



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 846/2020

In the matter between:

YOLANDA DYANTYI

APPELLANT

and

RHODES UNIVERSITY

FIRST RESPONDENT

SIZWE MABIZELA NO

SECOND RESPONDENT

WAYNE HUTCHINSON NO

THIRD RESPONDENT

Neutral citation: *Yolanda Dyantyi v Rhodes University and Others* (Case no 846/2020)
[2022] ZASCA 32 (29 March 2022)

Coram: SALDULKER, VAN DER MERWE, NICHOLLS AND HUGHES JJA
AND MATOJANE AJA

Heard: 21 February 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 09h45 on 29 March 2022.

Summary: Administrative law – disciplinary proceedings against student at public higher education institution – Promotion of Administrative Justice Act 3 of 2000 (PAJA) applicable – procedural fairness and right to particular legal representation under PAJA – dependent on particular circumstances of each case – in absence of compelling reasons to contrary procedurally unfair to require student to forgo services of counsel steeped in part-heard matter and available within reasonable time – decisions flowing from disciplinary inquiry reviewed and set aside.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Nhlangulela DJP sitting as court of first instance):

- 1 The appeal is upheld with costs, including the costs of two counsel.
- 2 The order of the court a quo is set aside and replaced with the following:
 - ‘(a) The decision of 10 October 2017, convicting the applicant on charges of kidnapping, assault, insubordination and defamation, in terms of rules 4.3 and 4.17 (a) and (b) of the first respondent’s Student Disciplinary Code, is reviewed and set aside.
 - (b) The decision of 17 November 2017, sanctioning the applicant by permanently excluding her from the first respondent, in terms of rule 7.27 (b) of the first respondent’s Student Disciplinary Code, and making various ancillary orders, is reviewed and set aside.
 - (c) The matter is remitted to the first respondent for reconsideration on condition that any continuation of the disciplinary inquiry against the applicant shall take place before another proctor.
 - (d) The first respondent is directed to pay the applicant’s costs, including the costs of two counsel.’

JUDGMENT

Van der Merwe JA (Saldulker, Nicholls and Hughes JJA and Matojane AJA concurring)

[1] During 2017, the appellant, Ms Yolanda Dyantyi, was in her third and final year of study for a Bachelor of Arts degree at Rhodes University (the university). As a public higher education institution the university is a juristic person in terms of s 20(4) of the Higher Education Act 101 of 1997. It is the first respondent in the appeal. The second

respondent is the vice-chancellor of the university in his official capacity. During 2016 the university instituted disciplinary proceedings against Ms Dyantyi (and others). The third respondent, Mr Wayne Hutchinson NO (the proctor), chaired the disciplinary inquiry. He found that Ms Dyantyi was guilty of the misconduct that she had been charged with and ordered her permanent exclusion from the university, with effect from 17 November 2017. Ms Dyantyi launched an application for the review and setting aside of the decisions of the proctor in the Eastern Cape Division of the High Court, Grahamstown. The university and the vice-chancellor opposed the application. Nhlangulela DJP dismissed the application with costs but granted leave to Ms Dyantyi to appeal to this court on the limited ground that I shall allude to. It suffices to say at this stage that the issue on appeal is whether procedural unfairness tainted the decisions of the proctor in respect of Ms Dyantyi.

The facts

[2] During the period from 17 to 20 April 2016, the university was affected by student protests. The protests were precipitated by the emergence, on social media, of a list of male students and former students of the university who had allegedly committed rape or acts of sexual assault at the university. The protests were directed at the perceived 'rape culture' at the university. The protestors believed that the university failed to effectively address the existence of pervasive sexual violence on its campus.

[3] During the protests, three male students were physically removed from their rooms at university residences, manhandled and deprived of their freedom of movement. Despite calls by the vice-chancellor and other members of the senior management of the university to release him, one of the students was held against his will for about 11 hours. The protests continued until the university obtained a comprehensive interim interdict on 20 April 2016. Ms Dyantyi participated in the protests but at all times maintained that she had done nothing unlawful.

[4] On 28 March 2017, nearly a year after the protests, the university gave written notice of a disciplinary inquiry to Ms Dyantyi. In terms of the notice, Ms Dyantyi had to answer to four charges of misconduct. The first was that she had committed the common

law crime of kidnapping in that, acting in common purpose with others, she deprived the aforesaid three male students of their freedom of movement and held them hostage. The second charge was one of insubordination, consisting of a failure to adhere to the lawful instructions of the vice-chancellor and his in-house legal advisor to release all or any of the three students. In the third place Ms Dyantyi was charged with having committed the common law crime of assault. It was alleged that she had manhandled and/or grabbed one of the said three students by his collar, continuously pushed him and spat in his face. The fourth charge was that Ms Dyantyi had defamed another student (not one of the three already mentioned) by referring to him as a rapist on social media.

[5] The notice alerted Ms Dyantyi to the provisions of clause 7.1 of the Student Disciplinary Code of the university (the disciplinary code). It provides for the rights of representation of a student at a disciplinary hearing, including the right to legal representation at own cost. It transpired that two fellow female students had to face the first and second charges at the same disciplinary inquiry.

[6] The vice-chancellor appointed the proctor in terms of the disciplinary code to preside over the disciplinary inquiry. The disciplinary code spells out the procedure to be followed at the hearing. It provides that in the event that the proctor finds a student guilty of a disciplinary offence, he or she has jurisdiction to impose any one or more of a variety of sanctions, ranging from a suspended fine to permanent exclusion from the university. In terms of the disciplinary code the university appointed two prosecutors to represent it before the proctor. They were Mr Sandro Milo and Mr Fundile Sangoni, both attorneys in private practice.

[7] The disciplinary hearing commenced on 26 June 2017. Ms Dyantyi was represented pro bono by two counsel, Ms Irene de Vos (not the lead counsel for Ms Dyantyi before us) and Mr Zweli Makgalemele, as well as an attorney (Mr Lindokuhle Mdabe) and a candidate attorney. The members of this legal team were either attached to or instructed by the Socio-Economic Rights Institute (SERI), a non-profit company registered as a law clinic. Counsel acted for one of the two other charged students on the instructions of an attorney. After the commencement of the

hearing, she ceased to be a registered student at the university and the disciplinary charges against her were not proceeded with. An attorney, Mr Justin Powers, appeared for the third student.

[8] Some preliminary skirmishes, including an unsuccessful application on behalf of all three students for the recusal of the proctor, preceded the calling of witnesses. Thereafter, the prosecutors presented the evidence of four witnesses. Two of them were the victims of the kidnapping referred to in the first charge. One of these two was also the victim of the assault alleged in the third charge. The third witness observed some of the events during the protests and the fourth was the complainant in respect of the fourth charge (defamation). Counsel for Ms Dyantyi cross-examined the witnesses and put to each of them that she denied any wrongdoing or that she had been a leader of the protests.

[9] The hearing stretched over several days (26 to 28 June, 7 to 8 August and 4 to 7 September 2017) and was then set down for hearing on 9, 10 and 11 October 2017. After lunch on 9 October 2017, the proctor excused Ms Dyantyi and Mr Makgalemele to prepare for her testimony on the following day. On 10 October 2017, however, Mr Powers proceeded to present his client's case. This was the result of an agreement between Ms Dyantyi's legal representatives and Mr Powers, to accommodate witnesses for his client that were present. The prosecutors did not object to this. So it transpired that the case for the fellow student was not concluded by the close of proceedings on 11 October 2017.

[10] In the result, dates for the continuation of the inquiry had to be determined. It appeared from the discussion on the record that the proctor was available on 25 to 27 October, 6 to 8 November and 13 to 15 November 2017. So, apparently, were the prosecutors. In respect of these dates, Mr Powers was only available on 26 and 27 October. He said that he had several weeks before proposed these dates to Mr Milo. There was no indication, however, that counsel for Ms Dyantyi had been involved in any such discussion. Mr Powers also pointed out that his client was due to write examinations during the week of Monday 6 November to Friday 10 November 2017. (The same applied

to Ms Dyantyi). Mr Powers was also available on 29 and 30 November and 1 December 2017, which in the circumstances were the first available dates of counsel for Ms Dyantyi.

[11] Mr Milo proceeded to say '... we made it very clear that the University's imperative is to conclude with these proceedings by 20th October. That is the imperative and we did make it clear that if we were unable to achieve finality by then, the University would unfortunately be left with no alternative but to schedule the matter on dates without reference to the availability of the parties. It's a step I'm loathe to request that we do but it's something which I fear we have to do'. (I accept that the reference to the 20th October was due to a slip of the tongue and should be understood as 30th October). He did not say why it was so important for the university to conclude the proceedings before 30 October 2017. However, this statement caused the focus to be placed on continuation of the hearing on 26 and 27 October 2017.

[12] Ms de Vos said that there was no intention to delay the matter. She explained that both she and Mr Makgalemele had prior commitments for these dates. Ms de Vos was engaged in an application in the Gauteng Local Division, Johannesburg to restrain the deportation of a person who faced the death penalty in Botswana. Mr Makgalemele was engaged in a matter between the President of the Republic of South Africa and the Office of the Public Protector, which had many weeks before been set down for the week of 23 to 27 October 2017. At no stage were these averments disputed.

[13] Ms de Vos said that Ms Dyantyi was a poor student who could not afford other legal representation and was unlikely to obtain pro bono legal representation at short notice. She pointed out that through no fault of Ms Dyantyi or her representatives, the disciplinary hearing commenced more than a year after the protests and that there was no rational reason why the matter should be concluded by 20 (30) October 2017. She also mentioned that the practice on the three previous similar occasions had been that the dates for the continuation of the proceedings were agreed upon.

[14] Ms de Vos concluded by contending that to set the matter down for dates on which counsel for Ms Dyantyi were unavailable would in these circumstances constitute a gross irregularity. Despite similar protestations by Mr Powers, the proctor simply ruled: 'Mr Milo, I think I must do the dates now. Alright. 26th, 27th, 6th, 7th and 8th November. Thank you. You can pack up.'

[15] On 20 October 2017 Ms Dyantyi submitted a formal application to the proctor for the postponement of the hearing that had been set down for the aforementioned dates, to dates on which her legal representatives were 'objectively' able to attend. The application was essentially based on the same grounds than those that had been put forward on 11 October 2017. It was submitted in the postponement application that should the inquiry not be postponed, the proceedings against Ms Dyantyi would be tainted by procedural unfairness. The university opposed the application.

[16] The proctor made a ruling on 24 October 2017, in these terms:

- '1. I have considered the application by Ms Dyantyi's representatives for the postponement of the hearing and the University's response thereto.
2. On the last sitting of the hearing on 11 October 2017, I duly considered the objections that were raised by Adv. De Vos to the proposed dates. I overruled her objections.
3. I am not persuaded that my decision should be revisited and in the result, the application is dismissed.'

Thus, the proctor gave no reasons for his rulings of 11 October and 24 October 2017 (the rulings). As a consequence of the rulings, neither Ms Dyantyi nor her representatives further participated in the disciplinary proceedings.

[17] The proctor produced his judgment on the merits on 10 November 2017. He found that Ms Dyantyi was guilty of kidnapping, insubordination, assault and defamation as charged. (He also found her fellow student guilty on the two charges put against her). On 17 November 2017, the proctor handed down the sanction in respect of Ms Dyantyi, as follows:

'9.1 Ms Dyantyi is excluded permanently from Rhodes University, forthwith as of the date of this order;

9.2 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; and

9.3 Ms Dyantyi's academic transcript shall be endorsed to read "*Conduct Unsatisfactory – Student permanently excluded for: Kidnapping; Assault; Insubordination; Defamation*".

9.4 Ms Dyantyi must vacate the 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.

9.5 The order set out in paragraph 9.4 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;

9.6 Any examinations, practicals 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*.'

[18] As I have said, Ms Dyantyi launched an application for the review and setting aside of both the decisions of the proctor of 10 November and 17 November 2017 (the decisions). The grounds of review were that the decisions had been materially affected by procedural unfairness and were unreasonable and/or irrational. In a supplementary founding affidavit filed under Uniform rule 53(4), Ms Dyantyi also alleged that the decisions were *ultra vires* the powers of the proctor and that she reasonably perceived the proctor to have been biased against her. The court a quo found no merit in any of the review grounds but subsequently granted leave to appeal limited to the procedural unfairness review ground.

The law

[19] As a public higher education institution, the university is publicly funded for the purpose of achieving the obligation of the state under s 29(1)(a) of the Constitution to make the right to higher education progressively available and accessible. It follows that the university is an organ of state as defined in s 239 of the Constitution and thus in s 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). In terms of s 27(1) of the Higher Education Act, the university is governed by its council. Section 32(2)(d), *inter alia*, provides that the council may make institutional rules regarding disciplinary measures

and disciplinary procedures relating to students. In terms of s 36, every student at a public higher education institution is subject to the disciplinary measures and disciplinary procedures determined by its institutional rules. The council of the university approved and the university applied the disciplinary code under these empowering provisions.

[20] Therefore, in subjecting Ms Dyantyi to a disciplinary inquiry, the university exercised a public power and/or performed a public function in terms of legislation, within the meaning of the definition of 'administrative action' in s 1 of PAJA. The decisions clearly affected Ms Dyantyi's rights adversely by direct external legal effect. It follows that PAJA was applicable and that Ms Dyantyi had the right to procedural fairness encapsulated in s 3 of PAJA.

[21] In C Hoexter & G Penfold *Administrative Law in South Africa* 3 ed (2021) at 501 it is said that:

'... procedural fairness is a principle of good administration that requires a sensitive rather than heavy-handed application. Context is all-important: the content of fairness is not static but must be tailored to the particular circumstances of each case. There is no room now for the all-or-nothing approach to fairness that characterised our pre-democratic law, an approach that tended to produce results that were either overly burdensome for the administration or entirely unhelpful to the complainant.'

At common law the opportunity of an individual to present evidence that supports his or her case and to controvert the evidence against him or her '... is the essence of a fair hearing and the courts have always insisted upon it'. See Lawrence Baxter *Administrative Law* 1 ed (1984) (3rd impression 1991) at 553. Today this forms part of the reasonable opportunity to make representations under section 3(2)(b)(1)(ii) of PAJA. In *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another* [2002] ZACC 2; 2002 (3) SA 265; 2002 (9) BCLR 891 para 104 Chaskalson P said that 'what procedural fairness requires depends on the particular circumstances of each case'. And in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)* [2001] ZACC 19; 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC) para 102 he said:

'Ultimately, procedural fairness depends in each case upon the balancing of various relevant factors including the nature of the decision, the "rights" affected by it, the circumstances in which it is made, and the consequences resulting from it.'

[22] In accordance with the position at common law, there is no general right to legal representation under PAJA. Unless a relevant instrument extends the right to legal representation, it is limited by s 3(3)(a) to serious or complex cases. Even in such cases there is no general right to the services of a specific legal representative or representatives. Whether, when and to what extent an affected person should be permitted or enabled to obtain or retain the services of a particular legal representative has to be determined by a similar balancing exercise than the one referred to in the previous paragraph.

[23] Thus, the question in such a case (that is, where the affected person is entitled to legal representation) is whether in the specific circumstances procedural fairness in terms of PAJA requires that the affected person obtain or retain the services of a particular legal representative. A weighing of considerations of timing and delay, prejudice to any affected party, availability of suitable alternative legal representation together with all other relevant factors, should provide the answer to this question. And it has to be said that the answer should seldom be in the affirmative.

Application of the law to the facts

[24] Was Ms Dyantyi's case such an exceptional instance? The following factors had to be balanced. On the one hand the university took a predetermined stance that it would seek the exclusion of all the accused students, including Ms Dyantyi. It made this attitude clear from the outset and at all stages during the disciplinary inquiry. In the result, Ms Dyantyi, an impecunious young student, faced grave potential consequences, including three wasted years at the university, the compromising of her ability to obtain admission at another university and dashed dreams and career prospects. Presentation of her case at the disciplinary inquiry was a matter of some factual and legal complexity. It was, therefore, rightly accepted that legal complexities and potential seriousness of the consequences of an adverse finding entitled Ms Dyantyi to adequate legal representation

for the duration of the inquiry. See *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others* [2002] ZASCA 102; 2002 (5) SA 449 (SCA) para 21.

[25] Ms de Vos and Mr Makgalemele represented Ms Dyantyi over the 12 days of the disciplinary hearing up to 11 October 2017. The transcript of the proceedings up to then came to over 700 pages. In such circumstances, the role of the instructing attorney (and his or her candidate attorney) is usually more of an administrative and logistical nature. There was no reason to believe that this was not the position in this matter. Thus, the rulings deprived Ms Dyantyi of the services of two counsel steeped in the matter. Moreover, they did so at a crucial stage of the proceedings, when Ms Dyantyi was about to testify and to otherwise present her case. The suggestion of the university that Ms Dyantyi should have proceeded with only the assistance of Mr Mdabe and the candidate attorney was quite unreasonable in the circumstances. It would have been difficult to obtain the services of counsel willing to act pro bono and able to properly prepare within the 10 working days between 11 October and 26 October 2017. And after the ruling of 24 October 2017 that was virtually impossible. This caused prejudice to Ms Dyantyi that could only have been justified by powerful considerations. That was especially so because all of this could have been avoided by the simple expedient of setting down the matter for 29 and 30 November and 1 December 2017, which dates were not unreasonably distant.

[26] What had to be placed on the other side of the scale? Nothing really, apart from the general principle that student disciplinary proceedings should be finalised with reasonable expedition. As I have demonstrated, the proctor gave no reasons for any of the rulings. It was a recurring theme in the answering affidavit in the review application, deposed to by the in-house legal advisor to the vice-chancellor, that Ms Dyantyi had no defence to the charges and throughout employed delaying tactics. But the prosecutors said nothing of the sort at the time, no doubt because they had no justification to say so.

[27] As I have said, Mr Milo did not at the time explain why the university regarded it as imperative that the proceedings be concluded by 30 October 2017. In the said answering affidavit, the following explanation was offered:

'162.1 The urgency to concluding the matter by 30 October 2017 was grounded in the fact that the University semester was coming to an end and the University would be entering its semester SWOT week period.

162.2 During this time the University does not generally schedule any events or disciplinary hearings, but reserves that time for academic engagements and examination preparation. This ground of urgency is not unique to the applicant's disciplinary hearing but applies generally to the University's disciplinary process.'

But that could only (possibly) have been a reason to not have a disciplinary hearing during the week from Monday 30 October to Friday 3 November 2017. In the circumstances it must be accepted that there was no compelling reason to conclude the disciplinary inquiry before 30 October 2017.

[28] It remains to address two findings that the proctor made in his judgment on the merits. In the first place, he recorded that Mr Sangoni had contacted Mr Mdabe when the hearing resumed on 26 October 2017 and that the latter confirmed that there would be no appearance by and on behalf of Ms Dyantyi. When asked whether 'there was any reason that he wished to advance for their absence', Mr Mdabe said that the reasons were set out in the postponement application. The proctor proceeded to say:

'In the result, I was satisfied that Ms Dyantyi and her legal representatives had waived their right to participate further in the proceedings.'

[29] This finding was plainly wrong. It did not follow from the recordal that Ms Dyantyi had waived the right to participate further in the hearing. Mr Mdabe's reference to the reasons put forward in the postponement application indicated quite the contrary, namely that the refusal of the postponement tainted the proceedings with fundamental unfairness. In line herewith, and with what Ms de Vos had foreshadowed in her address on 11 October 2017, the court a quo made the following finding, which was rightly not challenged before us:

‘Having resisted such a postponement, *albeit* unsuccessfully, both the applicant and her legal team decided not to engage in the disciplinary proceedings as they had already formed a view that the refusal by the third respondent to postpone the matter to 29 November 2017 was unreasonable.’

[30] Secondly, the proctor held that from the outset Ms Dyantyi had no intention of testifying in her own defence. This finding was gratuitous and wrong. Ms Dyantyi’s legal representatives repeatedly stated without question that she would testify (she was excused from the hearing on more than one occasion to prepare for her testimony, particularly on 9 October 2017) and she had not been called upon to answer such a proposition. Had this motivated the rulings, they would have been affected by a gross misdirection.

[31] In the particular circumstances of this case, a proper balancing of the relevant considerations would have dictated that the inquiry had to be postponed to the dates on which counsel for Ms Dyantyi were available. The failure to do so violated Ms Dyantyi’s right to procedural fairness under PAJA. It follows that the court *a quo* should have reviewed and set aside the decisions. Costs should follow this result in both courts, including the costs of two counsel.

[32] In accordance with the notice of motion in the review application, counsel for Ms Dyantyi asked that the matter be remitted to the university ‘for reconsideration before another proctor’. In the light of the findings of the proctor in respect of credibility and otherwise, the disciplinary proceedings should not continue before him. In my view, however, the proposed direction in this regard should allow for the lapse of time and possible changed circumstances. The matter should be remitted to the university for reconsideration in its discretion, on the condition that any continuation of the disciplinary inquiry against Ms Dyantyi should take place before another proctor.

[33] For these reasons the following order is issued:

- 1 The appeal is upheld with costs, including the costs of two counsel.
- 2 The order of the court *a quo* is set aside and replaced with the following:

‘(a) The decision of 10 October 2017, convicting the applicant on charges of kidnapping, assault, insubordination and defamation, in terms of rules 4.3 and 4.17 (a) and (b) of the first respondent’s Student Disciplinary Code, is reviewed and set aside.

(b) The decision of 17 November 2017, sanctioning the applicant by permanently excluding her from the first respondent, in terms of rule 7.27 (b) of the first respondent’s Student Disciplinary Code, and making various ancillary orders, is reviewed and set aside.

(c) The matter is remitted to the first respondent for reconsideration on condition that any continuation of the disciplinary inquiry against the applicant shall take place before another proctor.

(d) The first respondent is directed to pay the applicant’s costs, including the costs of two counsel.’

C H G VAN DER MERWE
JUDGE OF APPEAL

Appearances

For appellant: A de Vos SC (with her O Motlhasedi) (heads also prepared by S Wilson)

Instructed by: SERI Law Clinic, Johannesburg
Webbers Attorneys, Bloemfontein

For 1st and 2nd respondents: I J Smuts SC (with him N Molony)

Instructed by: Eversheds Sutherland (SA) Inc., Johannesburg
Lovius Block Inc., Bloemfontein