



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

**CASE NO: D8841/2022**

In the matter between:

<b>MAKAZIWE NQOBILE NDLOVU</b>	<b>First Applicant</b>
<b>SMANGALISO KHUMALO</b>	<b>Second Applicant</b>
<b>SIBONELO FANELE THABETHE</b>	<b>Third Applicant</b>
<b>SISEKELO JONA</b>	<b>Fourth Applicant</b>
<b>THEMBINKOSI NGOBESE</b>	<b>Fifth Applicant</b>
<b>SISEKELO JIYANE</b>	<b>Sixth Applicant</b>
<b>THULASIZWE MDLETSHE</b>	<b>Seventh Applicant</b>
<b>LANGALETHU McDONALD MALANDA</b>	<b>Eighth Applicant</b>
<b>ZAMILE FUNDA</b>	<b>Ninth Applicant</b>
<b>MTHOKOZISI ERIC GUMEDE</b>	<b>Tenth Applicant</b>
<b>SINDISWA ANAID MTHEMBU</b>	<b>Eleventh Applicant</b>
<b>SIBONISO SICELo NTSHABA</b>	<b>Twelfth Applicant</b>
<b>LUNGELO SHEZI</b>	<b>Thirteenth Applicant</b>

<b>BANDILE LUNGANI NYANDENI</b>	<b>Fourteenth Applicant</b>
<b>MTHOBISI MAVUNDLA</b>	<b>Fifteenth Applicant</b>
<b>BANDILE KHAMBULE</b>	<b>Sixteenth Applicant</b>
<b>MTHOKOZISI SIBIYA</b>	<b>Seventeenth Applicant</b>
<b>CODESA CYRIL GWALA</b>	<b>Eighteenth Applicant</b>
<b>SABELO INNOCENT MAGOSO</b>	<b>Nineteenth Applicant</b>
and	
<b>MANGOSUTHU UNIVERSITY OF TECHNOLOGY</b>	<b>First Respondent</b>
<b>MINISTER OF HIGHER EDUCATION AND TRAINING</b>	<b>Second Respondent</b>
<b>NATIONAL STUDENT FINANCIAL AID SCHEME</b>	<b>Third Respondent</b>
<b>ACTING-VICE CHANCELLOR AND PRINCIPAL PROF M. M. RAMOGALE</b>	<b>Fourth Respondent</b>
<b>STUDENT'S DISCIPLINARY COMMITTEE</b>	<b>Fifth Respondent</b>
<b>CHAIRPERSON OF THE STUDENT'S DISCIPLINARY COMMITTEE: DEAN OF STUDENTS - DR T KWEYAMA</b>	<b>Sixth Respondent</b>

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**ORDER**

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**The following order shall issue:**

1. Part A of the application is dismissed.
2. No order as to costs.

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## JUDGMENT

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**Nicholson AJ:**

[1] This is a review application where the Applicants, being students at the Mangosuthu University of Technology (“the university”), the First Respondent herein, were suspended, disciplined, and expelled for contravention of the university’s disciplinary code, and seek to review and set aside the decisions.

[2] The application is brought in two parts, namely Part A and Part B. In Part A, Applicants seek an order declaring various sections of the university’s 2022 General Rules and Regulations for Students (“general rules”), to be unlawful, invalid and unconstitutional. Further, Applicants seek an interim order for inter alia the reinstatement of the Sixteenth, Eighteenth and Nineteenth Applicants and the consideration of those Applicants by the National Students’ Financial Aid Scheme (“NSFAS”) for financial aid,<sup>1</sup> pending the outcome of both Part A and Part B.

[3] Initially, this matter was enrolled as an urgent to be heard on 2 September 2022 on less than three days’ notice; however, on that day it was adjourned to 9 September 2022, when the urgent interlocutory relief was refused. Before me, Applicants persist with the interim interlocutory relief, albeit on a less urgent basis.

[4] In part B, the Applicants seek an order to review and set aside the decision of the Fourth Respondent to suspend and/or expel some of the Applicants.<sup>2</sup> The review in Part B, is in terms of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”); accordingly, Part B may only

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<sup>1</sup> Volume 1: notice of motion, prayer 4 at page 9.

<sup>2</sup> Applicants’ heads of argument para 3.2.

be prosecuted once the reasons in terms of Uniform rule 53 have been filed by the university. Both parties agree that Part B is not ripe for hearing.

[5] In the premises, the matter before me only deals with Part A.

### **Factual Background**

[6] On 31 January 2022, the Second Respondent (who I shall refer to as the Minister from hereon) approved various foundation programmes which were designed to assist students who did not meet the minimum admission criteria for particular courses at the university. In as far as the Department of Accounting is concerned, the university has an Extended Curriculum Programme (“ECP”) to assist students who did not meet the minimum criteria for mainstream courses at the Department of Accounting.<sup>3</sup>

[7] The effect of these programmes is that an extra year of study is added to the study duration for that particular diploma i.e. a National Diploma in Accounting is normally three years. However, students who enter that programme through the ECP, would take four years to complete the Diploma, should they pass every year.

[8] In terms of NSFAS, students are not funded beyond an additional year of studying. However, since the ECP and the foundation programme is not recognised by NSFAS, students are either unable to pay for the ECP or foundation programme or if their study progresses beyond an additional year of study, NSFAS would not fund them. This is known as the N+1 Rule or N+ Rule.

[9] Applicants assert that between 31 January 2022 and 27 May 2022, in light of the university’s failure to compile the requisite reports for NSFAS, students which include the Applicants, did not receive their student

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<sup>3</sup> Ibid paras 49-51 at page 40.

allowances from NSFAS timeously which resulted in their inability to acquire study material, food and other basic necessities.

[10] On 1 June 2022, in light of the N+ Rule, NSFAS had still not funded any students in their fifth year; notwithstanding, between 25 January 2022 and 1 June 2022, various correspondence being exchanged between the Applicant and the university, wherein the university was requested to upload the requisite information to NSFAS.

[11] Between 1 June 2022 and 10 June 2022, various emails were exchanged between the SRC Secretary General, Mr Khumalo and the university, requesting their assistance. However, the issue was not resolved.<sup>4</sup>

[12] On 10 June 2022, the university published the examination timetable where examinations were scheduled to commence on Monday, 13 June 2022.

[13] On Sunday, 12 June 2022, the SRC sent a memorandum of grievances to the Fourth Respondent noting various grievances and inter alia the non-payment of NSFAS which results in the unpreparedness of students to write exams. The memorandum requested that the examinations be rescheduled to 20 June 2022.<sup>5</sup>

[14] On 13 June 2022<sup>6</sup> when the examination was meant to commence, students clad in balaclavas, masks and face shields vented their frustration by dragging SRC members out of their rooms in protest of the scheduled examination.

[15] The protest action involved the torching of parts of the university premises which included the guardroom - with the security still inside -

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<sup>4</sup> Ibid paras 57-59 at pages 42-43.

<sup>5</sup> Ibid para 59 at page 43.

<sup>6</sup> Ibid para 60 at page 43.

located in the main entrance, the senate chamber, examination office, academic affairs office, the mobile toilets and the torching of two university vehicles.<sup>7</sup> The damage caused by the protest action is in the region of R 2 million.<sup>8</sup>

[16] It is instructive to mention that while Applicants describe only one protest on 13 June 2022, in the joint answering affidavit of the First and Fourth to Sixth Respondents, whom for convenience I refer to as Respondents from hereon, refer to two protests, one being on 13 June 2022, which they refer to as 'student disruptions' and 'violent protests', and another being on 23 June 2022.

[17] While Applicants assert that the damage to property took place on 13 June 2022, on Respondents' version, 13 June 2022 involved disruptions, with the damage, described above, taking place on 23 June 2022.<sup>9</sup> Nothing turns on this contradiction.

### **Suspensions/ Disciplinary hearing/ Expulsion**

[18] In light of the protests, the Applicants were suspended. According to the Applicants, they came to know of their suspensions because their names and photo images were pasted on the notice board reserved for suspended students. It is instructive that the issue of both the suspensions and the disciplinary hearings which I shall deal with hereinbelow are not dealt with by the Applicants in any detail but merely dealt with in general terms.

[19] The Respondents went into laborious detail to explain their suspensions, the evidence, the charges and the outcome of the disciplinary hearing of each Applicant.

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<sup>7</sup> Ibid para 60 at page 43; Volume 3: answering affidavit para 7 at page 271.

<sup>8</sup> Volume 3: answering affidavit para 9 at page 272.

<sup>9</sup> Ibid para 7 at page 271; Respondents' heads of argument para 3.2.

[20] The disciplinary hearings took place between July 2022 and September 2022 and the notices of suspension were served on the Applicants in June 2022.<sup>10</sup>

### **The Law**

[21] The Applicants assert that the application is based on s 3(1), s 3(2)(b)(i) and(ii), 3(3)(a) and (b) of PAJA and s 1(c) of the Constitution.<sup>11</sup>

[22] These sections of PAJA read:

**'3 Procedurally fair administrative action affecting any person –**

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

...

(3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to-

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

(b) present and dispute information and arguments; and

(c) ...

(4)(a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).

(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including-

(i) the objects of the empowering provision;

<sup>10</sup> Volume 3: answering affidavit paras 17-119 at pages 275-298.

<sup>11</sup> Applicants' heads of argument para 4.

(ii) the nature and purpose of, and the need to take, the administrative action;

(iii) the likely effect of the administrative action;

(iv) the urgency of taking the administrative action or the urgency of the matter; and

(v) the need to promote an efficient administration and good governance.'

[23] Section 1(c) of the Constitution reads:

'(1) Everyone has the right to freedom and security of the person, which includes the right-

- (a) ...
- (b)
- (c) to be free from all forms of violence from either public or private sources;
- (d) ...'

[24] The Applicants aver that their rights in terms of the Constitution, which I refer to hereunder, have been infringed:

- (a) s 10 - everyone has inherent dignity and the right to have their dignity respected and protected;
- (b) s 17 - everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions; and
- (c) s 29(1)(b) - everyone has the right to further education, which the state, through reasonable measures, must make progressively available and accessible.

### **Clauses to be declared unconstitutional**

[25] The Applicants seek an order that the following sections of the general rules<sup>12</sup> be declared unlawful, invalid and unconstitutional:

(a) Section G.26.1(e) which reads as follows:

'e. The Principal or any person authorised by him may, when he regards it appropriate, suspend a student against whom a charge, accusation or

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<sup>12</sup> Volume 1: notice of motion, prayers 2.1-2.7.



allegation has been instituted for a period determined by him, i.e. he may prohibit the student to:

- i. enter any premises or residence of the University, or any part thereof;
- ii. exercise any right or privilege which he as registered student enjoys.'

(b) Sections G.26.5.4(b)(i) and (ii) which reads:

**'PROCEDURE OF STUDENTS' ACADEMIC DISCIPLINARY COMMITTEE AND THE STUDENTS' DISCIPLINARY COMMITTEE –**

a...

**b. Procedure during the hearing of serious misconduct**

- i. A charge of serious misconduct shall be instituted by the Registrar/Dean of Students.
- ii. If the Deputy Registrar/Dean of Students is of the opinion that there are reasonable grounds for a charge of misconduct against a student and that the misconduct of the student concerned is apparently of a serious nature, s/he shall formulate a written charge and convene a hearing by the Academic Disciplinary Committee when the charge has a bearing on the student's studies, or a hearing by the Students' Disciplinary Committee, when the charge does not have a bearing on the student's studies.'

(c) Sections G.27.15(a) and (b) reads:

**'MEETINGS -**

- a. No meeting or activity involving more than five students may be held on the residence premises after 20:00 without the consent of the Superintendent.
- b. No party – political meetings are permitted on the residence premises.'

[26] Applicants further seek an order that the general rules be declared unlawful and unconstitutional: to the extent that no provision is made for the minimum period within which a student may be disciplined from the date of the alleged offence or the date upon which the First or Fourth to Sixth Respondents ought reasonably to have become aware of the alleged offence, and to the extent that the general rules disallow the students to employ external legal representations of their choice where they face serious misconduct.

### **Argument**

[27] It is unclear in both the Applicants' founding affidavit and heads of argument, the reason that they assert that the application is based on s 1(c) of the Constitution because nowhere in the founding affidavit or in the heads of argument has it been inferred that Applicants were subjected to any form of violence. On the contrary, the Respondents aver that the Municipality, its employees and students were subjected to violence. Accordingly, I shall not deal with this issue any further.

[28] With regard to 'the right to human dignity' as guaranteed in s 10 of the Constitution, I am unable to find any facts that demonstrate that the Applicants right to human dignity has been violated. In their heads of argument, Applicants describe the right to human dignity in very broad terms.<sup>13</sup> The closest Applicants come to making out a case that their human dignity has been violated, is at paragraph 10 of their heads of argument that reads:

'The lawless suspensions and expulsions of the Applicants in this matter ring a stark reminder of the history of exclusion and the deliberate retardation of the potential of black and African people in particular. This has restored the bridge, which the Constitution sought to part with and destroy, between our egregious past and the hope of the new constitutional order.'

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<sup>13</sup> Applicants' heads of argument, paras 9-11.

[29] The suspensions cannot be described as lawless because the disciplinary code of the university makes allowances for both the suspensions and expulsions. Applicants have not provided any information as to which part of the suspensions and expulsions should be regarded as an indignity.

[30] In Applicants' heads of argument, under the heading 'The right to peaceful and unarmed protest has been violated', it appears that the Applicants aver that s 17 of the Constitution has been contravened. Applicants confirm that indeed, an emergency meeting was held to address the urgent matters affecting students where it was agreed that they would embark upon protest action. In the circumstances, so argued by Applicants, and in light of the fact that the university does not have a mechanism to embark on a legitimised process, the university's policies and/or rules are unconstitutional.<sup>14</sup>

[31] In considering G.27.15(a) and (b) of the general rules, Respondents aver<sup>15</sup> that the rules merely prohibits meetings after 20h00 at night and political meetings in the residence. The rule is justifiable because it controls both the numbers and the noise in the residence and the rest of the university campus is available for political meetings if need be.

[32] Applicants have been charged for holding a meeting in the residence after 20h00 in the evening and for damaging university property together with other harmful practices during the protests. There is nothing in the papers before me that suggest that the university is attempting to disregard the Applicants' rights in terms of s 17, because the limitation on Applicants' rights are justifiable in the circumstances.

[33] With regard to Applicants' rights in terms of s 29(1)(b) of the Constitution where the right to education is enshrined, the Applicants assert

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<sup>14</sup> Applicants' heads of argument paras 16-18.

<sup>15</sup> Respondents' heads of argument para 4.4.

that their right to education has been violated by firstly, their inability to obtain financial aid from NSFAS and secondly, their expulsions from the institution which would hamper any further chances from studying at other institutions.<sup>16</sup>

[34] Bearing in mind that I am adjudicating upon Part A of the application, which seeks to set aside certain sections of the university's general rules, there appears to be no incongruity between the Applicants' right to education and the university's rules. Given the fact that on Applicants' own version, the protests were violent, which not only destroyed property but threatened human life, the allegations if properly proved against Applicants, in my view, would attract a sanction of expulsion.

[35] Further, the Applicants aver that NSFAS does not recognise the ECP programme.<sup>17</sup> In the circumstances, it strikes me as odd that despite this insight, the Applicants embarked on a protest directed at the university when in fact, their grievance was with NSFAS.

[36] In their heads of argument, Applicants focused on 13 issues, which it deemed common cause.<sup>18</sup> These so-called common cause facts went to great length to demonstrate that the Respondents did not deny being in breach of the general rules when either suspending, disciplining or expelling the Applicants.

[37] Applicants argued that they were denied access to education which although a constitutional imperative is also a vehicle for improving the lives of the masses.

[38] The Applicants also view the policies of NSFAS and the fact that the university did not send the requisite information to NSFAS as a failure by NSFAS and/or the university to advance the Applicants' right to education.

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<sup>16</sup> Applicants' heads of argument paras 19-24.

<sup>17</sup> Volume 1: founding affidavit para 56 at page 42.

<sup>18</sup> Applicants' heads of argument paras 8.1-8.13.

[39] With regard to the unlawful suspensions, Applicants assert that the Seventeenth, Eighteenth and Nineteenth Applicants were suspended without being given an opportunity to make representations which is in contravention of s 3(2)(b)(ii) of PAJA.

[40] On the other hand, Respondents assert that the suspensions were not punitive in nature but merely precautionary and justified in the circumstances. Respondents aver<sup>19</sup> that section G.26.1(e) refers to the power afforded to the Principal to impose precautionary suspensions which is not punitive in nature. In support of that proposition, Respondents referred me to *Long v SA Breweries (Pty) Ltd and Others*<sup>20</sup> where in the context of labour law, the Constitutional Court confirmed that there is no requirement to afford the employee an opportunity to make representations prior to implementation of his/her precautionary suspension by an employer.

[41] Considering *Long*, section G.26.1(e) of the general rules is not unconstitutional.

[42] With regard to the expulsions, the Applicants aver that the Fifth to the Sixth, Eighth to the Fifteenth and Seventeenth to the Nineteenth Applicants were expelled from the university pursuant to disciplinary proceedings that took place between 25 July 2022 and 28 July 2022 following upon their suspensions.<sup>21</sup>

[43] Applicants aver that while section G.26.4 of the general rules provide that students charged with misconduct should be provided with written notification of such allegations for misconduct in writing within 14 days before the hearing; in consequence of the Applicants not being given adequate notice, the general rules were contravened together with s 3(2)(b)(i) of PAJA.

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<sup>19</sup> Respondents' heads of argument para 4.

<sup>20</sup> *Long v SA Breweries (Pty) Ltd and Others* (2019) 40 (ILJ) 965 (CC) para 25.

<sup>21</sup> Applicants' heads of argument para 32.

[44] Again, this submission does not advance any ground for the granting of any relief in Part A; because Part A deals with a constitutional invalidity while the grounds advanced here suggest that the university has failed to follow its own rules and not that the rules are unconstitutional.

[45] Applicants takes issue with the composition of the students' disciplinary committee which is composed in terms of section G.26.5.2(a).<sup>22</sup> The Applicants assert that the said rule was not complied with because there was no person with a legal background present and the SRC members who formed part of the composition of the committee were not designated by the SRC as prescribed by the general rules.<sup>23</sup>

[46] Again, this issue is pertinent to Part B of the application because it refers to non-compliance with the rules as opposed to a constitutional invalidity.

[47] Applicants further aver that the First to the Sixth, the Eighth to the Fifteenth and the Seventeenth Applicants' right to a fair hearing were violated because they were denied an opportunity:<sup>24</sup>

'41.1. to give evidence in their own defense either adequately or at all;

41.2. to call witnesses in support of their version;

41.3. to be represented by either a personal member or external legal representation;

41.4. to cross examine the witnesses who testified against them or have them cross examined;

41.5. to re-examine their own witnesses or have them re-examined;

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<sup>22</sup> Ibid para 37.

<sup>23</sup> Ibid para 38.

<sup>24</sup> Ibid para 41.

41.6. after all evidence had been given, to argue their case in their own defense;

41.7. after conviction, to present evidence in mitigation of punishment.’

[48] It is instructive that Respondents deny these averments<sup>25</sup> and has taken the time to explain the suspensions, the evidence led at the disciplinary enquiry and the expulsions of each Applicant in laborious detail,<sup>26</sup> while Applicants dealt with these issues in general terms. In the circumstances, this issue cannot be determined without having regard to the record; accordingly, this issue can only be determined with Part B of the application.

[49] Applicants further asserts that the sanctions imposed on the Applicants was too harsh because it effectively put an end to their academic career.<sup>27</sup> Applicants aver that the procedural irregularity was made worse by the fact that they were only able to view the charges, statements and other evidence on the morning of the hearing.<sup>28</sup> Further, Applicants aver that despite facing expulsion they were denied their right of legal representation which rendered the disciplinary process unfair and a violation of s 3(2)(b)(ii) of PAJA.<sup>29</sup> In support of the submission, Applicants directed me to *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*<sup>30</sup> that stated:

[40] What we glean from this is that the exercise of public power which is at variance with the principal of legality is inconsistent with the Constitution itself. In short, it is invalid....’

[50] I am not certain that *Gijima* supports Applicants’ argument, because *Gijima* referred to the non-compliance of s 217 of the Constitution which rendered a decision to award a public tender invalid, while Applicants are attempting to assert the right to legal representation being a constitutional

<sup>25</sup> Volume 4: answering affidavit para 162 at page 307.

<sup>26</sup> Volume 3: answering affidavit paras 14-119 at pages 273-298.

<sup>27</sup> Applicants’ heads of argument para 46.

<sup>28</sup> Ibid paras 47 and 48.

<sup>29</sup> Ibid para 50.

<sup>30</sup> *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC).

right. The only constitutional right to legal representation in the Constitution is s 35 where the right is afforded to arrested, detained and accused persons. There is no blanket constitutional right to legal representation at disciplinary hearings.

[51] Applicants aver further that they were not provided with reasons when found guilty of the charges in the charge sheet despite making a request for the reasons.<sup>31</sup> Respondents deny that the Applicants were not provided reasons by stating that reasons were provided in the answering affidavit.<sup>32</sup>

[52] Again, this is another issue that can best be ventilated with the benefit of the record. Accordingly, the issue can be best determined at Part B.

[53] Having regard to the section that Applicants seek to be declared unconstitutional, the only contentious section is G.26.5.4(c)(i) and (ii) which on perusal does not appear to allow legal representation. While I have already stated that there is no absolute right to legal representation other than to those persons stated in s 35 of the Constitution, in *Dyantyi v Rhodes University and Others*,<sup>33</sup> the Court held that the right to legal representation extends to serious or complex cases.

[54] The Respondents assert that there is no general right to legal representation by a legal practitioner but legal representation by a practitioner may be afforded in complex cases. For authority I was referred to *Dyantyi and Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee, and Others*<sup>34</sup>, where the court in considering a similar rule of the Peninsula Technikon Internal Disciplinary Committee,

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<sup>31</sup> Applicants heads of argument para 52.

<sup>32</sup> Volume 4: answering affidavit para 167 at page 308.

<sup>33</sup> *Dyantyi v Rhodes University and Others* 2023 (1) SA 32 (SCA) paras 22 and 23.

<sup>34</sup> *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee, and Others* 2002 (5) SA 449 (SCA) paras 8-13 and 20-22.



held that despite the wording, taking s 3(3)(a) of PAJA into account, the presiding officer would have a discretion<sup>35</sup> to allow legal representation.

[55] It is either common cause or axiomatic that there is no general right to legal representation.<sup>36</sup> Accordingly, the students would have had to motivate for legal representation. There is neither an indication, nor any averments in the papers, that Applicants requested legal representation and were refused. Accordingly, it is uncertain that if applicants had made the application for legal representation in terms of section G.26.5.4(c), the Applicants would not have been afforded legal representation.

[56] In any event, it is clear from *Hamata* that the section must be interpreted with s 3(3) of PAJA, to give a discretion to a presiding officer to allow legal representation. In the premises, the said section is not unconstitutional.

[57] In my view, upon a plain reading of G.26.5.4(b)(i) and (ii) of the general rules, it is not unconstitutional. In the premises, Part A of this application must fail in its entirety.

### **Costs**

[58] It is trite that courts have a wide discretion in the awarding of costs and that discretion must be exercised judicially. Applicants did not seek costs in the event of their success, while Respondents sought costs in the event of their success.

[59] In *Biowatch Trust v Registrar, Genetic Resources, and Others*<sup>37</sup> the Constitutional Court adopted the approach that applicants litigating for the

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<sup>35</sup> Ibid paras 9-11.

<sup>36</sup> See *Dabner v South African Railways and Harbours* 1920 AD 583 at 598 (quoted in *Hamata* para 5).

<sup>37</sup> *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC).

public benefit in constitutional matters should not be burdened with costs in the event that they are unsuccessful.

[60] In *Harrielall v University of KwaZulu-Natal*, the following was stated:<sup>38</sup>

[16] With regard to costs, the Supreme Court of Appeal here held that the *Biowatch* principle did not apply because “no constitutional issues were implicated”. And that the case was simply a review under the Promotion of Administrative Justice Act (PAJA) of an administrative decision of the university. This is not correct.

[17] The constitutional issues raised by the case are two-fold. First, a review of administrative action under PAJA constitutes a constitutional issue. This is so because PAJA was passed specifically to give effect to administrative justice rights guaranteed by section 33 of the Constitution. Moreover when the University determined the application for admission, it exercised a public power.’ (Footnotes omitted.)

[61] In *Economic Freedom Fighters v v Gordhan and Others*,<sup>39</sup> the Constitutional Court at paragraphs 82 to 83, criticised the High Court’s decision not to apply *Biowatch* and stated as follows:

[83] Regardless of the EFF’s motivation to involve itself in these proceedings, as a private party acting seemingly in the public interest, it pursued arguments of genuine constitutional concern. Although those arguments have been unsuccessful in both the High Court and on appeal before this court, it would be parsimonious to contend that the constitutional arguments the EFF raised were of a specious or opportunistic calibre. The EFF therefore should have received the benefit of the *Biowatch* principle and should not have had costs awarded against it.’

[62] In the circumstances, I am of the view that the Applicants should not be burdened with costs.

## Order

[63] In the result, I make the following order:

1. Part A of the application is dismissed.

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<sup>38</sup> *Harrielall v University of KwaZulu-Natal* 2018 (1) BCLR 12 (CC).

<sup>39</sup> *Economic Freedom Fighters v Gordhan and Others* 2020 (6) SA 325 (CC).

2. No order as to costs.

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**Nicholson AJ**

Date heard: 24 March 2023

Handed down on: 28 April 2023

Appearances:

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