

IN THE STUDENT COURT OF THE UNIVERSITY OF STELLENBOSCH
(HELD AT TYGERBERG)

In the matter:

CARMEN HAYLEY KENNEDY

Applicant

and

TSR DISCIPLINARY COMMITTEE

Respondent

JUDGMENT HANDED DOWN BY THE STUDENT COURT

The facts giving rise to the dispute

[1] The facts appear from the applicant's founding affidavit, although some of these facts are disputed. Although not entirely relevant to the Court's decision, I will briefly contextualise the present dispute. On or about 23 October 2015, during a period of student protests, the applicant was attending her usual ward rounds at the Tygerberg Hospital during that morning at approximately 08:00. Later that same day, the applicant was informed that all academic activity had been terminated. Despite this, the applicant noticed that a fellow classmate, Ms Naledi Mashishi, was tending to a patient. The applicant noted that she was unsure what Ms Mashishi was doing with the patient. Not long after, the applicant passed the room where Ms Mashishi had been busy and noted that the screening curtains were open and that Ms Mashishi appeared to be finished with her interaction with her patient. The applicant then photographed Ms Mashishi, because she was allegedly concerned that a fellow classmate could have been examined at a time when academic activities had been halted. The applicant then shared the photograph of Ms Mashishi on a specific WhatsApp group for the purpose of further investigation into the matter.

[2] On 19 January 2016 the applicant was informed that a complaint had been laid against her and that this would be investigated by the interim disciplinary committee, which consisted of Mr Lungelo Mlambo, Mr Nicholas Wayne, Mr Bryan Castle, Mr Conwill van der Heever and Ms Noxolo Kubheka. Ms Kubheka was a so-called "invited guest" to the committee.

[3] The photograph taken of Ms Mashishi by the applicant was found to not be legal by the respondent, although the applicant alleged that she was unaware that photography within Tygerberg Hospital is forbidden. Nevertheless, this is a substantive matter and accordingly falls outside of this Court's jurisdiction. This issue will not be decided on.

[4] The second issue that was dealt with by the respondent was a poll that was conducted by the applicant on a social media website, Facebook. The respondent found that this conduct was not malicious and that the nature of the applicant's office requires that the student body's needs are investigated and taken into consideration. The respondent accordingly issued the applicant with a written warning in this regard. It is neither appropriate nor necessary for this Court to make any findings in this regard.

The relief sought by the applicant

[5] The applicant approached the Court with the following plea: "...that [the] honourable Court:

- a) declare that the entire [d]isciplinary [p]rocess be declared void *ab initio* [...] and:
 - i) order that the disciplinary process be begun over and be properly conducted by providing [the applicant] with proper charges to answer and the opportunity to respond to same either verbally or in writing; and
 - ii) order that the Disciplinary Committee be properly constituted;
 - iii) inform [the applicant] as to who laid the complaint against [her];
OR
 - iv) order that all the sanctions against [the applicant] be quashed; and
- b) order that the relevant sections of the TSR Code of Conduct be amended to bring same into line with the Tygerberg Student Constitution."

[6] The applicant approached the Court with a number of grounds on which the procedures facilitated by the respondent were appealed. These will each be dealt with separately.

The jurisdiction of the Student Court

[7] Before dealing with the matter at hand, I think it prudent to first make a remark regarding the jurisdiction of the Student Court.

[8] In terms of section 55(1)(a) of the Tygerberg Student Constitution, the Student Court functions as an "administrative tribunal". Accordingly, the Court does not possess the jurisdiction to decide on substantive matters. The Court's jurisdiction extends only to procedure.

[9] Regarding the present matter, the Court's role is solely to assess whether the procedures followed by the respondent in relation to the applicant were procedurally correct and fair as per the Tygerberg Student Constitution.

The grounds of appeal

[10] In the applicant's founding affidavit, a number of grounds of appeal were laid out. Each will be dealt with in turn, following the order of the applicant's affidavit.

The constitution of the Disciplinary Committee and the inclusion of an invited guest

[11] The Tygerberg Student Constitution contains no empowering provision for the inclusion of an invited guest during the proceedings of the Disciplinary Committee. The implication is that since the Tygerberg Student Constitution does not make provision therefor, the inclusion of a so-called invited guest is not allowed.

[12] Furthermore, the Tygerberg Student Constitution has no provision that provides the Chairperson with a discretion to invite an external person to parttake in the proceedings of the Disciplinary Committee. Therefore, the invitation of a guest to parttake in the proceedings was beyond the Chairperson's power.

[13] The applicant submitted that the invited guest was not impartial and accordingly prejudiced the applicant. The Court makes no finding on the latter point, as it falls outside of the Court's jurisdiction.

[14] Regarding this point of appeal, the Court remarks, *obiter*, that the Tygerberg Student Constitution would need to be amended to afford the Chairperson the discretion to include an invited guest on an *ad hoc* basis, or to specifically provide for an invited guest regarding Disciplinary Committee proceedings. The Court finds in favour of the applicant on this point for the reasons set out above.

The minutes of the proceedings of the Disciplinary Committee

[15] Section 35(1)(i) of the Tygerberg Student Constitution stipulates that the Executive Committee of the TSR serves as the Disciplinary Committee of the TSR and its function is to regulate internal disciplinary matters of the TSR in terms of its internal Code of Conduct.

[16] Section 42(1) of the Tygerberg Student Constitution provides that "[a]ll decisions of the [TSR] must be minuted."

[17] The interaction between sections 35(1)(i) and 42(1) requires consideration. I do not believe that section 42(1) envisages that the decisions taken by the Disciplinary Committee are required to be minuted. Rather, it is the Court's view that this section intends that the decisions taken by the Executive Committee sitting in their capacity as the Executive of the TSR are

required to be minuted. The result is that minutes are always a requirement, save for when those persons from the Executive Committee are sitting as the Disciplinary Committee. There is thus a departure from the section 42(1) requirement of minutes being recorded when the Executive Committee sits as the Disciplinary Committee.

[18] What is more, the Court believes that due to the distinct nature of disciplinary proceedings, it is preferable that they be held in camera. It is our view that holding the proceedings in camera will produce the most just and equitable result.

[19] The Student Court therefore finds in favour of the respondents on this point of appeal – the proceedings of the Disciplinary Committee need not be minuted. However, the Disciplinary Committee is required to provide reasons for its decision(s), which the respondent did.

Date, time and place specifications in the Overview of the Disciplinary Committee

[20] For future reference, the respondents are ordered to affix the correct date, time and place on an overview.

Conflict of the TSR procedures with the Tygerberg Student Constitution

[21] The applicant challenged section 12 of the Disciplinary Procedures and Sanctions of the TSR Code of Conduct. Section 12 provides that "...the opinions together with the justification provided by the Executive Committee will be presented to the TSR and the TSR will vote on a motion to ratify the Executive Committee's decision, at a general TSR meeting where quorum is present. A valid vote constitutes 50% + 1 vote. If a majority vote is not upheld the TSR may veto the decision by the Executive Committee and adopt an alternative resolve or amend the directive sanctioned by the Executive Committee. No further appeal may be entered into."

[22] Section 35(2) of the Tygerberg Student Constitution states that decisions taken by the TSR Executive Committee in terms of section 35(1)(i) must be approved by the TSR at a later meeting of the TSR in order to come into effect. Essentially, section 35(2) provides for a ratification of the decisions taken by the Executive Committee sitting as the Disciplinary Committee. This was never done in terms of the decision taken against the applicant and the result is accordingly that the decision never came into force.

[23] Section 12 also mentions the Dean of Students. This office no longer exists and the Court hereby orders the respondent to amend section 12 of the Disciplinary Procedures and Sanctions of the TSR Code of Conduct to reflect the current position. As the office no longer exists, it is indeed justifiable that the respondent did not send the appeal to the Dean of Students.

[24] Furthermore, section 12 does not allow for appeal to the Appeal Court. The section must therefore be amended to provide for appeal to the Appeal Court, which is provided for in terms of section 67(1) of the Tygerberg Student Constitution. Moreover, section 2(1) of the Tygerberg Student Constitution provides that, "All constitutions, regulations, rules, codes, documents, motions and decisions adopted by any Tygerberg student body are subject to this Constitution and invalid in as far as they are inconsistent with it."

[25] The logical conclusion is that since section 12 of the Disciplinary Procedures and Sanctions of the TSR Code of Conduct does not provide for appeal to the Appeal Court, as envisaged by section 67(1) of the Tygerberg Student Constitution, the provision is invalid in terms of section 2(1) of the Tygerberg Student Constitution.

[26] Forbye, section 65(1) of the Tygerberg Student Constitution states: "All decisions of the Student Court are binding." Accordingly, the Court orders that section 12 be amended to be brought in line with the Tygerberg Student Constitution for reasons stated above.

Failure of the Disciplinary Committee to present charges to the applicant

[27] The applicant further submitted that the Disciplinary Committee failed to present charges to her.

[28] Section 14(a) of the Tygerberg Student Constitution reads as follows: "Every student whose rights or legitimate expectations are materially and adversely affected by any decision taken by a student body or a member of a student body, has the right to be notified of the nature and purpose of the proposed action." In terms of section 14(a), the applicant is afforded the right to be informed of the charges laid against it.

[29] In this regard, the Court finds that it was not sufficient for the respondent to merely send the applicant a complaint. A formal charge with reference to the section of the Constitution or otherwise that was breached must be presented to the applicant. This document must be a formal report, clearly stating at least the charges; against whom the charges were laid; and by whom the charges were laid. This will provide the accused with an opportunity to adequately respond. The Court finds in favour of the applicant on this ground of appeal.

Applicant not afforded the opportunity to respond to the charges

[30] After being presented with the charges, the accused must be afforded the opportunity to respond to the charges laid against him or her within a reasonable period of time. This response includes an account of the events and the raising of a defence, which must both be presented in the form of a written document.

[31] The Court affords the Disciplinary Committee the discretion to request an appearance of the accused at the disciplinary meeting.

[32] It must be borne in mind that the decision taken by the Disciplinary Committee is subject to the approval of the TSR in terms of section 35(2) of the Tygerberg Student Constitution. The requirement of ratification of the Disciplinary Committee's decision by the TSR acts as a safeguard for the accused, as it essentially means that the Disciplinary Committee's decision is not ultimate.

[33] At least eight TSR members are then required to vote on the decision taken by the Disciplinary Committee, as provided for by section 35(2) of the Tygerberg Student Constitution.

[34] Moreover, the accused has rights afforded to him or her in terms of sections 55 to 69 of the Tygerberg Student Constitution to approach the Student Court and thereafter the Appeal Court. There are thus two further bodies to which the decision taken by the Disciplinary Committee can be appealed and a system of two checks and balances is in place.

[35] The primary reason for the requirement of the accused's submission to the Disciplinary Committee being in writing is that we believe that it is in the interests of justice to do so. Requiring the accused to make oral submissions to the Disciplinary Committee could lead to a multiplicity of collateral issues. Secondly, written documents have substantially more evidentiary value than oral submissions.

[36] In conclusion on this point, the Court believes that the principle of *audi alteram partem* is adequately given effect to. Because the accused is afforded the right to make written submissions to the Disciplinary Committee, whose decision is subject to ratification by the TSR, and that the accused is automatically afforded the constitutional right to approach the Student Court and thereafter the Appeal Court, *audi alteram partem* is realised.

Lack of evidence beyond hearsay

[37] The submission made by the applicant that the respondent based its decision on nothing more than hearsay evidence is essentially a substantive matter and thus falls out of the Court's jurisdiction.

[38] However, I find it judicious to make one remark in this regard. It must be noted that this by no means relates to the evidence that may be considered by the Disciplinary Committee. The Court also makes no finding on whether the applicant's conduct was lawful or not.

[39] Whilst the Court was in session, it became apparent that there was a confusion regarding the evidence that was in fact taken into account.

[40] The result regarding this ground of appeal is that the respondent did indeed consider evidence beyond hearsay evidence in reaching its decision; however it disregarded the two witness' statements due to questionable credibility.

[41] The Court orders an overview must specify precisely which evidence was disregarded by the Disciplinary Committee. The Overview currently reads, "The Disciplinary Committee then agreed that the evidence given to the Committee could not be taken into account." This is inadequate. An overview must stipulate precisely what evidence could not be admitted by the Disciplinary Committee for the sake of absolute clarity.

Abandonment of the principles of natural justice

[42] The applicant's final ground of appeal was that the principles of natural justice were abandoned during the proceedings of the Disciplinary Committee, since the applicant's conduct was found to be lawful, however a finding was nonetheless made against the applicant based on the "turbulent times".

[43] It is trite law that conduct is either lawful or unlawful and it must be evaluated objectively, as opposed to being based on the *zeitgeist* of the day. The Court hereby finds in favour of the applicant on this ground of appeal, as if the Disciplinary Committee concluded that the applicant's conduct was lawful, then the enquiry should have terminated there. The Court agrees with the applicant that the conduct cannot be found to be lawful, yet "unacceptable" based on the time which was characterised by student protests.

Finding of the Court

[44] I now turn to the final findings of the Court. Each of the grounds of appeal have been addressed above. However, for clarity I will summarise the findings of the Court. The Student Court finds that the disciplinary process as conducted by the Disciplinary Committee be declared void for the following reasons:

- i. The Disciplinary Committee was not properly constituted.
- ii. The applicant was not presented with formal charges.
- iii. The applicant was not afforded the opportunity to defend itself.
- iv. Similarly, the applicant was not informed that the document to be submitted to the Disciplinary Committee should provide for more than the applicant's account of the facts, for example, the raising of a defence.

Order

[45] The Disciplinary Committee is ordered to reinstate proceedings against the applicant in accordance with this judgment. Only the proceedings of the Disciplinary Committee need be reopened. The applicant must thus be presented with formal charges, as per paragraph [29] above.

[46] The Student Court orders that the relevant sections of the TSR Code of Conduct be amended to be brought in line with the Tygerberg Student Constitution, as set out in paragraphs [21] – [26] above.

[47] The Court hereby declares the Overview void *ab initio* in its entirety, thus there is no need to rectify the Overview. The Overview ceases to exist and must be recreated anew according to the proceedings to be reinstated and in line with the findings of the Court.

Gouws C (de Villiers K, Zevenbergen I, Oosthuizen A & Coleman E concurring)

[48] I have had the opportunity to read the judgment by my colleagues and I am respectfully unable to agree with the reasoning and finding in paragraphs [30]-[36], for reasons set out below.

[49] In terms of section 14(b) of the Tygerberg Student Constitution every student whose rights are materially affected must be afforded the opportunity to make reasonable representation.

[50] It must be said that what would be considered to be reasonable would depend on the facts of the matter and the parties involved. I do not consider only allowing the applicant to make written submissions to be a reasonable opportunity in terms of section 14(b), based on the serious nature of the complaint. Therefore, it is my view that the applicant should also have the opportunity to make verbal submissions to the Disciplinary Committee.

[51] Furthermore, the Disciplinary Committee is tasked with establishing whether or not there was a contravention of the TSR Code of Conduct. In doing so it must consider all the representations made in reaching its decision, even if the representations are collateral. Excluding oral submissions, on the basis of a possibility of “a multiplicity of collateral issues”, even before the applicant has had an opportunity to make submissions does not seem to give effect to justice in my mind. In its deliberation the Disciplinary Committee can make a finding on evidence and give reasons for the findings.

[52] However, it must be noted that the Chairman of the Disciplinary Committee has discretion as to how he would like to handle the Disciplinary process. In this regard I would like to remark, *obiter*, that the Chairman should

in consultation with the accused, decide wheatear or not he / she would like to make written or oral submissions.

[53] Therefore, I find that the applicant should have the opportunity to respond to the allegations in an oral or written manner.

Coleman E.