REPORTABLE

CASE NO: 384/2000

In the matter between

MAX HAMATA	First Appellant
FREEDOM OF EXPRESSION INSTITUTE	Second Appellant
and	
CHAIRPERSON, PENINSULA TECHNIKON INTERNAL DISCIPLINARY COMMITTEE	First Respondent
CHAIRPERSON, PENINSULA TECHNIKON COUNCIL DISCIPLINARY COMMITTEE	Second Respondent
CHAIRPERSON, PENINSULA TECHNIKON COUNCIL	Third Respondent
PENINSULA TECHNIKON	Fourth Respondent

CORAM: **HEFER AP, HOWIE, MARAIS, NAVSA et NUGENT JJA**

DATE HEARD: 28 FEBRUARY 2002

DATE DELIVERED: 17 MAY 2002

Domestic tribunal – legal representation – discretion to allow.

JUDGMENT

MARAIS JA/

MARAIS JA: [1] The factual background to this appeal (before us by virtue of leave granted by the Court *a quo* – Hlophe JP and Brand J) is fully described in the reported judgment of the Court *a quo*.[1] In the view I take of the matter it is neither necessary nor appropriate to itemise and give consideration to all of the many grounds of attack upon the proceedings and decisions of the three bodies which culminated in the expulsion of the first appellant from the Peninsula Technikon ("Pentech").

[2] One of the first appellant's complaints, if upheld, will have so pervasive and fatal an effect upon all phases of the disciplinary proceedings that took place, that this Court will be obliged to set them and the decisions reached in them aside. The complaint relates to a refusal to allow the first appellant to be represented by the lawyer of his choice and the insistence, if he desired to be represented, upon him being represented by either a student or a member of the staff of Pentech. The refusal was based, as will appear, upon a particular

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1 2000 (4) SA 621 (C)

construction placed upon the relevant rule regulating representation at disciplinary proceedings.

[3] The rule[2] ("the representation rule") reads:

> "The student may conduct his/her own defence or may be assisted by any student or a member of staff of the Technikon. Such representative shall voluntarily accept the task of representing the student. If the student is not present, the Committee may nonetheless hear the case, make a finding and impose punishment."

[4] If the refusal of the Internal Disciplinary Committee (the "IDC") to allow, or even to consider allowing, the first appellant to be represented by a lawyer who was neither a student at Pentech nor a member of its staff stemmed from an erroneous belief that it was prohibited by the representation rule from allowing such representation, and if the first appellant was entitled to have his request considered on its merits and, conceivably, granted, it would follow inexorably that the ensuing enquiry would be vitiated at its inception and that all subsequent phases of the disciplinary proceedings would suffer the

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[2] 10.2.11 (1) (viii)

same fate. *A fortiori* is that the case where, as happened here, the first appellant did not acquiesce in the ruling and participate in the proceedings. Instead, he withdrew from them. The consequence was that the witnesses who then testified against him were not cross-examined, and the first appellant neither gave evidence himself, nor called witnesses, nor addressed any submissions on the merits to the IDC.

[5] Entitlement as of right to legal representation in arenas other than courts of law has long been a bone of contention. However, as the court *a quo* correctly observed, in *Dabner v South African Railways and Harbours* 1920 AD 583 at 598 more than eighty years ago this Court categorically denied the existence of any such absolute right. South African courts have consistently accepted the correctness of that view. It is not entirely clear from the judgment in *Yates v University of Bophuthatswana and Others*[3] whether the court was holding otherwise or whether its recognition of a right to legal

[3] 1994 (3) SA 815 (BGD) at 834 G-J, 835 C-D, 844 D. The ambiguity arises from the passage at 835 C-D: "Apart from a recognition of the right to legal representation, what is generally accepted as an essential aspect of cases before tribunals in this country is the principle of a fair hearing."

representation in that case was grounded solely upon an implication arising from the terms of the conditions of service applicable to the applicant. If the former, the decision would have to be regarded as, with respect, an aberrant one. Indeed, counsel for the appellants laid no claim to any such general and absolute entitlement and declined to submit that legal representation, whenever sought, is a *sine qua non* of any procedurally fair hearing. The submission was less bold and infinitely less productive of the potential tyranny of artful forensic footwork and heavy accompanying costs to which all manner of organizations, institutions, voluntary associations and individuals might become exposed no matter how mundane the issue which arises. The submission was that in the particular circumstances of this case and, more specifically, the nature of the charges and the first appellant's intended reliance in his defence upon constitutionally entrenched freedoms, fairness required that he be allowed "outside" legal representation and that the IDC was vested with a discretion to allow such representation.

[6] The IDC took the view that the rules prohibited it from exercising any such discretion. If it was right in so thinking, and because admission as a student of Pentech entails a contractual submission to its rules,[4] questions could arise as to the validity of such an absolute prohibition or the enforceability of any waiver (inherent in admission as a student) of even the right to have the IDC exercise a discretion in that regard. If it was wrong in so thinking, those questions would not arise. I turn therefore to that issue.

[7] There are only three conceivable objects which the rule may have been intended to achieve. They all conflict with one another to a greater or lesser degree. They are, whatever the nature of the charge and the possible consequences of it being upheld:

> (a) to prohibit absolutely, any form of representation other than that for which provision is made in the rule; or
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> (b) to grant tacitly, an absolute right to be represented by a lawyer of one's choice and to extend expressly the right to representation to encompass representation even by a non-lawyer, provided only that such non-lawyer is a student or a member of the staff of Pentech; or

[4] Regulation 10.1.1 of the General Regulations.

(c) to grant, an absolute right to representation by a student or member of staff of Pentech irrespective of whether such person is a lawyer; to deny an absolute right to representation by a lawyer of one's choice if the latter is neither a student at, nor a member of the staff of, Pentech; but to allow the IDC, in the exercise of its discretion, to permit representation by such a lawyer.

[8] Which of these three objects the rule should be held to have achieved entails an interpretive exercise which is governed by long established principles and must also be informed, to the extent to which the language in which the rule is couched reasonably permits, by any relevant values enshrined in the Bill of Rights.[5] As to the latter, it is significant that while the Bill of Rights expressly spells out the right "to choose, and to consult with, a legal practitioner"[6] and "to choose, and be represented by, a legal practitioner"[7] it does so only in the context of an arrest for allegedly

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5 s 39 (2) of the Constitution of the Republic of South Africa Act 108 of 1996. The rules are not of course "legislation" but the obligation "when developing the common law --- (to) promote the spirit, purport and objects of the Bill of Rights" presumably requires the various presumptions which have evolved in the common law as aids to the interpretation of written instruments to be supplemented by a further presumption, namely, that conformity rather than non-conformity with the spirit, purport and objects of the Constitution was intended

6 s 35 (2) (b)

7 s 35 (3) (f)

committing an offence[8] and the right to a fair trial which "every accused person" has.[9] Neither in s 33 nor in item 23 (2) of Schedule 6[10] which are devoted to "administrative action" is there any comparable recognition or bestowal of such a right. If it was intended to be recognised or bestowed I would have expected it to be expressly done as was done in s 35[11].

[9] Moreover, in the national legislation[12] enacted, as required by s 33 (3), to give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to be given written reasons where rights have been adversely affected by administrative action, there is, once again, what can only be construed as a deliberate omission to accord or recognise such a right. Instead, s 3 (2) (a) recognises and reaffirms what had long been axiomatic in the common law, namely, that a "fair administrative procedure

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8 s 35 (1)

9 s 35 (3)

10 A transitional provision which was to remain in force until the national legislation required by s 33 (3) to be enacted to give effect to the right to lawful, reasonable and procedurally fair administrative action was enacted. It was applicable when this case arose.

11 Cf the analogous comment in *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another*, 2002 (3) SA 265 (CC) at 291 H.

12 Promotion of Administrative Justice Act, No 3 of 2000. It was not in operation at the time. The date of commencement was 30 November 2000 but s 4 has still not been brought into operation.

depends on the circumstances of each case"[13]. S 3 makes provision for legal representation only in a "serious or complex" case in which, "in order to give effect to the right to procedurally fair administrative action", an administrator decides, in the exercise of a discretion, to grant an opportunity to obtain "legal representation".

[10] There is a marked contrast between certain rights spelt out in s 3 (2) (b) which "must" be given and the "opportunities" spelt out in s 3 (3) which "may, in (the administrator's) discretion, also" be given. The opportunity of obtaining legal representation is one of the latter. What is more, neither these rights nor the opportunities are cast in stone. "If it is reasonable and justifiable in the circumstances" s 3 (4) (a) allows an administrator to depart from them.

[11] This constitutional and statutory position comes as no surprise. There has always been a marked and understandable reluctance on the part of both legislators and the courts to embrace the proposition that the right to legal

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13 "What procedural fairness requires depends on the particular circumstances of each case". Per Chaskalson CJ in *Bel Porto School Governing Body Western Cape and Another, supra*, at 295 G. See, too, the cases cited in support of the propostion in note 23 to par 104 at p 295 of that judgment.

representation of one's choice is always a *sine qua non* of procedurally fair administrative proceedings.[14] However, it is equally true that with the passage of the years there has been growing acceptance of the view that there will be cases in which legal representation may be essential to a procedurally fair administrative proceeding. In saying this, I use the words "administrative proceeding" in the most general sense i e to include, *inter alia*, quasi-judicial proceedings. Awareness of all this no doubt accounts for the cautious and restrained manner in which the framers of the Constitution and the Act have dealt with the subject of legal representation in the context of administrative action. In short, there is no constitutional imperative regarding legal representation in administrative proceedings discernible, other than flexibility to allow for legal representation but, even then, only in cases where it is truly required in order to attain procedural fairness.

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[14] See, for example, *Dabner v SA Railways and Harbours* 1920 AD 583 at 598; *Maynard v Osmond* 1977 QB 240 (CA) at 255H-256B; *Lamprecht and Another v McNeillie* 1994 (3) SA 665 (AD) at 672A-G; De Smith, Woolf and Jowell, *Judicial Review of Administrative Action,* 5th ed, p 450-451.

[12] There may be administrative organs of such a nature that the issues which come before them are always so mundane and the consequences of their decisions for particular individuals always so insignificant that a domestic rule prohibiting legal representation would be neither unconstitutional nor be required to be "read down" (if its language so permits) to allow for the exercising of a discretion in that regard. On the other hand, there may be administrative organs which are faced with issues, and whose decisions may entail consequences, which range from the relatively trivial to the most grave. Any rule purporting to compel such an organ to refuse legal representation no matter what the circumstances might be, and even if they are such that a refusal might very well impair the fairness of the administrative proceeding, cannot pass muster in law.

[13] The range of issues which could conceivably arise in disciplinary proceedings at Pentech and the consequences of the findings which could be made in such proceedings are such that there is plainly a need for the kind of

flexibility to which I have alluded in paragraphs [11] and [12]. That flexibility is, as I have said, now a constitutional imperative. Not, I emphasise, in every conceivable kind of case in which an administrative organ may have to make decisions but only in those in which the administrative organ may be faced from time to time with making decisions which on a conspectus of all the relevant circumstances cannot fairly be made without allowing legal representation. Consequently, with that imperative in mind, I approach the task of deciding which of the three conceivable interpretations of the representation rule I have postulated in paragraph [7] is the correct one.

[14] There is no doubt something to be said for the interpretation suggested in paragraph [7] (b). In as much as the fellow student or member of staff who may be asked to represent the person arraigned before the IDC may be a qualified lawyer, it is not possible to conclude that the rule was intended to prohibit altogether representation by lawyers in disciplinary enquiries. And in as much as the fellow student or member of staff chosen need not be a lawyer,

to that extent the provision may be seen as one extending rights of representation rather than curtailing them. But such an interpretation takes insufficient account of what seems to me to be the manifest purpose of the representation rule when seen in the context of other rules governing the proceedings of the IDC.

[15] Rule 10.2.11 (1) (vi) reads: "The hearing shall take place in camera." Rule 10.2.11 (1) (viii), as we have seen, obliges the student or member of staff of Pentech who is asked to represent the student to do so "voluntarily" (sic). The student's parents are to be notified of any adverse decision within seven days of the hearing.[15] There is no requirement that they be given any prior notification of the hearing. The provision made for subsequent appeals to the Council Disciplinary Committee ("the CDC") and the Council itself makes no reference to the subject of representation. As far as the CDC is concerned,

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[15] Rule 10.2.11 (1) (xi)

the student may make written submissions in support of the appeal[16] and, unless the Council itself decides otherwise, "the appeal shall be based solely on the record of the proceedings of the IDC".[17] The student shall be entitled to be present when the appeal is being considered"[18] and the CDC "may, when considering the appeal summon the appellant to offer evidence in substantiation of the written contentions in relation to his/her grounds of appeal".[19] It may also, "if it deems it necessary, summon persons to give evidence at the appeal hearing".[20]

[16] In contradistinction to the position at the hearing before the IDC where the "Judicial Officer" (a legally qualified person in the employ of Pentech) discharges what amounts to a prosecuting function and is entitled "to address" the IDC "after the evidence is led",[21] no equivalent right exists when the appeal is considered by the CDC. The Judicial Officer is restricted to

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16 Rule 10.2.15 (1)
17 Rule 10.2.15 (3)
18 Rule 10.2.15 (4)
19 Rule 10.2.15 (5)
20 Rule 10.2.15 (6)
21 Rule 10.2.15 (1) (ix)

appearing before the CDC and presenting "a summary of facts, judgment, reasons for judgment and the grounds of appeal".[22] Somewhat unusually, the chairperson of the IDC "may appear before the Council Disciplinary Committee and may submit argument or explanation in substantiation of his (sic) judgment or of the penalty imposed on the appellant".[23]

[17] It appears from all this that, save where the Council itself (and not the CDC) directs otherwise, or the CDC invokes the power conferred by Rule 10.2.15 (5), the appellant must rest content with the written submissions made in support of the appeal. That accounts no doubt for the absence of any specific provision in the rules regulating representation of a student before the CDC. What the position is intended to be where the Council directs that the appeal shall not be confined to the record of the proceedings before the IDC or the CDC invokes its powers under Rule 10.2.15 (5), is far from clear. But what is clear, I think, is that the provisions relating to appeals to the CDC

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[22] Rule 10.2.15 (7)
[23] Rule 10.2.15 (8)

provide no evidence of any desire to confer even greater rights of representation than those (if any) which might ordinarily exist. On the contrary, they point in the opposite direction. The same is true of the further appeal to the Council itself where the student is confined to lodging an appeal in writing to the Council and no provision whatsoever is made for the student's appearance when the appeal is considered. The point is that no support can be found in the rules governing appeals for interpreting Rule 10.2.11 (1) (viii) as a generous broadening of a **right** to representation.

[18] The overall picture presented by these related provisions is of a desire to exclude outsiders, be they lawyers or laypersons, from the domestic disciplinary procedures of Pentech. That seems to me to be the manifest purpose of the rule restricting a student (at least ordinarily) to representation by either a fellow student or member of the staff of Pentech. The total exclusion of lawyers as such cannot have been its object. As I have pointed out earlier, the use of lawyers as such is not precluded, provided only that they

are students or members of the staff at Pentech. Furthermore, there is an entitlement to be represented by such a person no matter how simple the resolution of the issue or how great the lack of seriousness of the potential consequence of an adverse finding may be. In that regard the IDC certainly has no discretion.

[19] However, once one concludes that the purpose of the representation rule is to exclude representation **as of right** by "outsiders" whether or not they be lawyers, can one say that the IDC also has no discretion to allow representation by a lawyer who is neither a student nor a member of the staff of the Technikon? The IDC is a legal construct and it can only exercise those powers which those who brought it into being intended it to have. A power to allow representation of a kind other than that which has been deliberately restricted to achieve a particular purpose may of course result in that purpose sometimes being frustrated and there is certainly no express conferment of such a power. But, if the correct point of departure

when interpreting the rules is that, constitutionally, the law requires the flexibility to which I have referred in paragraphs [11] and [12] (as I believe to be the case), the absence of any express provision in the rules conferring a discretion does not matter. The question is rather whether there is sufficient indication in the rules that any such residual discretion on the part of the IDC was intended to be excluded.[24] The answer, in my opinion, is that there is not.

[20] The fact that a student's **entitlement** to representation has been qualified to achieve the purpose referred to in paragraph [19] is not of itself a sufficiently strong indication of an intention to exclude a residual **discretion** to allow representation of a different kind in appropriate circumstances. In a clash between Pentech's understandable desire to conduct domestic disciplinary proceedings within the family, as it were, and the need, because of the exigencies of a particular case, to allow outside legal representation in order to achieve procedural fairness, it can hardly be supposed that the IDC

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[24] Cf *Libala v Jones NO and the State* 1988 (1) SA 600 (C) at 604A-F; *Dladla and Others v Administrator, Natal, and Others* 1995 (3) SA 776 (N) at 775J-776B and 776J.

was intended to have no power to achieve that fairness and was intended instead to be compelled to sacrifice fairness and to accord higher priority to keeping the conduct of the proceedings "within the family". I conclude therefore that the IDC did indeed have a discretion to allow "outside" legal representation.

[21] That does not mean, of course, that permission to be represented by a lawyer who is neither a student nor a member of the staff of Pentech is to be had simply for the asking. It will be for the IDC to consider any such request in the light of the circumstances which prevail in the particular case. Such factors as the nature of the charges brought, the degree of factual or legal complexity attendant upon considering them, the potential seriousness of the consequences of an adverse finding, the availability of suitably qualified lawyers among the student or staff body of Pentech, the fact that there is a legally trained "Judicial Officer" presenting the case against the student, and any other factor relevant to the fairness or otherwise of confining the student

to the kind of representation for which the representation rule expressly provides, will have to be considered.[25] In doing so, Pentech's legitimate interest in keeping disciplinary proceeding "within the family" is of course also to be given due weight but it cannot be allowed to transcend all else no matter how weighty the factors in favour of allowing of "outside" legal representation may be.

[22] That the IDC considered itself bound by the relevant rule to refuse to even entertain a request to be permitted to be represented by an outside lawyer is patently clear both from the transcript of the proceedings before it and the affidavits filed in these review proceedings. The appellant was entitled to have that request considered by the IDC. It follows that the proceedings of the IDC and all subsequent proceedings before the CDC and

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[25] "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." Per Chaskalson CJ in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho intervening)*, 2001 (3) SA 1151 (CC) at 1184 E.

the Council must be set aside. It follows too, that the findings of those bodies and the expulsion of the appellant from Pentech must also be set aside.

[23] I have dealt with the question of the existence of a discretion as if the bodies concerned were engaging in "administrative action" within the meaning of the Constitution because it was on that premise that counsel on both sides argued the matter. It may be questionable whether that premise is correct but it is neither necessary nor desirable in the absence of argument to decide the point because I am satisfied that an application of the principles of the common law in existence in the pre-constitutional era also lead to the same conclusion. They, too, require proceedings of a disciplinary nature to be procedurally fair whether or not they can be characterised as administrative and whether or not an organ of state is involved.[26] If, in order to achieve such fairness in a particular case legal representation may be necessary, a

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[26] "Item 23 (2) (b) seems to me to encapsulate and in some respects extend the well-known common law grounds of judicial review as they have developed over the years in England and South Africa – legality, procedural fairness and rationality." Per Chaskalson CJ in *Bel Porto School Governing Body, supra* (note 11) at 291 F-G.

disciplinary body must be taken to have been intended to have the power to allow it in the exercise of its discretion unless, of course, it has plainly and unambiguously been deprived of any such discretion.[27] If it has, the validity in law of the deprivation may arise but, in my opinion, there is no such deprivation in these rules. In short, the point of departure when interpreting the rules remains the same in this case whether the procedural fairness of the proceedings of these particular disciplinary bodies is regulated by the Constitution or by the common law as subsumed under the Constitution. Such a point of departure (the assumed existence of the discretion) would of course be consistent with the values embodied in the Constitution. In future cases the Promotion of Administrative Justice Act will also have to be considered.

[24] In their notice of motion the appellants applied for a number of ancillary declaratory orders. In my view, it would be neither desirable nor

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[27] This approach to the matter is substantially the same as that adopted by Didcott J in *Dladla and Others v Administrator, Natal and Others* 1995 (3) SA 776 (N) at 775J-776B and 776J.

appropriate to grant them. The first declarator sought was that subparagraphs (vi) and (viii) of rule 10.2.11 (1) "permit students to be represented by outside legal representatives in matters such as the present matter ----- both before the Internal Disciplinary Hearing (sic) and the Council Disciplinary Committee, alternatively that the said subparagraphs ----- are unconstitutional".

[25] In so far as the declarator sought purports to declare the rights of students generally (as opposed to the appellant specifically) it is not germane to any existing dispute to which students generally are parties. The concept of "matters such as the present matter" is far too vague to delineate those matters in which outside legal representation should be permitted and those in which it should not. In any event, that is an *ad hoc* decision to be made by the IDC in the exercise of its discretion and it is not for this Court to dictate to it in advance what its decision should be. In so far as the declarator is sought to be confined to the present case, the same applies. The IDC has not yet considered the question and it is entitled to do so unfettered by specific

directives given in advance by this or any other court. The fact that its decision in that regard may be subsequently potentially amenable to correction in review proceedings provides no warrant for usurping the exercise of its discretionary power before it has even been exercised.

[26] As for the Council Disciplinary Committee, it is an appellate body. If a rehearing of the charges results in a finding which is not adverse to the appellant or the imposition of a penalty which he is not disposed to appeal against, the declarator will have been academic as between the appellant and Pentech. And even if it be assumed that the CDC has the same discretion as I have concluded the IDC has to allow outside legal representation (a matter which I leave open), the other objections set out in paragraph [25] to the grant of a declarator would apply.

[27] As for the alternative declaration of unconstitutionality, that cannot be made in respect of the IDC if the view I have taken in paragraph [20] that the IDC does have a discretion to allow outside legal representation is correct.

In so far as the declarator of unconstitutionality is asked for with reference to the CDC, I am not disposed to decide whether the CDC has or has not the same discretion as the IDC when the question may be academic as between the appellant and Pentech and the considerations I have raised in paragraphs [15], [16] and [17] of the judgment were not addressed by counsel in their written heads of argument nor adequately debated during oral argument. Their implications had plainly not been considered.

[28] For the same reason I am not disposed to grant the second declarator sought, namely that rule 10.2.15 “permits students, or their legal representatives, to present argument on appeal before the Council Disciplinary Committee as of right, alternatively that the said rule is unconstitutional”.

[29] The third declarator sought is too vague to be legally effective and in addition relates to something which is not in issue. An order is sought directing “that regulation 10.1.14 ----- be interpreted in a way that is consistent with Respondent’s obligations to respect the constitutional right to freedom of

expression". The respondents have at no time disputed that there is a constitutional right to freedom of expression. Their case against the appellant is, *inter alia*, that that right does not extend to protect him against the consequences of originating and publishing highly defamatory statements known to him to be false and that, even if he was not the originator of the knowingly false statements, his reporting of those false statements by others without taking reasonable steps to verify them amounted to an abuse of the right to freedom of speech.

[30] In the event of the appeal succeeding (as it has) counsel for the appellants asked for the costs of two counsel and the costs of an application (Case no 6749/99) brought by the first appellant and M & G Media (Pty) Ltd, trading as The Mail and Guardian Newspaper, to have first appellant reinstated as a student pending the review of the disciplinary proceedings. In that matter it was agreed without prejudice to reinstate first appellant and that the costs of that application should stand over for determination in the review

application and an order to that effect was made by the court seized with the matter.

[31] First, the costs in this Court. Subject to what is said in paragraph [36] there is no reason why the costs of the appeal should not follow the result. However, I do not believe that the costs of two counsel are justified. Respondents have not been represented at any stage by two counsel and the appellants were not represented in the Court *a quo* by two counsel. On appeal the appellants were represented by two counsel both of whom were junior counsel. Counsel who addressed oral argument to this Court was in fact the same counsel who had appeared on his own in the Court *a quo*.

[32] Although the case was said to involve difficult constitutional questions relating to freedom of expression and freedom of the press, it had in fact virtually nothing to do with either. The Mail and Guardian was not being taken to task for having published the article. The first appellant's status as a student of journalism did not *ipso facto* relieve him of his obligation to abide

by the rules of Pentech and his personal right to freedom of expression was obviously not absolute. Whether or not it had been abused was a largely factual enquiry.

[33] At the hearing before the IDC the right to freedom of expression could of course have become of importance if the evidence had shown that without indulging in misrepresentation as to the purpose for which he wanted the information, the first appellant had been told these things by third parties, that he had no reason to doubt their veracity, and that he acted in good faith. And because the right of freedom of expression could have potentially become a factor it was legitimate for the first appellant to ask the IDC to take that into account in deciding whether to allow him outside legal representation. But once that was refused and he absented himself from the proceedings as a consequence, and after it had been found on the evidence that he had deliberately misrepresented his purpose in talking to interviewees and had fabricated many of the allegations in the article, it should have been obvious

that the merits of those findings could not be successfully challenged on review and that, consequently, any invocation of the right to freedom of speech and to freedom of the press would ring hollow indeed. Indeed, it was conceded before the Court *a quo* that those factual findings had to be accepted as correct in considering the review. To imagine that the constitutional issues of freedom of the press and freedom of speech would loom large or at all in either the review or in this appeal was therefore no more than wishful thinking.

[34] The costs in case no 6749/99 which were reserved for decision by the court hearing the review present some problems. The papers in that application are not before this Court and it is not apparent why M & G Media (Pty) Ltd were co-applicants. It is, on the face of it, difficult to see what legal interest it would have had in securing the temporary reinstatement of an expelled Pentech student. It did not attempt to participate as a co-applicant in the review proceedings and while it seems clear that the order of the Court *a*

quo that it should be jointly and severally liable for the costs of the application for the first appellant's temporary reinstatement (case no 6749/99) must be set aside, there is no apparent reason why the respondents in the review and this appeal should be ordered to pay its costs in that application and there will be no such order.

[35] Nor is there any justification for an order that all the respondents in the review and this appeal should jointly and severally pay the first appellant's costs in those proceedings for temporary reinstatement. The first, second and third respondents in both the review and the appeal were not respondents in that application for the appellant's temporary reinstatement. Only the fourth respondent was cited and it is only against fourth respondent that an order for costs should be made.

[36] The second appellant (Freedom of Expression Institute) also chose to enter the fray when the review proceedings were launched because of its interest in freedom of expression and freedom of the press. Its well-

intentioned participation was misguided. For the reasons I have given, the review proceedings and this appeal had little to do with either. It was ordered by the Court *a quo* to pay respondents' costs in that court. That order cannot be allowed to stand now that the review has succeeded but here again I see scant reason for ordering the respondents to pay the second appellant's costs in either the Court *a quo* or in this Court. Objectively regarded, there was no justification for its participation in the litigation. It did not engage other counsel to put its own independent submissions before the court and contented itself with the submissions which counsel for the first appellant would make. The respondents should not be ordered to bear its costs. The review has succeeded but on a ground which has nothing to do with freedom of speech or freedom of the press.

[37] It is ordered:

> (a) that the appeal is upheld and the decision of the Court *a quo* including its orders as to costs in both the review proceedings and case no 6749/99 are set aside;

(b) that the decisions of the Internal Disciplinary Committee of 17/18 November 1998, the Council Disciplinary Committee of 14 April 1999, and the Council of 15 June 1999 are set aside;

(c) that the costs of the review proceedings in the Court *a quo* and the first appellant's costs of appeal shall be paid by the respondents jointly and severally, the one paying the other to be absolved;

(d) that the second appellant bear its own costs in both the Court *a quo* and in the appeal;

(e) that fourth respondent pay the costs of first appellant in case no 6749/99;

(f) that M & G Media (Pty) Ltd bear its own costs in case no 6749/99.

[38] In as much as the orders as to costs were not fully debated at the hearing, the parties are given leave to file written submissions in that regard within two weeks of the date of this order, failing which the costs orders will become final.

R M MARAIS
JUDGE OF APPEAL

HEFER AP)
HOWIE JA)
NAVSA JA)
NUGENT JA) CONCUR

REPORTABLE

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FREEDOM OF EXPRESSION INSTITUTE Second Appellant

and

CHAIRPERSON, PENINSULA TECHNIKON INTERNAL DISCIPLINARY COMMITTEE First Respondent

CHAIRPERSON, PENINSULA TECHNIKON COUNCIL DISCIPLINARY COMMITTEE Second Respondent

CHAIRPERSON, PENINSULA TECHNIKON COUNCIL Third Respondent

PENINSULA TECHNIKON Fourth Respondent

CORAM: **HEFER AP, HOWIE, MARAIS, NAVSA *et* NUGENT JJA**

DATE HEARD: 28 FEBRUARY 2002

DATE DELIVERED: 9 SEPTEMBER 2002

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JUDGMENT

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MARAIS JA/

MARAIS JA: [1] The only parties who have sought to have the provisional orders as to costs varied are the respondents. In their submission, each of the parties should be ordered to pay their own costs, both in the Court *a quo* and on appeal. The contention is founded upon two propositions: first, that the appellants succeeded on a point not raised by them in either court; secondly, that instead of confining their attack to the point upon which they succeeded, they traversed unnecessarily a number of issues which resulted in the incurring of considerable extra expense in conducting the litigation.

[2] As to the first proposition, it is not accurate. The failure of the IDC to exercise a discretion to allow outside legal representation was raised pertinently in the founding affidavit at paragraph 27.3. It also formed the basis of the declaratory order sought in the first part of prayer 3 of the notice

of motion. Moreover, in paragraph 30 of the heads of argument in the Court *a quo* the appellants argued: "The rule relating to the IDC does not expressly permit outside legal representation; but nor does it expressly prohibit it. It is silent on the subject. The IDC, however, interpreted it as entailing an absolute prohibition on representation by an attorney. In construing the provision in this way, it is submitted that the IDC, and the other committees, again misconstrued the nature of the discretion conferred by the regulation." The Court *a quo* considered and rejected the argument. This Court took a different view.

[3] As to the second proposition, the considerations which apply in a trial action when a timeously taken exception to a pleading would have averted the trial cannot be applied indiscriminately to motion proceedings. In motion proceedings the applicant is obliged to set out in its entirety his, her or its case in the notice of motion and accompanying affidavits. The piecemeal advancing of contentions in a series of motion proceedings successively

launched as the forerunner of each fails, is potentially productive of litigatory tyranny and is not to be encouraged. In any event, if there is indeed a separable issue which could be decisive of the case, it is open to any of the parties to motion proceedings to apply for the separate adjudication of the issue. The respondents made no such application .

[4] Finally, this is not a case in which all the other grounds of attack raised in the motion proceedings have been found to be entirely devoid of merit. In my view, no good cause for the variation of the existing orders as to costs has been shown and the orders are hereby made final.

R M MARAIS
JUDGE OF APPEAL

HEFER AP)
HOWIE JA)
MARAIS JA) CONCUR
NAVSA JA)
NUGENT AJA)