



## THE SUPREME COURT OF APPEAL REPUBLIC OF SOUTH AFRICA

### ***Yolanda Dyantyi v Rhodes University and Others***

**From:** The Registrar, Supreme Court of Appeal

**Date:** 29 March 2022

**Status:** Immediate

***Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.***

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Today the Supreme Court of Appeal (SCA) upheld the appeal by the appellant with costs, including the costs of two counsel. The SCA replaced the order of the court a quo and remitted the matter to the first respondent for reconsideration on condition that any continuation of the disciplinary inquiry against the appellant shall take place before another proctor. The SCA also directed the first respondent to pay the appellant's costs, including the costs of two counsel.

The appellant was Ms Yolanda Dyantyi who, in 2017, was in her third and final year of study for a Bachelor of Arts degree at Rhodes University (the university). The university was the first respondent in the appeal. The second respondent was 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 N O (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 the SCA on a limited ground.

The issue on appeal was whether procedural unfairness tainted the decisions of the proctor in respect of Ms Dyantyi. The SCA held that s 32(2)(d) of the Higher Education Act 101 of 1997, inter alia, provides that the council may make institutional rules regarding disciplinary measures and disciplinary procedures relating to students. The SCA decided that 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 Promotion of Administrative Justice Act 3 of 2000 (PAJA). It was held that the decisions clearly affected Ms Dyantyi's rights adversely by direct external legal effect, that it followed that PAJA was applicable and that Ms Dyantyi had the right to procedural fairness encapsulated in s 3 of PAJA.

The SCA said that 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'. Where an affected person was entitled to legal representation, the question was whether in the specific circumstances procedural fairness in terms of PAJA required that he or she obtain or retain the services of a particular legal representative. The court held that 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 that the answer should rarely be in the affirmative.

The court also assessed that the university took a predetermined stance that it would seek the exclusion of all the accused students, including Ms Dyantyi. In the result, Ms Dyantyi, 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. In terms of what had to be placed on the other side of the scale, the SCA found nothing apart from the general principle that student disciplinary proceedings should be finalised with reasonable expedition.

In relation to two findings that the proctor made in his judgment on the merits, the SCA held that they were plainly wrong. These were that Ms Dyantyi had waived the right to participate further in the hearing and that she had no intention of testifying in her own defence. It was further held that 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. The SCA held that it followed that the court a quo should have reviewed and set aside the decisions. The SCA then ordered costs to follow the result in both courts, including the costs of two counsel. The SCA remitted the matter to the university for reconsideration in its discretion, on the condition that any continuation of the disciplinary inquiry against Ms Dyantyi takes place before another proctor.