective opportunity to lead her evidence, because Mr. Hutchinson postponed the inquiry to a date on which the matter could not proceed in the presence of her counsel. In doing so, Mr. Hutchinson deprived himself of the opportunity to hear any evidence at all in support of Ms. Dyantyi.

18 The Court erred in paragraph 18 of its judgment in finding that –

18.1 Ms. Dyantyi was represented by four counsel. This was simply not true. She was represented by two junior advocates.

18.2 Ms. Dyantyi was represented by Ms. de Vos SC. This is also untrue. Ms. de Vos SC took no part in the disciplinary inquiry.

18.3 Ms. Dyantyi and her legal team "decided not to engage in the disciplinary inquiry as they had already formed a view that the refusal by the third respondent to postpone the matter to 29 November

2017 was unreasonable." This conclusion is wholly at odds with the common cause facts, in that –

18.3.1 On 11 October 2017, the inquiry was postponed to 26 October 2017, not 29 November 2017.

18.3.2 The two advocates acting for Ms. Dyantyi were required to be in the High Court in Johannesburg and Pretoria during the week beginning 24 October 2017. They accordingly could not attend the inquiry.

18.3.3 Notwithstanding this, Mr. Hutchinson scheduled the inquiry to continue on 26 October 2017 – a date on which he knew for a fact that Ms. Dyantyi's counsel would not be able to attend.

18.3.4 Mr. Hutchinson then refused a written application to postpone the inquiry from 26 October 2017, to dates on which Ms. Dyantyi's counsel could attend.

18.3.5 Mr. Hutchinson did not at the time give – and has not since given – reasons for this refusal.

18.3.6 There was no appearance for Ms. Dyantyi on 26 October 2017, because her counsel were engaged in court elsewhere.

19 The Court erred in failing to attach significance to Mr. Hutchinson's utterance of the words "I am the University", which the Court records at paragraph 31 of its judgment. This utterance clearly indicates bias.

20 The Court erred, in paragraph 33 of its judgment, in failing to record or attach significance to the fact that the "ratification" of the hearing dates of 7 and 8 August 2017 was accompanied by a strenuous objection to the ex parte conversation in which those dates had been chosen by the University Prosecutor, and agreed to by Mr. Hutchinson, without the knowledge or participation of Ms. Dyantyi's representatives. The Court also erred in failing to record that Ms. Dyantyi's representatives stated at the time that the ex parte conversation with the University Prosecutor was plainly indicative of bias.

21 The Court erred, at paragraph 34 of its judgment, in holding that the postponement application brought in the week before 26

October 2017 was motivated on the basis that "one out of four members of the applicant's legal team had to attend a conference in New York and that another member had work to attend to in other courts". A conference in New York was never given as the reason for Ms, Dyantyi's counsel's unavailability on 26 October 2017. The sole basis of the application was that both of the two (not four) counsel appointed to represent Ms. Dyantyi had to be in court in Johannesburg and Pretoria during the week of 24 October 2017.

22 The Court also erred in purporting to record Mr. Hutchinson's reasons for refusing the postponement application in this paragraph. Mr. Hutchinson never gave these – or any other – reasons for refusing the postponement application.

23 The Court erred, in paragraph 35, in applying the decision of *Hamata v Chairperson of Peninsula Technikon Disciplinary Committee* 2002 (5) SA 449 (SCA). *Hamata* deals only with the issue of when legal representation will be permitted in a disciplinary inquiry. It does not address the situation in this case: in which Mr. Hutchinson excluded Ms. Dyantyi's legal representatives from the inquiry, by postponing it to a date on which those representatives could not reasonably be expected to attend.

24 The Court also erred, in paragraph 35 of its judgment, in finding that Ms. Dyantyi was represented by a "team of four lawyers under the leadership of a Senior Counsel". This is at odds with the common cause facts. Ms. Dyantyi was represented by two junior advocates. There were no senior counsel at the inquiry.

25 The Court erred, in paragraphs 36 and 37 of its judgment, in relying on the decision of the Court in McFall v Rhodes University. That decision is plainly wrong, since it has the absurd consequence of requiring an applicant for internal review to formulate her grounds of review before being placed in possession of the material necessary to do so.

26 The Court erred, in all these circumstances, in concluding that Mr. Hutchinson "applied all the institutional rules of the first respondent reasonably, correctly and without prejudice to or bias against the applicant". This conclusion cannot be sustained on the common cause facts.

Errors relating to costs

27 The Court erred, in paragraphs 40 to 44 of its judgment, in failing to apply the *Biowatch* rule. The Court was wrong to conclude that Ms. Dyantyi had conducted herself in a "frivolous and vexatious manner". No primary facts were found to support this conclusion.

> The vexatious conduct found appeared, insofar as the Court's reasoning can be discerned, to relate to other litigation pursued by Ms. Dyantyi, and not to the review with which the Court was seized. There was absolutely no suggestion that Ms Dyantyi had conducted herself vexatiously in pursuit of the review that was before the Court, and there was, accordingly, no basis on which to depart from the *Biowatch* rule."

[5] In the body of the document entitled Supplementary Grounds of Appeal appears the following Notice:

> "Take Notice Further That Ms Dyantyi contends that the question of whether a student facing exclusion from a University may be deprived of the assistance of counsel, raises constitutional questions concerning the right of access to further education and training, entrenched in section 29 (1)*(b)* of the Constitution, 1996. This is a compelling reason for the judgment of the Court *a quo* to be reconsidered on appeal."

[6] Quite obviously, the intention of the applicant as gleaned from the Notice as aforementioned is to raise a further ground predicated on the provisions of s 29 (1)*(b)* of the Constitution, 1996 which read:

> "Education (1) Everyone has the right-
>
> (a) …
>
> (b) to further education, which the state, through reasonable measures, must make progressively available and accessible…"

[7] I accept the fact that the broad ground based on s 29 (1)(*b)* arises from the review proceedings. This fact is acknowledged in the heads of argument by the respondents where the context in which the grounds is raised is attributed to the findings of guilt, the applicant's withdrawal from the disciplinary proceedings and the sanction that followed.

[8] The grounds of appeal are set out in a liberal manner with the result that they are lengthy and confusing. Stripped to their simple formulation I understand the grounds in this matter to be that:

(i) The judgment of the Court *a quo* reflects errors with regard to the manner in which the analysis of the facts relevant to merits and procedure were applied during the disciplinary hearing. The upshot of these attacks boils down to the assertion that the convictions and sanction were decided on the wrong facts.

(ii) The applicant was denied her right to legal representation during the disciplinary hearing. This ground relates to the application for postponement that were commenced with orally on 11 October 2017 and repeated in writing on 24 October 2017. When this application was refused, the applicant together with her legal representatives withdrew participation in the disciplinary hearing completely.

(iii) The third respondent was biased in favour of the first respondent, and

(iv) The applicant was denied her right of internal review.

(v) The applicant was denied her right to education that is protected under s 29 (1)*(b)* of the Constitution, 1996.

(vi) Finally, the court *a quo* failed to apply the *Biowatch* rule when considering the costs of the application for review.

[9] The provisions of s 17 (1)*(a)(i)* of the Superior Courts Act 10 of 2013 state that an application for leave to appeal may only be granted if the court hearing it finds that reasonable prospects of success on appeal are present. The Supreme Court of Appeal has on countless occasions given guidance to the High Courts on the meaning of the test: "reasonable prospects of success." In one of the cases, in *S v Smith* 2012 (1) SACR 567 (SCA) at para [7], the following was stated:

> "What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as

> hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[10] As correctly submitted by *Ms De Vos SC*, counsel for the applicant, during the hearing of this application this is a factually complex matter. It required a careful evaluation of the facts, and the application of legal principles thereto. However, it cannot be correct that the court of review inappropriately isolated the factual events that were otherwise the integral parts of inseparable developments ranging from the manner in which the offences were committed by the applicant right up to the time when she would be expected to launch an internal appeal. Such a submission is not supported by the established legal principles. Navsa JA in *S v Trainor* 2003 (1) SACR 35 (SCA) at [9] issued a warning against such a facts isolationist approach when he said:

> "The compartmentalised and fragmented approach ... is illogical and wrong."

[11] In my opinion *Mr Smuts SC,* counsel for the first and second respondents, arguing for the refusal of the application for leave, adopted a correct approach. The heads of argument that he filed on behalf of the respondents speak for themselves. There will be no need to rehash them in this judgment.

[12] Suffice it to say that the outcome of the review proceedings is a product of proven facts and the legal principles that were applied thereto. The general submission advanced on behalf of the applicant that erroneous facts were taken into account does not make a distinction whether those facts were material or not. The incorrect facts under question are that the applicant had four, instead of two advocates; she was legally represented by *Ms De Vos SC* instead of *Ms de Vos*; on the 11 October 2017 the inquiry was postponed to 29 November 2017 instead of 26 October 2017; and that the reason for absence of two advocates was that they had commitments overseas, instead of commitments in courts elsewhere in

the RSA. A proper assessment of those factual errors shows that they were not in themselves material enough to change the outcome of the review application.

[13] Absence of faith on the part of *Ms De Vos SC* in the strength of the grounds pertaining to breaches of applicant's rights to internal review and the *Biowatch* rule demonstrably puts paid to those grounds. For my part, a case was not made out on those grounds. The reasons set out in the main judgment remain unshaken.

[14] Similarly, I remain unpersuaded that I *erred* in my findings related to the ground that the third respondent was biased in favour of the first respondent. There cannot be a prospect of success on appeal on this ground.

[15] The ground of appeal that the applicant was denied a right to legal representation as encapsulated in paragraphs 1.1, 1.2, 2 read with paragraph 6 of the notice of application for leave to appeal does have merit in my view. To the extent that this ground is capable of the interpretation that is set out in the main judgment, and also the interpretation that has been advanced in argument that the refusal of postponement sought by the applicant made it impossible for her to participate in the disciplinary hearing duly legally represented by counsel of her own choice, I am driven to the conclusion that a prospect of success on appeal does exist.

[16] More must be said about the issue of legal representation during the disciplinary hearing. The nub of the argument advanced on behalf of the applicant is that the court of review did not take into account that the appellant was entitled to continue to be represented by counsel who had already been chosen by her, and only such counsel must have been allowed by the third respondent to stay in the proceedings until the stage of finalization regardless of the fact that she was unavailable to participate in the hearing on 26 October 2017.

In the contrary, I approached the representation rule on the premise that the applicant's right to legal representation was not taken away but the decision of counsel to commit herself in another court on the face of the disciplinary hearing that was in progress and without being substituted by an alternative counsel was not an adequate reason for stopping the disciplinary hearing.

[17] In light of the conflicting interpretations of the representation rule, the question whether to direct the hearing of the appeal to the Supreme Court of Appeal or to the Full Court of this Division could not have been a simple matter to decide.

[18] The provisions of s 17 (6)*(a)* of the Act provides that generally a single Judge granting leave in terms of s 17 (2)*(a)* must direct that the appeal be heard by a full court. A referral to the Supreme Court of Appeal is not a general rule. Certain jurisdictional factors must be present for such a referral to be made as is provided in subsection (6)*(a)(i)* that the decision to be appealed should involve a question of law of importance or a decision of the Supreme Court of Appeal must be required to resolve differences of opinion. Alternatively, in terms of subsection 6 *(a)(ii)*, the administration of justice must require consideration of the decision by the Supreme Court of Appeal. In this case the pre-condition in subsection (6)*(a)(i)* apply. The question of law arising in the matter is whether the right of the applicant to legal representation, as affirmed in the case of *Humata And Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others* 2002 (5) SA 449 (SCA), extends the meaning of such a right to include that the applicant was also entitled only to the services of one and the same chosen counsel even if the absence of that counsel, *albeit* without sound reasons, meant stalling the disciplinary hearing. To my mind, a proper decision of this important question is a matter of interest to the applicant, as a student, in the same way that it is important to the first respondent when implementing the Students Disciplinary Code.

[19] The general rule is that in the absence of exceptional circumstances the costs of the application for leave should be costs in the cause of the appeal proceedings. That rule applies to this case.

[20] On the invitation by both counsel, I now turn to deal with the print media statement that emerged three days before the commencement of this virtual court proceedings on 07 September 2020 and the interruption of the court proceedings that took place on 11 September 2020.

[21] The Socio Economic Rights Institute (Seri) runs a law clinic that provides legal services for the benefit of the applicant. Seri carries on business at 54 De Korte Street, Braamfontein. On 04 September 2020 it published a Press Statement entitled: "Rhodes University Continues To Deny Yolanda Dyantyi A Fair Disciplinary Hearing." The statement was published under the hand of one Nomzamo Zondo acting in her capacity as Seri's Executive Director with email-nomzamo@seri-sa.org and cell number 071 301 9676. I can do no better than to quote the contents of the Press Statement herein below:

> **"PRESS STATEMENT**
> **4 SEPTEMBER 2020**
>
> **RHODES UNIVERSITY CONTINUES TO DENY YOLANDA DYANTYI A FAIR DISCIPLINARY HEARING**
>
> Rhodes University continues its war against Yolanda Dyantyi, a former student who took part in the anti-rape protests on the University campus in April 2016. In November 2017, the University permanently expelled Ms. Dyantyi after she was convicted of "kidnapping", "assault", "defamation" and "insubordination" by a disciplinary inquiry instituted by the University. She was convicted by a disciplinary inquiry, which was procedurally flawed. The punishment meted out was grossly prejudicial. The terms of her expulsion have made it practically impossible for her to enrol in any other higher education institution for the foreseeable future.
>
> Rhodes University charged Ms. Dyantyi in March 2017, almost a year after the protest. The disciplinary inquiry sat between June and October 2017, however, the University's appointed Proctor postponed the portion

of the inquiry pertaining to Ms Dyantyi's case to a date on which her legal representatives were unable to attend, making it impossible for Ms. Dyantyi to present her case or to continue participating in the proceedings. Ms. Dyantyi was ultimately convicted and sanctioned in her absence.

Ms. Dyantyi has sought to challenge her expulsion on the basis that she was denied the assistance of counsel and consequently of any reasonable opportunity to present her case. The Proctor who presided over the inquiry was reasonably suspected of bias and after finding Ms. Dyantyi guilty based on weak evidence, the University unlawfully denied her the right to an internal review, made available to her in terms of the University's disciplinary rules.

Ms. Dyantyi, who was 19-years old at the time, took part in a protest that sought to address a crisis that had affected the University for years and continues to affect all women in South Africa. The spontaneous protest and movement became known as the "#RUReferenceList" and took place after a list was anonymously published on Facebook containing the names of 11 current and former male students accused of sexual assault or violence against women at Rhodes University.

Hundreds of students took part in the protest that lasted a week. The students demanded that the University amend its rape policy, and suspend and investigate the students accused of sexual assault. Numerous other protests against gender-based violence took place at Rhodes, making similar demands. It was however, only after the "#RUReferenceList" protest that Rhodes University eventually took steps to address the students' concerns. The University established a "Sexual Violence Task Team".

Rhodes University has, at the same time, taken credit for making the changes demanded by the protest, and used its institutional might to bully and punish Ms. Dyantyi for taking part in the protest.

Since Ms. Dyantyi's expulsion, Rhodes University has remained unrelentingly determined to prevent her from challenging the outcome of the disciplinary inquiry. It has committed its resources and its power to singling out Ms. Dyantyi and attacking her character, describing her as "insidious", arguing that she tells 2 "outright lies" and that she is "mischievous and dishonest". Disappointingly, this is the basis on which the University has denied her right to a procedurally just disciplinary process, at which Ms. Dyantyi would be afforded the opportunity to tell her side of the story.

Yolanda Dyantyi has said: "I'm fighting for my right to a fair trial. The University, through the Vice Chancellor's orders, has done all they can to silence me and hold me accountable for acts I was not given the opportunity to contest. Much like the accused rapists who were given an

opportunity to testify as witnesses on behalf of the University, I should be given that opportunity too."

In December 2019, Ms. Dyantyi approached the Grahamstown High Court to set aside the outcome of the disciplinary hearing in a review application. In March 2020 the Grahamstown High Court dismissed Yolanda's review application and ordered her to pay the University's costs. In April 2020, SERI filed Ms. Dyantyi's application for leave to appeal, primarily submitting that the Court erred in failing to consider Ms. Dyantyi's argument that the postponement of her disciplinary hearing to a date when her legal representatives were not available had resulted in an unfair disciplinary process. Rhodes University has opposed the application and it is due to be argued on 7 September 2020.

Contact details:

• Nomzamo Zondo, SERI's Executive Director: nomzamo@seri-sa.org / 071 301 9676."

[22] On 07 September 2020, and just before the commencement of arguments *Mr Smuts SC* presented the Press Statement to the Court as a complaint emanating from the first respondent that the contents thereof had the effect of besmirching the integrity of both the University and Court in a way that was disruptive to smooth running of the proceedings. A cursory look at the Press Statement shows that the contents thereof are connected directly to the merits of the application before the Court. It criticises the judgment in a manner that is favourable only to the applicant. It casts aspersions on the ability of this Court to decide the parties' dispute in a manner that is fair to the applicant. As if that was not enough, during the virtual hearing one of the participants invited by the court, as it must have done so, interrupted *Mr Smuts SC* as he was addressing the court with utterances to the effect that the Rhodes University proceedings against Yolanda Dyantyi have not been dropped because the intention is to ensure that Yolanda does not pursue university studies in her lifetime as a punishment for having joined a campaign for the establishment of a new rape culture in Rhodes University. The computer monitor in front of me indicated that the participant who was interfering with the court proceedings was one Yonela Sobhekile. Yonela's voice was that of a female person. *Ms De Vos SC* disavowed the

knowledge of Yonela and advised the Court to dismiss her from the virtual court. The interruption necessitated an adjournment for some time. Upon reconvening the court I saw a message on the computer monitor which read that Yonela had decided to leave the platform on her own.

[23] What became obvious from the unenviable turn of events as aforementioned is that:

(a) The real person behind the press statement, which is misleading, is unknown to the Court.

(b) The reason, objective and motive underlying the contents of the press statement is unknown to the Court.

(c) The true identity of the participant, who interrupted the virtual court proceedings, other than the name Yonela Sobhekile that popped-up on the monitor, is unknown to the Court.

(d) However, the Court can decipher from the press statement and the interruption that, *prima facie*, it is being subjected to scandalous attack that borders on criminal contempt arising *in* and *ex facie curiae.*

[24] As correctly submitted by *Mr Smuts SC* a need for referral of the press statement and the interruption during the virtual court proceedings to the National Prosecuting Authority (NPA) for investigation is the least available channel to be used in order to secure protection of the integrity of the administration of justice. In support of this submission the Court was referred to the case of *S v Mamabolo* (ETV and Others Intervening) 2001 (1) SACR 686 (CC) where the Constitutional Court said the following at 698c:

> "[19] This manner of conducting the business of the courts is intended to enhance public confidence. In the final analysis it is the people who have to believe in the integrity of their judges. Without such trust, the judiciary cannot function properly; and where the

> judiciary cannot function properly the rule of law must die. Because of the importance of preserving public trust in the judiciary and because of the reticence required for it to perform its arbitral role, special safeguards have been in existence for many centuries to protect the judiciary against vilification. One of the protective devices is to deter disparaging remarks calculated to bring the judicial process into disrepute."

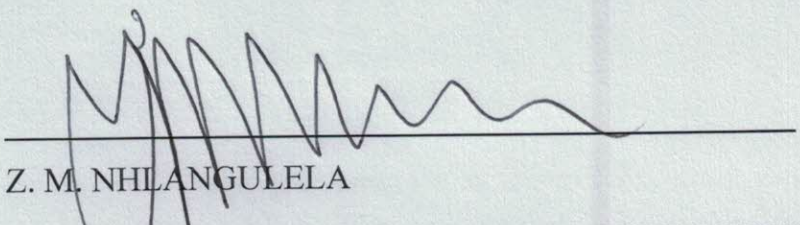
And further at 707g:

> "[45] … Scandalising the court is not concerned with the self-esteem, or even the reputation, of judges as individuals, although that does not mean that conduct or language targeting specific individual judicial officers is immune. Ultimately the test is whether the offending conduct, viewed contextually, really was likely to damage the administration of justice."

[25] On the aforegoing considerations, I find myself bound to refer the first respondent's complaint together with the scary incident of court interruption that unfolded right in front of my eyes to the NPA for an appropriate action to be taken.

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

1. **The application for leave to appeal be and is hereby granted.**
2. **It is hereby directed that the appeal be heard by the Supreme Court of Appeal.**
3. **The costs shall be costs in the cause of the appeal proceedings.**
4. **The Registrar of the Court, Grahamstown shall deliver a copy of this judgment to the NPA for appropriate action to be taken.**



Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

MTHATHA

Counsel for the applicant:	Adv. A.M. De Vos SC, appearing with: Adv. O. Motlhasedi
Instructed by:	Seri Law Clinic c/o Legal Resources Centre GRAHAMSTOWN
Counsel for the 1st and 2nd respondents:	Adv. I.J. Smuts SC, appearing with: Adv. N. Molony
Instructed by:	Eversheds Sutherland (SA) Inc c/o Huxtable Attorneys GRAHAMSTOWN