
SOUTH AFRICA / JUDGMENT

Mafungwa and Another v Walter Sisulu University and Another (1485/2018) [2019] ZAECMHC 70 (5 November 2019) [2019] ZAECMHC 70

COURT

Eastern Cape High Court, Mthatha

BEFORE

Zono

CASE / FILE NUMBER

1485/2018

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IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION: MTHATHA]

CASE NO. 1485/2018

Heard on: 24 October 2019

Delivered on: 05 November 2019

SIPHESIHLE MAFUNGWA

1st Applicant

YAMKELA MXOKOZELI

2nd Applicant

And

WALTER SISULU UNIVERSITY

1st Respondent

MINISTER JADEZWENI – RECTOR CAMPUS

WALTER SISULU UNIVERSITY

2nd Respondent

JUDGMENT

ZONO AJ

INTRODUCTION

- [1] Applicant lunched this application, mainly challenging the decision taken by the second respondent dated 6 December 2017 suspending the applicants from the University. Although the Notice of Motion is divided into two parts, it appears that all the relief are consequent upon the granting of relief setting aside applicant's suspension.
- [2] The application is opposed by the University and the Campus Rector (the two respondents). Notice to Oppose and answering affidavit has been delivered to meet applicant's case. Applicants replied to the answering affidavit.
- [3] Issues in this application are largely common cause. The applicants, prior to their respective suspension by the University on 6 December 2017, were medical students enrolled with the University. Both applicants were implicated in the crime of murder allegedly committed on 12 May 2017. A person who was allegedly killed was

one of the medical students registered with the University. On this fateful day the University was beset by riot, unrest and or violent confrontation between students registered in respondents' Mthatha Campus. On 14 May 2017 applicants, together with other students, handed themselves over to the South African Police Services, Central Police Station, Mthatha. They were subsequently released on bail on 12 June 2017. The Criminal Case is still not finalised.

- [4] Subsequent to that the applicants went to the University. First suspension letter were served upon the applicants by the University. That suspension was challenged in this court which proceedings culminated in an order dated 17 August 2017 taken by consent setting the suspension aside. It appears that such consent was reached because the University failed to afford applicants opportunity to make representations to the Campus Rector, prior to the decision to suspend them. Subsequent to that the applicants went back to the University and resumed their academic activities.
- [5] Pursuant to a number of notices the applicants respectively appeared before the Campus Rector and showed cause, why their suspension orders should not be made as required by Article 6.2(a) of the University Disciplinary Code. Subsequent to that hearing a decision was taken and decision is embodied in the letter of suspension dated 6 December

2017. In what follows I set out the contents of the suspension letter.

RE: SUSPENSION FROM THE UNIVERSITY

"Having heard your verbal presentation on 21 November 2017, you are hereby advised that the University has decided to suspend you until the final disposition of the charges. This suspension is issued in terms of Clause 6.1 of WSU Student Disciplinary Code which provides for suspension of a student who has been charged with serious crime, as listed in Schedule 1 of the Criminal Procedure Act 51 of 1977 in a court of law [and also to ensure your safety]."

You are forthwith prohibited from participating in any University activities, attending lectures, enter the premises of the University, not bring any motor vehicle into the grounds of the University, cease to reside in any University residence, and to hold any leadership position in any University recognised structure.

Should you need specific information regarding the aforementioned, you are to contact the writer via email on this address: mjadezweni@wsu.ac.za.

Yours sincerely

Prof JMM Jadezweni

Rector: Mthatha Campus

It is this decision I set out to deal with. Perhaps late in the judgment I will deal with the question of reconsideration of this decision.

- [6] The applicants impugn this decision on two grounds: namely, that they were never asked any questions during their respective hearings and that the Campus Rector and other officials sitting with him failed to take record of what constituted their representations during the hearings.
- [7] The arduous task I must now embark upon is to decide the lawfulness of the respondent's decision to suspend the applicants. As a creature of statute and thus a public body with its powers limited to those conferred upon it by statute,[1] the University duly issued Student Disciplinary Code of Conduct to promote a culture of learning and teaching in a disciplined and dignified environment as an Institution of higher learning.
- [8] In its preamble the code provides that "The student Disciplinary Code is the central document on all aspects of disciplinary conduct at the University. Any policy pertaining to student disciplinary issues inconsistent with it shall not be regarded as valid." Article 1.3(a) provides that "students are subject to the WSU Student Disciplinary Code." Article 1.3(c) further provides that "ignorance of the WSU Student Disciplinary Code, Rules and Regulations cannot be raised as a defence in disciplinary proceedings." Because students are bound by the code they are expected to know it by heart, such to include provisions of Article 6 of the Code.
- [9] Article 6 deals with summary procedure and the following are its provisions:

SUMMARY PROCEDURE

"6.1 when a charge of having committed an offence as defined in these Rules is pending against a student or when in the opinion of the Campus Rector such a charge ought to be instituted against a student or when a student has been charged with a serious crime, as listed in Schedule 1 of the Criminal Procedure Act 51 of 1977, (as amended) in a court of law, the Campus Rector may order that, the student shall:

- (i) Cease attending lectures or tutorial;
- (ii) Cease participating in such other activities of the University;
- (iii) Not enter the premises of the University;
- (iv) Not bring any motor vehicle onto the grounds of the University;
- (v) Cease to reside in any University residence;
- (vi) Cease to hold any leadership position in any University recognised structures.

6-2 The Campus Rector shall not make any order in terms of Article 6.1 above unless:

- (a) The student has been given an opportunity to appear before the Campus Rector to show cause why the order should not be made and;
- (b) The Campus Rector considers it to be in the interest of the student community or employees or the University to make the order.”

[10] Of importance at the present moment are the provisions of Article 6.2. It is this article that deals with the procedure before and during hearing. A question that must be asked and answered is whether an opportunity to appear before the Campus Rector was given to the applicants. It is a common cause that the applicants were not only called upon to appear before the Campus Rector but also asked to narrate a story of their involvement in the commission of the alleged murder on 12 May 2017. A version by the respondents that is admitted by applicants in reply is as follows: “Both applicants in the present matter were afforded an opportunity to show cause, why a suspension order should not be made as is required by Article 6.2(a) of the First Respondents’ Disciplinary Code.” From here it is clear that the hearing was commenced by a question or a probe to the applicants to show cause, why, a suspension order should not be made. At the very least an opportunity was given to them by casting an invitation to them to explain how they got implicated in the murder and show cause why a suspension order should not be made.

[11] It is only when rights are infringed or threatened that the impugned conduct becomes the business of the Judiciary.[2] In this case the applicants do not allege that they have a legally recognised right to be asked questions during the hearing.

Where there is no right no infringement or threat exists, consequently there is no remedy available. The remedy only exists where there is a right.[3]

[12] An invitation to show cause was well accepted and opportunity grabbed by both hands by the applicants. They narrated a story without any interruption and in the process of narrating a story, they were pleading their innocence. We now know what they said in a nutshell. They explained to the Campus Rector how innocent they are, and that they even went to the extent of stating that they were the victims themselves of the occasion. Has this exercise fulfilled the purpose of Article 6.2 of the code? The answer is in the affirmative. An opportunity was fully given to the applicants. They narrated their story from beginning to

the end. Even the Counsel for applicant confirmed during argument that the applicants told the Campus Rector everything they wanted him known. Even the question that was asked to them to show cause is a common cause. The purpose of the hearing was not to ask questions but to afford applicant opportunity to show cause in terms of Article 6-2. Article 6-2 does not require questions to be asked to the student but opportunity to be given to him to show cause, and that was done.

[13] Even the notice dated 16 November 2017, which was a Notice to Attend Suspension Hearing, put it plain the purpose of the hearing. The notice was intended to prepare the applicants for the hearing so that they may prepare themselves. The full text of the notice is as follows:

RE: NOTICE TO ATTEND SUSPENSION HEARING

“This letter serves to notify you, that in terms of Article 6 of the WSU Student Disciplinary Code of Conduct, the Campus Rector may order your suspension if it is alleged that you have been charged with a serious crime, as listed in Schedule 1 of the Criminal Procedure Act 51 of 1977.

As you have been charged with a serious crime, in terms of Schedule 1 of the Criminal Procedure Act, the Campus Rector, Professor Jadezwi, wishes to consider whether he should suspend you.

You are accordingly requested to appear again before the Campus Rector to show cause, why you should not be suspended. Any unjustified failure to attend the inquiry will result in further disciplinary action.....” From this it is clear the applicants were aware of the purpose of the inquiry or hearing from the date of receipt of that notice.

(which is the 17 November 2017). Applicants’ complaint about Campus Rector’s failure to ask questions is

unmeritorious.

[14] It is now known what the applicants said during the hearing. They championed a cause that they were innocent. They sought not to be suspended for that reason. Whether or not that was relevant for purposes of issuing a suspension order entirely depends again on the provisions of Article 6-2(b). Article 6-2(b) deals with what must be taken into account by the Campus Rector after an opportunity to show cause has been given to the students to consider whether or not to issue a suspension order. The following is what need to be taken into account: “the interest of the student community or employees or the University.” Interest of the accused student is not a consideration in the enquiry. They did not allege that during hearing they informed

the Campus Rector that it will be in the interest of the student community or employees or University not to suspend them. On this score as well I cannot find that the suspension was contrary to the provisions of Article 6-2 of the Code.

- [15] The fact that the proceedings were not recorded, I find that to be in dispute. The respondents are adamant that the proceedings were being recorded. In that case respondents' version should prevail.[4] Even if I were to be wrong on this I still find that this ground is devoid of any merit on two grounds: Firstly the applicants are not alleging any prejudice they suffered or will suffer as a result of failure to record. The cause they championed during the hearing and the narration they made to the Campus Rector is a common cause. There is no dispute about what happened and what was said during the hearing. Lastly Article 6-2 does not provide for any manner of recording. I accordingly find that the suspension hearing was fair and lawful in every respect.
- [16] A matter that should not detain me long is that of a reconsideration application in terms of Article 12. Whilst the document referred to as application for consideration is not dated, it is not clear as to when it was served upon the Campus Rector. The date of receipt of the representations is important so as to determine whether they were made within the required time period. It cannot be determined whether or not consideration application was made. It is not known at this stage whether or not those representations were made within the prescribed time.
- [17] However, what is important and certain is that those representations were considered by the Campus Rector. It is a common cause that a response to the representations was verbally made and that response confirmed applicants' suspension. All what applicants are complaining about is that it should have been made in writing. There is no basis laid for that except to submit that if you make representations in writing it is expected that you will be answered to in writing. All the same the response was imparted to the applicants.
- [18] Article 12-5 provides that "the Campus Rector may at his/her discretion revoke a suspension provided that steps have been taken to proceed with the disciplinary hearing on the charge of misconduct against the student." Article 12.6 provides that: "The Campus Rector may at his/her discretion confirm the suspension." It is discernible from these provisions that reconsideration of suspension by the Campus Rector is a matter of discretion. The Campus Rector has exercised that discretion fully.
- [19] Having said the above, I find that the application cannot succeed. There is no reason why general rule that costs should follow the result cannot be applied.
- [19] In the result the following order shall issue:
- (a) The application is dismissed with costs.

A.S. ZONO

JUDGE OF THE HIGH COURT (ACTING)

APPEARANCES:

Counsel for the applicants

: Adv. Nyobole

Instructed by

: Mgcotyelwa Krewu Inc.

MTHATHA

Counsel for the respondents

: Adv. De La Harpe S.C.

Instructed by

: Drake Flemmer & Orsmond Inc.

c/o Fikile Ntayiya & Associates

[1] Nkasa and Others v Walter Sisulu University and Another (2527/2017)[2017] ZAEMHC23 (11 July 2017; The Institution Statute of

Walter Sisulu University published in Government Gazette 37235 and Government Notice No.13 of 17 January 2014 (the Statute).

[2] Vumazonke v MEC for Social Development and Others 2005(6) SA 229 (SE) Para 9.

[3] Masemole v Special Pensions Appeal Board and Another (CCT 260/18)

[2019] ZACC 39 (15 October 2019) Para 51.

[4] Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 at 634.

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