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

CASE NO: 18555/2019

In the matter between:

CHUMANI MAXWELE **Applicant**

and

THE UNIVERSITY OF CAPE TOWN **Respondent**

JUDGMENT DELIVERED ELECTRONICALLY TUESDAY 08 DECEMBER 2020

DOLAMO, J

INTRODUCTION

[1] 2015 – 2016 were eventful years on the academic calendar. Many of the leading universities in this country, which in the past had been insulated against the usual student boycotts afflicting their less prestigious counterparts, for the first time experienced heightened student protest actions. These resulted in the disruption of their academic programmes and activities. The University of Cape Town (UCT) was no exception. Some of the students at this institution embarked on protest actions which came to be known as #FeesMustFall, #RhodesMustFall and the Shackville. Although

not all students participated or supported these protest actions such was the force of those who were protesting that the normal academic programme of the University was adversely affected.

[2] In addition to the academic programmes and activities being affected, property, in the form of university buildings and other movable assets, such as rear art collections, books and vehicles, were damaged or completely destroyed. As a result many students who were fingered as having been in the forefront of these activities were either expelled or suspended, with many of them also facing criminal charges. The applicant, Mr Chumani Maxwele (Maxwele), who was an under graduate student at the time, was amongst those who were suspended. He, however, successfully challenged his suspension in this court. On the 15 September 2015 Nuku AJ gave an order reviewing and setting aside Maxwele's suspension.

[3] Around October 2016, it became clear to all stakeholders at UCT, the University's Executive in particular, that unless a different, more creative, constructive, progressive and forward looking approach was adopted, the university was in danger of losing the 2016 academic year, with disastrous consequences. As a result, the University's Executive engaged with the Student Representative Counsel (SRC), those students who were in jeopardy as a result of their participation in the protest actions, as well as other stakeholders to find a meaningful and lasting solution to the problem. This process of engagement lead to the conclusion of an agreement on or about the 6 November 2016, which came to be known as the IRTC/Shackville TRC (The

Commission).

[4] While the IRTC/Shackville TRC agreement is not a model of clarity in draftsmanship the purpose for which it was concluded was clearly to de-escalate tensions so as to end the cycle of protests and counter actions on the university campus. The agreement proposed that "*in the spirit of restorative justice… clemency*" be granted on the basis of, *inter alia*, the following principles:

> *"i) signing a declaration (attached) by specific individual students who have been subject to Student Disciplinary Tribunals that will provide clemency for specific offences which relate to the protests around February 2016*
>
> *ii) formally acknowledging wrong-doing and committing not to repeat such actions in the future by those granted clemency*
>
> *iii) accepting that if the student is in breach of the Student Code of Conduct after November 6 2016, the University shall be entitled to charge the student as provided for in the University's student disciplinary procedures.*
>
> *iv) agreeing that if there are disruptions of exams, academic activities, the residence system (inclusive of the dining halls and other recreational spaces) or the normal functioning of the university, and where no clear evidence is demonstrated that concerted efforts were taken to represent such actions, the University may approach the mediators to request revoking the clemency.*
>
> *v) understanding that the IRTC/Shackville TRC will request submissions from all constituencies on the clemencies granted and make recommendations on the granting of amnesties (or the continuation of clemency) and what the nature of these amnesties will be."*

[5] A student seeking clemency had to make a full disclosure of his/her participation

in the protests actions. Such an applicant had to accept that the university management was obliged to set a code of conduct and to enforce disciplinary procedures when it believed that the code has been breached. An applicant was also obliged to disclose whether he/she had been found guilty of an offence in breach of the University's Code of Conduct and the date of such conviction. In addition an applicant has to renounce violence, wanton destruction and damage to property. The result was that clemency for "*unlawful*" activities arising out of the protest actions was granted to those who applied and qualified. Maxwele was a beneficiary of this process: he was granted clemency, which could lead to full indemnity.

[6] The Commission's report, that contained the evidence gathered and recommendations made, was adopted by the University's Executive. As envisaged in the agreement the Institutional Reconciliation and Transformation Commission (IRTC) was established. Its terms of reference was to look into the Shackville protest of February 2016, including any related or subsequent protest action; to invite submissions from all constituencies and make recommendations on converting clemencies into amnesties or to retain such clemencies; make recommendations on how to deal with outstanding cases[1] in the spirit of restorative justice. Regarding cases which pre-dated November 2016, where no charges had been issued, the Commission recommended that UCT decides without undue delay whether or not to charge the students involved.

[7] Having been granted clemency Maxwele continued with his studies at UCT. He

[1] Outstanding cases was understood by the commission to mean those cases relating one way or another to Shackville cases, which involved three students who were granted clemency but did not benefit from the amnesty procedure.

went on to complete a BA Degree majoring in Politics, Gender and African studies. Thereafter he enrolled for an Honours degree in Political and African studies which he completed in 2018. He is currently doing a Masters' Degree in African Studies. He has been accepted for a Doctor of Philosophy (PHD) programme in African Studies at Cambridge University for 2021 academic year.

[8] On or about the 6 October 2017 Maxwele was served with a notice to appear before UCT's Disciplinary Tribunal on four charges. In respect of Charges 1 and 2, Maxwele was accused of having intimidated and racially abused Ms M Kirova, an academic member of staff, on 1 May and 15 September 2015, respectively. Charge 3 related to an incident which occurred on 17 February 2015, were Maxwele was alleged to have entered the computer laboratory at the Hiddingh Campus without authorisation. It was further alleged that he refused to produce his student card when requested to do so and directed verbal abuse, in an aggressive manner at Ms Nicole Forbes, a part time student employee. Charge 4 dealt with an allegation that Maxwele assaulted and intimidated Mr Ganger, a witness at a disciplinary hearing involving Maxwele and two other students, which incident allegedly occurred on the 4 May 2016.[2]

[9] The disciplinary hearing commenced on the 4 December 2017 and, was scheduled to continue until the 8 December 2017. It was however concluded on the 6 December 2017, after Maxwele had withdrawn from further participation in the proceedings on the 5 December 2017. The proceedings culminated in Maxwele's

[2] The charge against Maxwele that he contravened University Student Conduct Rule 16.2 was withdrawn.

conviction on all four counts. The sanction, which was eventually imposed on the 5 September 2018, was his immediate expulsion from UCT. This had the effect of his post-graduate studies at UCT coming to an abrupt end. Maxwele noted an appeal against his conviction and the sanction of expulsion and that appeal was dismissed by the UCT Student Discipline Tribunal of Appeal on the 9 October 2019. I shall in the course of this judgment deal in more detail with events surrounding the disciplinary hearing as well as the appeal, some of which form the basis of this review application.

[10] After the dismissal of his appeal, and on the 21 November 2019, Maxwele brought an urgent application in this court and obtained an interim order, pending adjudication of Part B, being the present review application. In terms of this interim order he was granted third party access to UCT's internet service, third party learning resources via a platform called "*vula*" and third party access to physical and online library resources for purposes of conducting research associated with his Master's degree. The order permitted him to be on campus but only for purposes of meeting with his Masters' research supervisor and upon the latter's invitation. This order effectively suspended his expulsion, Part B was postponed to 11 February 2020. After being postponed several times the matter eventually came before this court on the 22 September 2020.

[11] I digress to point out that Maxwele was unrepresented throughout the proceeding before the Disciplinary as well as the Appeal Tribunals. He also launched the review application without legal representation, his current legal representatives only came on

record on 25 October 2019. Upon coming on record Maxwele's legal representatives filed an amended notice of motion as well as a fresh founding affidavit, which was referred to as a supplementary founding affidavit. This was necessary to cure the glaring shortcomings in his papers.

[12] The grounds for review, as distilled from the amended papers, can be summarized as follows: The failure by the University to provide Maxwele with legal representation in the disciplinary and appeal proceedings; the Tribunals' alleged failure to apply the *audi alteram partem* rule. The Tribunals' alleged failure to take into account the outcome of the IRTC process, where Maxwele was given clemency in relation to charges covering the period traversed in the IRTC report, and a failure to take into account the IRTC's recommendation relating to all cases arising out of the 2016 and 2017 protest actions, in accordance with the restorative justice approach; and the alleged shortcomings of the transcripts of the proceedings of both tribunals, coupled with the Appeal Tribunal's alleged failure to consider the record of decision in its deliberations.

[13] The review application is opposed by UCT. UCT argued that Maxwele was not challenging the Tribunal's rulings and findings, dated the 10 July 2018 nor did he challenge these rulings and findings in his request for leave to appeal. The only question in this review application, according to UCT, was whether the uncontested rulings and findings of the Tribunal warranted a sanction of expulsion.

[14] While the review application was premised on the grounds stated *supra*, Mr *V Ngalwana* SC, for the applicant argued the matter on four legal points. One of these points, the composition of the disciplinary tribunal, was raised for the first time in argument. Counsel for the applicant relied on several Constitutional Court (CC) judgments[3] to support his contention that a legal point can be raised for the first time in argument provided that there is no prejudice to the opposing side and no new factual issues are raised. This rule was affirmed by the CC subject to certain conditions that were articulated in *Maphango and Others v Aengus Lifestyle Properties*[4] as follows:

> *"[109] The rule in terms of which a court permits a party to raise a point of law is subject to well-known conditions. These conditions ensure fairness to all parties. First, the point sought to be raised must be a point of law in the true sense of the word. Second, if not foreshadowed in the pleadings, it must be supported by the established facts in the record. Third, the entertainment of the point must not prejudice the other parties. Consistent with these requirements, in Barkhuizen this court made it clear that a party will not be permitted to raise a point not covered in the pleadings if its consideration will result in unfairness to the other party. The purpose of this rule is to give a fair hearing to all parties. Therefore, the rule promotes the right to a fair hearing which is entrenched in s34 of the Constitution." (emphasis added)*

I hasten to point out that I was assured that there would be no prejudice to UCT as its Counsel, Mr I *Jamie* SC, was given advanced notice that this legal point would be raised. Secondly, I was assured that no new factual issues would be raised by this new legal point as well as the other three.

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[3] *Business Partners Ltd v Yellow Star Properties* 1061 (Pty) Ltd (7188/2011) [2012] ZAKZDHC 96 (17 July 2012, esp paras 4 – 5; *Alexkor v Richtersveld Community* 2004 (5) 409 (CC) at paras 42 – 44; *CUSA v Tao Ying Metal industries (Pty) Ltd* 2009 (2) SA 204 (CC) at para 68; *Maphango v Aengus Lifestyle* 2012 (3) SA 531 (CC) at para 109; *Mostert v Nash* 2018 (5) SA 409 (SCA) at para 61.

[4] 2012 (3) SA 531 CC at para [109].

[15] From a conspectus of the papers it is clear that the point regarding the composition of the disciplinary tribunal is a point of law in the true sense of the word and that it is supported by the established facts on record. Applying the principles set out in *Maphango*, *supra*, I am satisfied that, it may be raised for the first time in argument. The respondent will also not be prejudiced since Counsel was given advanced notice that this would be raised. I accordingly proceed to deal with these points of law. First I deal with the question of the composition of the Disciplinary Tribunal.

1. <u>COMPOSITION OF THE DISCIPLINARY TRIBUNAL</u>

[16] It is common cause that when the Disciplinary Tribunal (DT) sat for the first time in this matter it consisted of the Proctor and two assessors. This was in line with Rule DJP 5.2 which provides that a Proctor must hear a matter with two assessors where the Senior Proctor considers the breach of conduct to be serious enough to warrant a sentence as provided for in Rule DJP 5.12[5], in the event of a conviction. There is no doubt that the Senior Procter considered the charges against Maxwele to be of a serious nature: so serious that, in the event of a conviction, a sanction of expulsion from UCT was a distinct possibility. For this reason he/she applied the provisions of Rule DJP 5.2[6] and ordered that the Disciplinary Tribunal Proctor must sit with two assessors, selected in accordance with the provisions of Rule DJP 5.5. The chairperson of the

[5] The sanctions provided for in Rule DJP 5.12 are: *(a) expulsion; (b) rustication; (c) a fine of up to R5000.00; (d) community service of up to 300 hours; (e) the withdrawal of any degree, diploma, certificate or examination or other result; (f) the payment of a sum of money as compensation for damage caused by the student; (g) any other sentence which may be imposed by a tribunal in terms of DJP 5.11 or which the proctor may competently impose by reason any other rules framed by the University Council.*

[6] Rule DJP 5.2 provides that: *A proctor: (a) hears the matter with two assessors where a Senior Proctor, or their absence the Vice-Chancellor's nominee, considers that the breach of conduct is serious enough to warrant a sentence allowed by DJP 5.12; and (b) hears all other matters without assessors.*

Disciplinary Tribunal also acknowledged that the charges were serious and may result in expulsion.

[17] In terms of Rule DJP 5.5 the Senior Proctor must select one assessor (the staff assessor) drawn from a list of not less than six names provided by the Vice Chancellor and the other from a list of not less than six names provided by the SRC (the student assessor). While the rule is silent as to who or how the Vice Chancellor or the SRC, as the case may be, would source the names to be included on the respective lists, in theory, any name may be included on either of the two lists. It is, however, apparent that the one list is intended to include names of UCT staff members and the other the names of students at this institution. This is to make the tribunal truly representative of the UCT community. In this respect Counsel for the applicant submitted that a student assessor was necessary to assist the Proctor, who is an outsider, to understand student politics, and in so doing, to put the issues in the matter in their proper perspective. This will include, but not limited to, bringing a perspective on the seriousness of the charges against a student appearing before the tribunal. I agree with this view.

[18] At the commencement of the hearing Maxwele objected to the appointment of the student assessor, raising concerns that he may be biased, merely because he was white. I deem it unnecessary to deal in full with the reasons he advanced in his recusal application. It suffices to state that, although the Proctor was not persuaded that these were valid grounds for a recusal, the student assessor nevertheless elected to recuse himself, to ensure that the hearing proceeded "*properly*" and without any further delays.

[19] After the recusal of the student assessor the Procter purported to invoke the provisions of Rule DJP 5.6 and proceeded with the hearing with only one assessor. Rule 5.6 provides as follows:

> *"When a proctor sits with assessors, a verdict may be reached by a majority. If, for any reason, an assessor is unable to assume or continue with their duties as an assessor, a proctor has an ordinary and a deciding vote on matters of verdict. If both assessors are unable to continue with their duties as assessors, the matter must be heard afresh."*

[20] In terms of rule DJP 5.6 the verdict is reached by a majority i.e. the Proctor sitting with the assessors. Where one of the assessors is for whatever reason no longer available to continue with his/her duties in the proceedings, a verdict would still be possible, being that of the Proctor and the remaining assessor. In the event where the Proctor and the remaining assessor cannot agree the Proctor would have an ordinary and a deciding vote and his/her decision would be the verdict of the Tribunal. The proceedings must start *de novo* where both assessors are no longer available.

[21] The applicant argued that the withdrawal of the student assessor at the beginning of the proceedings meant that the tribunal was no longer properly constituted and consequently the entire process before it must be set aside. He found support in the decision in this Division in Premier of the *Western Cape Province v Acting Chairperson Judicial Service Commission and Others*[7] where the proceedings and decision of the Judicial Service Commission (JSC), reached in the absence of the

[7] 2010 (5) SA 634 (WCC).

Premier of the Western Cape in a matter involving a Judge of the Western Cape Division of the High Court of South Africa, where declared invalid and inconsistent with the Constitution, on a procedural basis, for want of compliance with section 178 (1) (K) of the Constitution. The Court was also referred to a judgment of Innes CJ in *Schierhout v Union Government (Minister of Justice)*[8], as the origin of the rule that in an adjudicative process, when several persons were appointed to exercise judicial powers, then in the absence of provision to the contrary, they must all act together to bring out one adjudication being of the entire body.

[22] Counsel for UCT argued that the Senior Proctor acted perfectly within the powers derived from the provisions of this rule which allows him to continue with a hearing where one of the assessors, who was part of the tribunal, is unable to assume or continue with his/her duties. I understood the argument to mean that since the rules do not provide for the appointment of a substitute assessor, where one of the original assessors has withdrawn, it is legitimate for the Proctor to continue with the hearing with one assessor. The purpose of Rule DJP 5.6, according to UCT, is to regulate circumstances where one or both of the assessors are not available to continue with the hearing.

[23] Whether the proceedings before the disciplinary tribunal remained valid, after the recusal of the student assessor, depends on the interpretation of Rule DJP 5.6. On the law governing the approach to the interpretation of documents the seminal judgment of

[8] 1919 A.D. 30 at p. 44.

Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[9], is apposite. The judgment states the law as follows:

> *"… The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."*

[24] From the passage in *Endumeni Municipality*, *supra*, it is apparent that context and the language used, to the extent the language in which the rule is coached reasonably permits the enjoyment of the relevant values enshrined in the Bill of Rights[10], is the most important aspect to be considered in the interpretation of a document. What is meant by the word "*verdict*" as used in Rule DJP 5.6? This word is

[9] 2012 (4) SA 593 (SCA) at paragraph [18].
[10] See *Hamata v Chairperson Peninsula Technikon* 2002 (5) SA 449 (SCA) at para [8].

not defined in the Rules: it must therefore assume its ordinary grammatical meaning. The Oxford Dictionary defines the word "*verdict*" to mean a decision on an issue of fact in a civil or criminal case or an inquest. The word verdict, as used in Rule DJP 5.6, is clear and unambiguous. It refers to the decision and not the entire proceedings leading up to a verdict. The express choice of this word was intended to convey that Rule DJP 5.6 is only available where an assessor withdraws at the decision stage.

[25] Where a Senior Proctor has deemed it necessary to appoint assessors in terms of Rule DJP 5.2 these assessors become members of the Disciplinary Tribunal and must act together with the Proctor. They remain members of the tribunal until the proceedings are concluded by returning a verdict. Where an assessor withdraws from the proceedings during the hearing of evidence, the Proctor cannot utilise the provisions of Rule DJP 5.6 to continue to the conclusion of the proceedings without the full complement of assessors. The only part of the proceedings which a Proctor may conclude without all the assessors is the verdict. He cannot invoke the provisions of this rule to continue with a hearing in which one of the assessors has withdrawn in the course of the proceedings, in this case even before evidence was led and before the verdict stage was reached. The withdrawal of the student assessor in *casu* meant that the tribunal was no longer properly constituted.

2. IRREGULARITIES IN THE PROCESS AFFECTING THE LAWFULNESS OF THE DECISION

[26] Maxwele submitted that UCT's decision to expel him was preceded by a process

riddled with irregularities. Counsel argued that Maxwele was not only challenging the reasonableness, appropriateness or proportionality of the sanction based on the evidence presented but was also, of necessity, challenging the lawfulness or the fairness of the process by which the sanction was reached. UCT, on the other hand, argued that what was at issue in this application was whether the uncontested rulings and findings of the Disciplinary Tribunal warranted the sanction of expulsion. In this respect it was argued that the sanction was both reasonable and rational in the circumstances[11] in which the violation of UCT's Rules of Conduct occurred.

[27] Counsel for the applicant submitted that the lawfulness of the tribunal's decision cannot be determined without a thorough consideration of the process which led to the decision, the two being inextricably connected. Support for this submission was found in the judgment of Botha JA in *Van Rensburg v Van Rensburg en Andere*[12] where it was held that a construction of a Rule of Court that would prevent the Court from deciding an application on a point of law which arises out of the alleged facts merely because the applicant has not relied thereon in his application, can and must be avoided, otherwise it could lead to the intolerable position that the Court could be bound by a mistake of law on the part of the applicant[13].

[11] It was submitted that this was so given the ongoing harm inflicted by the applicant and the importance of deterring such conduct in a place of learning.
[12] 1963 (1) SA 505 (A) at 510 A – B.
[13] The original text in the Afrikaans language in which the judgment was written reads as follows: *"'n Uitleg van 'n Hofreël wat die Hof sou verhinder om 'n aansoek op 'n regspunt uit te wys wat uit die beweerde feite ontstaan, slegs omdat die aansoekdoener nie in sy aansoek uitdruklik daarop gesteun het nie, kan en moet vermy word, anders sou dit kon lei tot die onhoudbare posisie dat die Hof deur 'n regsdwaling aan die kant van die aansoekdoener gebonde kan wees."*

[28] The principle enunciated in *Van Rensburg*, *supra* is, in my view, a sound principle which goes to ensure that justice is done and that a proper ventilation of the issues raised by the facts of the case, is not stifled. I see no reason for departing from these principles in this matter.

[29] The irregularities Maxwele complained of are said to be a failure to afford him an opportunity to appoint a legal representative; the Proctor accepting the evidence of Prof Moultri, who was not called as a witness to give evidence, to supplement the evidence of Kirovo; failure to call for relevant and admissible evidence; and biasness on the part of the Proctor. I proceed to deal with these allegations in more details hereinafter.

2.1 <u>LEGAL REPRESENTATION</u>

[30] The applicant's contention is that the issue of legal representation was raised as early as the 4 February 2020 when the applicant filed his supplementary affidavit in terms of Rule 53 (4), following the filing of the Rule 53 record on the 6 December 2019 (and on 31 January 2020). UCT disputed this and argued that this issue was only raised for the first time in applicant's replying affidavit where it was contended that from the surrounding circumstances, it ought to have been incumbent upon both the chairperson of the Disciplinary and the Appeal Tribunals, respectively, to *mero moto* raise the issue of representation, since it was evident from the outset that an expulsion was a possibility. According to UCT the possibility of an expulsion would not have been apparent to the chairperson of the Disciplinary Tribunal since he would not have been aware of the evidence to be led and the applicant's defence thereto. As regards the Appeal Tribunal it was conceded that the issue of legal representation was raised at the

outset.

[31] On the complaint that Maxwele was not afforded legal representation Counsel for UCT, relying on the judgment in *Hamata and Another v Chairperson, Peninsula Technikon International Disciplinary Committee and Others*[14], submitted that there is no absolute right to legal representation in all *fora* other than in courts of law, and that the discretion whether or not to allow external legal representation is essentially based on considerations of fairness. Based on UCT's Rule DJP 5.9 Counsel, whilst conceding that the applicant would have been entitled to legal representation in the Disciplinary Tribunals, if he had applied, this would not have been at the University's expense as the applicant appeared to contend. He also pointed out that the charge sheet draws the applicant attention to his right to legal representation.

[32] UCT's argument is two-fold: first it is submitted that the applicant did not request legal representation during the pre-hearing meeting nor in the course of the hearing before the tribunal; that it was only on the 7 December 2017, after the conclusion of the hearing on the 6 December 2017, that he advised the Tribunal that he had secured legal representation and requested that the hearing be re-opened and postponed until February 2018. Secondly, UCT submitted that although the applicant was entitled to legal representation at the Tribunal hearings he was not entitled to a UCT-funded legal

[14] 2002 (5) SA 449 (SCA) at paras [11] and [12]; *Fransman v Speaker of Western Cape Provincial Legislature. where the rule that there is no absolute right to legal representation in fora other than in courts of law was endorsed and in a judgment of Boqwana J in this Division in Fransman v Speaker of the Western Cape Provincial Legislature and Another, where it was held that such representation cannot be excluded as of rule: a discretion, exercised by the Tribunal, based on all the relevant facts, will guide whether legal representation should be allowed or not.*

representation.

[33] It would be useful to undertake an analysis of Rule DJP 5.9 to determine the position regarding legal representation. This rule provides that a student who has been charged before the tribunal is entitled to be represented by another student or a UCT staff member. The right to legal representation, however, is not automatic: a student must apply for the right to be legally represented and the Proctor has a discretion to grant or refuse such application. In granting the right to legal representation the Tribunal will take into account the nature of the charges brought against a student; the degree of factual or legal complexity of the matter against the student; the seriousness of the potential consequences upon an adverse finding; the availability of suitable representatives among the University's student or staff body; and any other relevant factor. An application may not be refused where an adverse finding could lead to expulsion: once it is shown that an expulsion is a possibility the Proctor cannot exercise his/her discretion to grant or refuse representation but is bound to grant the right to be legally represented.

[34] Where the right to legal representation has been granted the University would give the student adequate opportunity to obtain such representation and set a date or dates for the matter to be heard. Such a date or dates has to be dates suitable to all the parties. But a student cannot frustrate the arrangement of suitable date or dates by insisting on being represented by a lawyer who is not available. Where the right to legal representation has been granted but the student is unable to afford one, the University

will use its best endeavours to facilitate representation by a qualitied staff member, a candidate attorney or a lawyer willing to take the case *pro bono*.

[35] In *Hamata, supra* the SCA, while confirming the principle that there is no entitlement as of right to legal representation in arenas other than courts of law, nevertheless recognised the need for flexibility to allow for outside legal representation in particular circumstances. The court held that[15]:

> *"[11] This constitutional and statutory position comes as no surprise. There has always been a marked and understandable reluctance on the part of both legislators and the Courts to embrace the proposition that the right to legal representation of one's choice is always a sine qua non procedurally fair administrative proceedings. However, it is equally true that with the passage of the years there has been growing acceptance of the view that there will be cases in which legal representation may be essential to a procedurally fair administrative proceeding. In saying this, I use the words 'administrative proceeding' in the most general sense, ie to include, inter alia, quasi-judicial proceedings. Awareness of all this no doubt accounts for the cautious and restrained manner in which the framers of the Constitution and the Act have dealt with the subject of legal representation in the context of administrative action. In short, there is no constitutional imperative regarding legal representation in administrative proceedings discernible, other than flexibility to allow for legal representation but, even then, only in cases where it is truly required in order to attain procedural fairness.* (own emphasis)
>
> *[12] There may be administrative organs of such a nature that the issues which come before them are always so mundane and the consequences of their decisions for particular individuals always so insignificant that a domestic rule prohibiting legal representation would be neither unconstitutional nor be required to be 'read down' (if its language so permits) to allow for the exercising of a discretion in that regard. On the other hand, there may be administrative organs*

[15] *Hamata, supra*, at paras [11] and [12].

which are faced with issues, and whose decisions may entail consequences, which range from the relatively trivial to the most grave. Any rule purporting to compel such an organ to refuse legal representation no matter what the circumstances might be, and even if they are such that a refusal might very well impair the fairness of the administrative proceeding, cannot pass muster in law."

[36] In my view, it is in recognition of this principle of flexibility referred to in *Hamata, supra*, that Rule 5.9 was framed. By limiting legal representation to instance where the student had applied for an was granted such right the rule preserves the discretion of the tribunal which must be exercised according to the dictates of each and every case. In exercising this discretion, the tribunal would be guided by the factors and circumstances alluded to *supra*[16]. Legal representation would not be allowed where the proceedings before the disciplinary tribunal are of the mundane variety with no dire consequences to the student.

[37] What is the position where the student does not expressly apply legal representation but it is evident from the surrounding circumstances that a conviction may have grave consequences to him/her? Must the Proctor wait until the student brings an application for the right to legal representation or must he be proactive, and *mero moto* in the interest of justice advice the student to apply for legal representation? This will particularly, be the case where it is patently clear that the student does not understand the proceedings and serious consequences await him, in the event of a conviction?

[16] in paragraph 34.

[38] Counsel for the applicant pointed to numerous passages in the transcript of the proceedings where Maxwele indicated that he did not understand legal concepts or the proceedings. This according to Counsel, was a clear sign that Maxwele was requesting legal representation. I deem it unnecessary to deal in detail with these instances save to state that Maxwele did not expressly apply for legal representation but it was clear that he does not understand legal concepts. The most glaring of these instances are to be found in the following excepts of the record in terms of Rule 53 page 55 lines 217 – 219 (53/55, 217-219): Maxwele tells the Proctor during the hearing that: "*this is a legal serious matter. That can lead to expulsion*", to which the chair responds, "*That is correct*"; at 53/87, 1000: where Maxwele said that: "*how do you then expect me to understand all the statements that are written here which are legally written. I am not a legal expert*"; at 53/107, 298: where Maxwele was asked by the Proctor to plead to the charges, and he said that: "*No, but I don't understand it, those are legal questions that I don't understand…*"; at 53/112, 421: where applicant again protested and said that: "*we can continue, but you must know that I have put on record that I don't understand the legal terms the legal documents, the framing, the construction of the charges thereof…*"; at 53/124,689: … applicant complained that he did not understand the process and it is clear from his question to the Proctor that why he should put his version to the university's witnesses if he disputes what they are saying.

[39] Counsel for the university argued that unlike in a criminal case the Proctor had no authority to impose legal representation upon the applicant or to second guess his

election to proceed without legal representation. He further argued that as an intelligent and highly politically involved student it can be safely assumed that Maxwele was aware of his right to legal representation.

[40] The passages quoted by Counsel reflect Maxwele's frustrations with his lack of comprehension of the process and the legal terminology used. He was, however, conscious of the fact that he was engaged in a serious matter which may result in his expulsion. He repeatedly requested the assistance of an interpreter. What was clear, however, was that he did not really struggle with the English language but needed assistance in understanding legal concepts and the process in which he was involved in. As this could only be rendered by a legally trained person it should have been evident to the Proctor that Maxwele needed the services of a legal representative, and should have afforded him an opportunity to engage one.

[41] It is unfortunate that his requests for an interpreter were taken to literally mean that he needed an interpreter to help him interpret from English, the language of the proceedings, to IsiXhosa, his mother tongue. Hence the argument that he was proficient in the English language and did not need an interpreter. Given the language of rule DJP 5.9 I am however, constrained to accept that in the absence of an express request for legal representation in the hearing the Proctor could not assign one for him. It may be time for the rules of the University to be revised to allow for legal representation where the interest of justice requires it. The Proctor may have to actively encourage a student to opt for legal representation to ensure a fair hearing.

2.2 ADMITTING INADMISSIBEL EVIDENCE OF PROF MOULTRI

[42] The other irregularity alleged to have vitiated the proceedings is that the Procter admitted (the word used by the applicant is "*accepted*") the evidence of Prof Moultri, an observer who was not called as a witness, but who was allowed to address the hearing while Kirova was testifying, so that as he had put it, to "*assist on a factual basis*". Moultri's interruption of the proceedings to give evidence happened on two occasions. First during the hearing on the merits and secondly when Maxwele returned to apply for leave to appeal.

[43] After Maxwele withdrew from further participation in the tribunal proceedings on the hearing continued with the University calling witnesses to give *viva voce* evidence. The first witness to be called was Kirova. Before she took the witness stand the Presenter brought an application to allow Moultri to sit in the hearing to give Kirova support. The motivation for this application was that, due to the nature of the allegations and the experience she had allegedly endured at the hands of Maxwele she had requested that a member of staff be present to give her support. The application was granted.

[44] After Moultri was allowed to be present in the hearing the transcript of the proceedings reflects that while Kirova was testifying about the incident relating to count 2 and was asked by the Presentor to clarify a statement in her email in which she rhetorically asked when the nonsense relating to Maxwele's behaviour would be brought

to an end Moultri, unsolicited, offered "*to assist on a factual basis*". He then gave what appeared to be the background to the email which Kirova had written. He went on to mention that he was involved in all aspects of the case throughout. Moultri continued to render a version giving details of what happened since the chance encounter between Kirova and Maxwele on the 1 May 2015, Maxwele's counter-complaint against Kirova in which he accused her of racially profiling him, how this has affected her and that notwithstanding these serious allegation, Maxwele failed to avail himself to testify at her hearing.

[45] After Maxwele was found guilty on all charges and a sanction of expulsion imposed Maxwele returned to the tribunal to seek leave to appeal. Moultri was in attendance and Maxwele objected to his presence. Moultri, in response to Maxwele's objection, addressed the Proctor seeking leave to be present and observe the proceeding as he had been Kirova's union representative. He relied on Rule DJP 8.4 to argue for a right to be present in the hearing. After a heated exchange Maxwele relented and Moultri was allowed to remain in attendance, in line with Rule DJP 8.4 which states that such proceedings are open to any member of council, staff or student of the university.

[46] It is apparent from the record that Moultri did not seek nor was granted leave to address the tribunal. On the first occasion it was without any prompting while on the second occasion it was in reaction to Maxwele's objection to his presence. I am of the view that his utterances, however, did not any way contaminate the proceedings. It is evident from the judgment on the merits as well as the sanction imposed that the

Proctor did not take any of what Moultri said into account. The proceedings cannot, on this account alone, be impeached.

2.3 IGNORING ADMISSIBLE EVIDENCE

[47] The complaint here is that Ms Kirovo testified that there were two (2) security cameras in the Mathematics building, where the confrontation with Maxwele occurred that should have recorded the incident of 1 May 2015, yet the Proctor did not call for the footage captured on those security cameras. The argument was that this footage would have served as conclusive evidence of what exactly happened instead relying entirely on the subjective evidence of the supposed victim.

[48] The evidence of Kirova was substantially clear in all respect. For this reason the Proctor only had her version to consider. It was not a situation where the Proctor was faced with two conflicting version and the footage required to corroborate one or the other version. In the circumstances it was not necessary for him to call for the CCTV footage. The evidence of Kirova was sufficient. I am accordingly not persuaded that not calling for video the footage is an irregularity.

2.4 BIASNESS ON THE PART OF THE PROCTER

[49] It was submitted that the Proctor was biased and that this was reflected in his comments which are captured in the transcript of the proceedings. It was argued that the Proctor appeared to be making common cause with the university's case and that this was confirmation of Maxwele's fears of biasness on his part. This alleged bias was

said to be sufficient to have the proceedings before the Proctor reviewed and set aside. The university objected on the basis that the issue was not foreshadowed in the papers and that it would be prejudicial to it to deal with it for the first time in argument.

[50] The passage in the transcript, which is the source of this complaint relates to the exchange between an unidentified male person, apparently the Presenter, and the Proctor. This reads as follows[17]:

> "***MALE***: *But, so it is a bit of a bonus if we do finish today I am sure we will so if we can only get head started.*
>
> ***CHAIRPERSON***: *Yes, he says that. So he leaves. We then would have to then address that issue in a sense of… he didn't want to listen to UCT's version, so what we going to then do is put up a strong factual basis to defeat his position that is what I am looking for from UCT. We will just now. [0:27:02 end of background speaking]."*

[51] The above comments, viewed at face value and without any explanation from the Proctor are worrisome. I agree, however, with Counsel's submission that the University would be prejudiced if it were to deal with this aspect at this stage. But I am unable to come to any conclusion without having his version before me. I am consequently compelled to dismissed this objection without determining its merits. It is desirable that any decision of this Court on any point be the product of thorough consideration of, *inter alia*, forensically tested argument from both sides on questions that pertinently raised in the papers. Any decision on this issue formulated by counsel, would be *obiter* and

[17] Rule 53 page 242 lines 218 and 219; page 243 lines 246 – 251.

based on argument heard from only one side[18].

3. MOOTNESS

[52] The applicant submitted that the expulsion sanction, if confirmed by this Court, would be academic and therefore moot. UCT argued that the order sought is not moot: the applicant remains a registered student of the University and is expected to continue to be a registered student until the completion of his Masters degree; that while he is a registered student he is required to refrain from contravening the Rules of the University and in the event of being found guilty by a Disciplinary Tribunal for a similar contravention then the suspended sentence would come into effect. For this reason the University persisted in seeking an order in terms of its offer in terms of Rule 34.

[53] The advent of a constitutional dispensation in this country brought about the concept of mootness. A case is moot and therefore not justiciable if it no longer presents an existing or live controversy or the prejudice, or threat of prejudice, to the plaintiff no longer exist[19]. These principles have recently been restated by CC in *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exportation and Exploration SOC Limited and Others* the Court holding that it has discretionary powers to entertain even admittedly moot issues. It will do so where the interest of justice requires.

[18] See *Western Cape Education Department and Another v George* 1998 (3) SA 77 (SCA) at 84 E.
[19] See Constitutional Law of South Africa 2nd Edition Volume 1 by Woolman et al at 7-18.

[54] In terms of section 16(2)(a)(i) of the Superior Courts Act[20] when at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result the appeal may be dismissed on this ground alone. In *Western Cape Education Department and Another v George*[21] the Court assumed, without deciding, the practical effect or result referred to in section 21A [a corresponding section to 16(2)(a)(iii) in the repealed Supreme Court Act 59 of 1959] is not restricted to the position, *inter partes*, but that it was wide enough to include a practical effect or result in some other respect, such a matter of wide public interest or urgency, or to resolve conflicting High Court decisions. In the context of a University if may be of importance to serve as a precedent that would deter other potential offenders of committing similar transgressions of the rules of the University. But in the *Laser Transport Group (Pty) Ltd and Another*[22] the court refused to entertain an appeal holding that with three months before the expiry of the contract period a decision on appeal would have no practical effect and that there was no discrete point of public importance that would affect matters in the future.

[55] The argument that the order would be moot is founded on the erroneous notion that the sanction would affect only Maxwele's current Masters studies and would be rendered moot since he has no intentions of returning to UCT beyond the current academic year. But in the light of the conclusion I have reached on the other issues raised I deem it unnecessary to decide this point.

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[20] Act 10 of 2013.
[21] 1998 (3) SA 77 (SCA).
[22] Quoted Constitutional Law of South Africa 2nd Ed. Vol 1 by Woolman et al 7-21.

4. <u>DISPROPORTIONAILTY OF THE SANCTION</u>

[56] The applicant submitted that the sanction of expulsion is disproportional to the alleged charges on which Maxwele was found guilty. He argued that the offences did not warrant a sanction of expulsion. He submitted that since he has been a thorn on the side of the University administration with his #RhodesMustFall and #FeesMustFall movements the convictions presented the University with the opportunity to make an example of him. He argued that he has taken that opportunity out of their hands by undertaking not to return to the University. This, according to him, seems to be a disappointment to the University as it wanted to punish him for embarrassing it with his two popular movements. He submitted furthermore that there was no practical value to be had by expelling him when he would be leaving the University in three months' time.

[57] The University argued that the sanction befitted the offences. Factors that were taken into consideration included that at the time of these offences the applicant was a 31 year old B.Soc Science student who has been registered with the University since 2011, and that, as he had been granted amnesty for his previous misdemeanours none of those transgressions featured in the consideration of the sentence imposed and did not influence the decision on sentencing. The University pointed to the applicant's conduct at the Tribunal hearing, particularly the complete disdain and disrespect he demonstrated towards the members of the Tribunal and that he of his own volition abandoned the proceedings, despite being warned that an adverse outcome may follow the applicant was described as volatile, who disregarded authority and University rules, and presented an attitude of entitlement. He was characterised as a person who, when he was unable to obtain what he wanted, he responded in an aggressive, intimidating

and threatening manner towards any person who appeared to stand in the way of what he required. In circumstances where rules were presented, it was argued that the applicant would, without provocation, become progressively aggressive and hurl unwarranted racial slurs. For all these reasons it was submitted that the sanction of expulsion was the only appropriate sanction.

[58] Again I deemed it unnecessary to reflect on the appropriateness or otherwise of the sanction given the conclusion that I have arrived at on the validity of the entire proceedings. My reluctance to deal with the appropriateness of the sanction must not be construed as an endorsement of Maxwele's conduct. The transcript of the proceedings and other documents portray Maxwele as a man who did not want to submit himself to authority. It is one thing to be fearless and refuse to bow do an unlawful and oppressive regime, and to actively challenge such oppressive authorities, but it is another to be outright rude, disrespectful, belligerent and defiant, even where it was not necessary. His bellicose attitude and unprovoked outbursts of anger are to be deprecated. But any disciplinary action against him has to be conducted in a procedurally fair manner so that the outcome can be legitimate.

5. COSTS

[58] I have agonised long about the question of costs. Both sides asked for costs in the event of being successful. I have expressed my view about Maxwele's conduct. Awarding him costs may appear to be to reward him for his unruly conduct. But on the other hand, the University persisted with opposing the application when it was patently

clear that the disciplinary hearing was conducted contrary to its own rules. In the end I have come to the conclusion that a fair order would be to award costs to the successful party.

6. CONCLUSION

[59] To summarise the continuation of the hearing after the withdrawal of the student assessor, right at the beginning of the hearing, rendered the entire proceedings invalid. The Proctor misdirected himself by resorting to the provisions of rule DJP5.9. This rule does not save the proceedings from a declaration of invalidity.

The order I make is the following:

1. The proceedings of the University of Cape town (UCT) Student Disciplinary Tribunal under case no. 15/0017/HC in terms of which the applicant was found guilty and the sanction of expulsion from UCT was imposed, are hereby reviewed and set aside;
2. The decision of the UCT Student Discipline Tribunal of Appeal under case no 15/0017/HC in terms of which the applicant's appeal was dismissed, is hereby reviewed and set aside;
3. The consequent termination of the applicant's registration with UCT through expulsion is hereby declared invalid; and
4. The respondent is ordered to pay the costs of this review application such costs to include the employment of two counsel.

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M J DOLAMO

JUDGE OF THE HIGH COURT