REPUBLIC OF NAMIBIA **REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 66/2013

In the matter between:

JOY SASMAN **1ST APPLICANT**

ABIUS AKWAAKE **2ND APPLICANT**

and

THE CHAIRPERSON OF THE INTERNAL DISCIPLINARY PANEL OF THE WINDHOEK INTERNATIONAL SCHOOL **1ST RESPONDENT**

WINDHOEK INTERNATIONAL SCHOOL **2ND RESPONDENT**

TRUSTEES FOR THE TIME BEING OF WINDHOEK INTERNATIONAL SCHOOL **3RD RESPONDENT**

Neutral citation: *Sasman v The Chairperson of the Internal Disciplinary Panel of the Windhoek International School* (A 66/2013) [2013] NAHCMD 115 (04 April 2013)

Coram: GEIER J
Heard: **28 March 2013**
Delivered: **04 April 2013**

Flynote: ***Practice*** – Applications and motions –urgent application - Urgent application for the review and setting aside, with immediate effect, of a ruling of the internal disciplinary panel of a school refusing the applicants' minor child legal

representation at a disciplinary hearing – court accepting that proceedings, in which the rights of children are involved, ‘ … *are sui generis and invoke a special jurisdiction bestowed on the court to look after the interests of children … ‘ and* that *‘a pedantic approach requiring an applicant seeking urgent relief to meticulously explain the reason for every delayed action in coming to court as inappropriate in most cases, unless the circumstances and facts of such delay are palpably so unreasonable and so oppressive that the court would refuse to come to the assistance of such an applicant on an urgent basis’* – as it could not be said that the applicant has acted unreasonably overall – and as the common cause facts pertaining to this matter showed that the parties were agreed that the disciplinary process against the minor child should be determined as expeditiously as possible - and as it was not only desirable - but also in the interest of all parties and the minor child, centrally involved in this matter - that the disciplinary process against the minor be finally resolved, or be as close as possible to completion, as soon as possible by the time that school would start again – court – in view of the overriding considerations pertaining to the matter exercising its discretion in favour of entertaining the application on an urgent basis.

Administrative law - Administrative action - Review - Domestic remedies - Duty to exhaust internal remedies before instituting legal proceedings - Requirement not absolute - jurisdiction of Court to review administrative action deferred only if and to extent that contract, governing relationship between the parties creates, either expressly or impliedly, obligation first to exhaust internal remedies – even then court retaining a discretion to condone the failure to exhaust internal remedies – were this might be inappropriate or inadequate for instance or where such process would also be tainted by a material irregularity which might vitiate the entire process complained of and in which circumstances it would make no sense to defer the decision on the merits of this matter until the internal remedies have been exhausted -

Administrative law - Administrative action - Review - Domestic remedies - Duty to exhaust internal remedies before instituting legal proceedings - Requirement not absolute - If a domestic tribunal fails to act in accordance with natural justice, the person affected by their decision can always seek redress in the courts –

Administrative law - Waiver - Reliance on waiver - Party alleging waiver bears onus to prove waiver - Must prove that party had knowledge of right abandoned; that abandonment was express or implied or by conduct; that such abandonment was conveyed to other party, expressly, or impliedly or by conduct .

Summary: Urgent application for the review and setting aside, with immediate effect, of a ruling of the internal disciplinary panel of the Windhoek International School refusing the applicants' minor child legal representation at a disciplinary hearing – applicants contending that panel should have afforded applicant's minor child the right to legal representation as the minor child would otherwise not enjoy a fair hearing – due to the nature of the charges brought - the degree of factual legal complexity of the matter - the potential seriousness of the consequence of an adverse finding - the age of the minor child - the age of the witnesses - the fact that there is a qualified attorney to adjudicate on the matter - respondents contending on the other hand that application was not urgent – that the available internal appeal remedies should have been exhausted first – that applicants had waived their right to insist on legal representation for their minor child during such proceedings by again participating in the disciplinary hearing which they had refused to attend on legal advice – that the disciplinary panel had not acted mala fide, ultra vires or breached the rules of natural justice and had thus exercised its discretion properly as a result of which the court should refrain from interfering in the matter –

As proceedings, in which the rights of children are involved, ' … *are sui generis and invoke a special jurisdiction bestowed on the court to look after the interests of children* Court however exercising discretion in favour of entertaining application on an urgent basis –

As the contractual framework, governing the relationship between the parties, did not require the parties to exhaust all internal remedies first and as the court would in any event also have the power to condone a failure to exhaust internal remedies and in certain circumstances were the validity of the entire disciplinary process was in question - court holding that it would make no sense to defer the decision on the merits of this matter until the internal appeal avenue had been exhausted – court thus not upholding special defence that internal remedies should first have been

exhausted –

On the facts of this matter Court however finding that the applicants - through their conduct – in again participating in the disciplinary proceedings – which they had left – indicating that they would only continue to participate therein – if legally assisted – and which subsequent conduct was plainly inconsistent with the right relied upon in this application – had waived such right – Respondents accordingly discharging onus in proving this defence -

As the effect of the waiver was that it has extinguished the right, relied upon by the applicants in this matter, it followed that no relief could be granted on the basis thereof – application accordingly dismissed with costs-

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ORDER

The application is dismissed with costs, such costs to include the costs of one instructed- and one instructing counsel.

JUDGMENT

GEIER J:

[1] The applicant's minor child T is a 12 year-old learner at the Windhoek International School. He is currently in Grade 7.

[2] The school is a private school as envisaged in the Education Act, Act 16 of 2001.

[3] The relationship between the school and the applicants and the child is one based in contract. On admission to the school the applicants agreed to be bound by

the terms and conditions of such admission, including adherence to the school's policies.

[4] On account of an initial report by an unnamed parent the school opened an investigation relating to the possible handling, possession, use and the selling of Marijuana by the applicant's minor child T. This ultimately led to T's suspension and expulsion. This step triggered a first urgent application by the applicants against the school, the 2nd respondent in this matter. This matter was settled when the school agreed to withdraw the decision to expel T and to uplift his suspension with immediate effect. It was also agreed that the school would re-initiate the disciplinary process against T, which process was intended to proceed, and be completed, as a matter of urgency. This was on 13th February 2013. In such premises the 1st application was withdrawn on 14 February 2013.

[5] On 19 February 2013 the school gave a fresh notice in terms of which T would again be suspended pending the finalisation of the disciplinary hearing which was scheduled for the 25th of February 2013.

[6] On account of the applicant's legal practitioner's involvement, the school agreed on 21 February 2013 to uplift also this further suspension.

[7] On 19 February and under cover of its 'Notice of Disciplinary Hearing' the school informed applicants and T that the main charges which T would have face were:

'Charge, 1: that on or about the end of November 2012 you dealt in Marijuana on the school campus,

Alternative to charge 1: that on or about the end of November 2012 you possessed Marijuana on the school campus.'

There was also a further charge.

[8] In this notice the details of the Chairperson of the Disciplinary Panel, the first respondent, in this application and the two other members of the panel were also

given - importantly the notice also stated that T could be represented by his parents or by a school official.

[9] The so- scheduled disciplinary proceedings commenced on 25 February 2013. It was chaired by the 1st respondent, a practising legal practitioner, and two Trustees of the school, the 2nd respondent herein.

[10] The 2nd respondent is incidentally operated under a trust. All the trustees of the school, including the two said panel members, were collectively cited as the 3rd respondent herein.

[11] During the hearing of 25 February the applicants produced a written application to the chairperson. This application is a lengthy document – (hereinafter referred to as 'Document 6') - of some 31 pages excluding annexures. It starts off with the curious introductory paragraph: *"Be pleased to take notice that I, on T's behalf, shall, at the commencement of the hearing, raise the following issues for decision before the matter is heard …"*.

[12] It then raises issues such as *'unreasonable delay', 'unfair disciplinary action'*, that the charges are *'vague and embarrassing', 'double jeopardy'*, '*res judicata'*, *'constructive expulsion'* and *'autrefois acquit'*.

[13] 'Document 6' also includes a nine page catalogue of some 112 questions styled in the same fashion as a *'request for further particulars'*. Additionally it was pointed out in 'Document 6' that the school policy did not contain an express prohibition to allow legal representation during the disciplinary hearing and, accordingly, and as the proceedings were chaired by a lawyer, it was demanded that T be allowed legal representation during the hearing.

[14] The disciplinary panel declined this request and this decision was conveyed to the applicants on 4 March 2013. In response to that communication the applicant's legal practitioner, on behalf of her clients, threatened that the panel provide its ruling in writing by 12h00 on 5 March 2013, failing which an application would be brought on 6 March 2013, at 09h00 hours.

[15] The panel did provide its written ruling on the 6 of March 2013.

[16] On 11 March 2013, the legal practitioner of the applicants' wrote a further letter to the 1st respondent, noting that her client's request for legal representation had been turned down, and that the outcome of the hearing on the merits of the matter was set for 13 March 2013. Accordingly the applicants afforded themselves the luxury of postponing the threatened urgent application until after the ruling on the merits.

[17] The ruling on the merits was delivered promptly on 13 March 2013 in which the panel recorded that it had, on a balance of probabilities, and on the evidence heard, found that T had possessed and dealt with Marijuana, on one occasion, on the school premises and that he was thus found guilty on count 1. He was acquitted on the 2nd charge of having brought the school into disrepute.

[18] On the issue of the sanction to be imposed the panel recommended that T be placed on internal suspension until Wednesday 20 March 2013, during which period the school would institute a procedure for the reintegration of T, as a positive contributing member of the school, that T should deserve a chance to acknowledge and rectify his mistakes, that he should receive counselling during this period and a rehabilitative programme and that a contract, between T and the school, should be drawn, in which T was to acknowledge his actions and in which he would undertake to reform.

[19] On the 14th of March 2013 the applicants were advised that T had a right of appeal. The 'notice of right of appeal' informed applicants further of the time- lines applicable to such appeal and who the members of the appeal panel would be. It was again stated that the applicants could represent T during the appeal hearing alternatively, that they could seek the assistance of a school official.

[20] In such circumstances, and on less than 24 hours' notice, the applicants then brought a second urgent application, on 14 March 2013, which was set down for hearing on 15 March 2013 at 09h00 hours.

[21] In this application they sought an order in the following terms:

'(a) That leave be granted to dispense with the forms and service provided for by the Rules of the above Honourable Court and that his application be heard as a matter of urgency in terms of Rule 6(12) of the Rules of High Court.

(b) Reviewing and setting aside, with immediate effect, the ruling of the 1st respondent made on 6 March 2013 refusing the applicants' legal representation and all the other subsequent rulings made in pursuance thereof.

(c) Ordering that the applicants are and hereby authorised to secure legal representation of the minor child's choice at the said disciplinary hearing held by the 2nd respondent.

(d) Cost of this application to be borne by the 1st and 2nd respondents jointly and severally, the one paying, the other to be absorbed.

(e) Further and/or alternative relief.'

[22] The application was opposed and the parties were put to terms regarding the further exchange of papers. The application then came to be argued on 28 March 2013. On the day a number of *in limine* issues were also raised which thus require determination.

URGENCY

[23] All three respondents took the stance that the matter was not urgent and that the applicant had not made out a case in that regard. It was pointed out that applicants had not initiated the application as soon as reasonably possible after the cause thereof had arisen and that they had deliberately delayed the bringing of the application and then initiated it on truncated time periods.

[24] At the hearing of the matter Mrs Angula, who appeared on behalf of the applicants, immediately and correctly conceded that the applicants had not, as far as practically possible, brought the application in terms of the rules, as was required.

[25] In fact it appeared from the Notice of Motion that no adaptation of the applicable rules had been set out therein to regulate the exchange of papers in order to ensure procedural fairness.

[26] She conceded that the application could have been brought on a semi-urgent basis, especially if it was taken into account that the school had in the interim closed

for the holidays on 20 March 2013 and would only reopen on 9 April 2013. She conceded further that the application, on less than 24 hours' notice, had been inappropriate in the circumstances and that she would have no objection if the prejudice, which had been occasioned thereby - to the respondents and the court - on the 15th of March 2013 - on which the matter had originally been set down - would be addressed by an appropriate order as to costs.

[27] Ms Angula however persisted in her stance that the matter should still, and nevertheless, be determined on an urgent basis as the parties had since then been able to exchange full papers as well as heads of argument.

[28] The matter was thus ripe for hearing especially if one were to take into account that a child was about to expelled after having been found guilty without a proper hearing.

[29] Both Mrs de Jager, who appeared on behalf of the 1st respondent, and Mr Obbes, who represented the 2nd and 3rd respondents at the hearing, presented detailed argument in writing and orally during the hearing of the application as to why this matter should not be determined on an urgent basis.

[30] During argument the court however drew the attention of the parties to the recently reported decision of *EH v D 2012* (2) NR 451 (HC) where Damaseb JP pointed out that proceedings, in which the rights of children are involved, ' … *are sui generis and invoke a special jurisdiction bestowed on the court to look after the interests of children*… '[1]. It was for this purpose that the learned Judge considered that *'a pedantic approach requiring an applicant seeking urgent relief to meticulously explain the reason for every delayed action in coming to court as inappropriate in most cases, unless the circumstances and facts of such delay are palpably so unreasonable and so oppressive that the court would refuse to come to the assistance of such an applicant on an urgent basis'*.[2]

[31] Without wanting to do an injustice to the forceful arguments of both counsel for respondents on urgency it appears to me nevertheless that the overall objective

[1] At 455 para [8]
[2] At 455 para's [8] – [9]

background facts of this matter indicate that there has not been an inordinate delay in the bringing of this application to the extent that it can be said that the applicant has acted unreasonably - save for what has been said in regard to the proceedings of the 15th of March 2013 - and that the court should therefore not be inclined to allow this matter to be heard on an urgent basis.

[32] The common cause facts pertaining to this matter show that the parties are agreed that the disciplinary process against T should be determined as expeditiously as possible. The school is currently closed for the holidays and it is due to reopen on the 9th of April. If the applicants succeed in their review the disciplinary process will have to start afresh, this time with legal representation. If the application fails on the other hand the 2nd respondent will have to consider the recommendations on the sanctions that the 2nd respondent will ultimately deem proper to impose on T in the circumstances. The applicants would then have five days to consider whether or not to appeal this matter.

[33] Whatever the outcome it is clear that it would not only be desirable but also in the interest of all parties and the minor child, centrally involved in this matter, that this disciplinary process against T be finally resolved, or be as close as possible to completion, by the time that school starts again.

[34] It is these overriding considerations which determine in my view that I should exercise my discretion in favour of entertaining this application on an urgent basis. I accordingly dispense with the forms and service and compliance with the time limits set by the Rules of Court and condone the applicants' failure to comply therewith.

THE FAILURE TO EXHAUST INTERNAL REMEDIES

[35] Respondents contended further that it was unreasonable for the applicants to have rushed to court before the internal remedies available to them had been exhausted, more particularly it was submitted that the complained of irregularity relating to T's representation could have been addressed during the appeal.

[36] Counsel for the respondents reinforced this argument by pointing out that the disciplinary panel had only made a recommendation in regard to the sanction to be imposed on T and that the 2nd respondent's decision in this regard was still outstanding.

[37] All counsel where agreed that the mere existence of an internal remedy was not enough, by itself, to indicate a contractual intention that all internal remedies should first be exhausted. Indeed none of the parties contended that the contractual framework in this case pointed to a clear intention to this effect.

[38] Upon closer scrutiny of the 2nd respondent's 'Policy and Procedures Manual', administrative due process is available to learners. The manual clarifies further that due process also means an entitlement to appeal a decision about charges to a higher level. The manual also states that students have a right to be told clearly what the rules are and that they have the right to appeal to higher authority if they feel that they have been dealt with unfairly or have not been given an objective hearing.[3] The manual also lays down the procedure for a hearing to appeal a decision to expel a student. Here the manual states that such a hearing may be requested.

[39] It appears that the contractual framework entitles a learner to utilise the available appeal process but does not oblige the utilisation thereof. Also the Notice of Right of Appeal, given on the 14th of March, merely confirms T's right of appeal.

[40] It emerges that the contractual framework which governs the relationship between the parties' herein thus indeed does not require the parties to exhaust all internal remedies first. There is simply no clear intention expressed to this fact.

[41] In any event the court would also have the power to condone a failure to exhaust internal remedies. First where the remedy might be inappropriate or inadequate for instance or where such process would also be tainted by an irregularity complained of.[4]

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[3] See for instance the 'Policy and Procedures Manual' at paragraphs G12.1 and G 14
[4] See for instance generally : Hoexter *'Administrative Law in South Africa'* – 2007 at pages 478 to 479

[42] It is clear that the central question pertaining to this case is, whether or not, T should have been afforded the right to legal representation at the disciplinary hearing instituted against him.

[43] It is also clear that if the contentions on behalf of T were upheld that the refusal to afford such legal representation is so fundamental that the complained of misdirection of the panel would not only entirely taint the disciplinary process so far but also all subsequent proceedings, such as any appeal.

[44] In this regard it must be of relevance that also the '*Notice of Right to Appeal'* states that T would only be allowed to be represented during the appeal by his parents or any school official.

[45] In my view both the contractual framework, governing the relationship between the parties, which does not oblige the parties to first exhaust all internal remedies, as well as the real possibility that all steps, taken during the disciplinary proceedings subsequent to the refusal to afford T legal representation, might be found to be invalid, drive me to the conclusion that there was no duty on the applicants, in this case, to first exhaust all internal remedies. Even if I were wrong on this it appears that the failure to do so should, in any event, be condoned, given the real possibility that the validity of the entire disciplinary process is in question and in which circumstances it would make no sense to defer the decision on the merits of this matter until the appeal avenue has been exhausted.

[46] What ultimately reinforces this decision is succinctly stated by Lord Denning in *Annamunthodo v Oilfields Workers' Trade Union*[5], as cited with approval in *Turner v Jockey Club of South Africa*[6] by the South African Appellate Division:

> ' … If a domestic tribunal fails to act in accordance with natural justice, the person affected by their decision can always seek redress in the courts. It is a prejudice to any man to be denied justice. He will not of course, be entitled to damages if he suffered none. But he can always ask for the decision against him to be set aside.'

[5] (1961) 3 All E.R. 621 at p 625
[6] 1974 (3) SA 633 (A) at p 655 H

[47] In any event I agree that *'a failure of natural justice in a trial body cannot be cured by a sufficiency of natural justice in the appellate body'*[7] and as was pointed out by Megarry J in *Leary v N.U. of Vehicle Builders*[8]*:*

"If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal?"[9]

THE ARGUMENTS IN REGARD TO THE RIGHT TO LEGAL REPRESENTATION

[48] The 'Policy and Procedures Manual' of 2nd respondent provides merely for a students' right to have someone assist them in the presentation of their case.

[49] On behalf of applicants Ms Angula submitted that the word 'someone' as used in the manual was wider than the category of persons referred to in the manual and could be defined to mean, in appropriate circumstances, that this could include a legal practitioner.

[50] If one has regard to the decision of the Disciplinary Panel it emerges that the panel took the opposite view in the circumstances. These stances sum up the fundamental clash underlying these proceedings.

THE REQUEST BY APPLICANTS

[51] The application for legal representation to the panel, which was also preceded by an exchange of e-mails, was formulated as follows:

'In view of the allegations levelled against Tuyamba and the circumstances of this case I feel that Tuyamba should not enjoy far hearing unless he is allowed legal representation. As Tuyamba's parent are much interested in this matter and fear that I would not be able to provide adequate representation to Tuyamba, to this effect to have requested the school to allow us to appoint a legal representative to represent Tuyamba" which request was refused.

[7] Leary's case at 720
[8] (1970) 2 All E.R. 713
[9] Also at p 720

I refer to the correspondence between my wife and the school principal in that respect marked A18. Our request for legal representation is borne out by the fact that the school appointed an independent Chairperson who is also a lawyer. This appointment was made extensively to ensure compliance with the law. I believe that Tuyamba has a constitutional right to legal representation which is of paramount importance in this case.

Additionally there is no restriction in the school policy prohibiting legal representation especially when the chairperson is an outsider and the lawyer. In this regard I require that Tuyamba be allowed legal representation at any future hearing.'

THE RULING THEREON

[52] It appears firstly from the ruling that the panel initially considered the question as to whether or not T enjoyed an absolute constitutional right to legal representation. The panel also noted the absence of an express exclusion of legal representation in the school policy.

[53] In this regard the panel took its lead from the South African Supreme Court of Appeal's decision made in *Hamata and Another v Chairperson* Peninsula Technikon *Internal Disciplinary Committee and Others*[10] with reference to which it noted that, in the context of administrative action[11], legal representation may be excluded.

[54] The panel took cognisance of the fact that even where legislation, or rules make provision for not allowing legal representation that there may still be cases in which legal representation should be allowed, as this would be essential to ensure fair administrative- and quasi administrative proceedings.

[55] The panel then referred to and cited certain relevant passages from the judgment and considered that they were of application to the case before it.

[56] With reference to the 2nd respondent's Policy and Procedure Manual, the panel come to the conclusion that, although silent on the point, it should be interpreted 'in a rather restrictive manner'.

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[10] *2002 (5) SA 449 (SCA)*
[11] or quasi administrative action

[57] This conclusion of the panel seems to have been based on a reading of the entire manual and the individuals or bodies who are referred to therein and who would be entitled to be present, be heard, represent or make decisions.

[58] It was noted that the manual continuously attempts to resolve matters internally. This conclusion was reached with reference to Clauses G5 and G13.4 of the manual for instance.

[59] The panel felt that the policy, which could be extracted from the manual and the wording and phrasing employed therein, indicated that also the 2nd Respondent's policy, just like in the *Hamata* case, intended to keep 'matters within the family'.

[60] Importantly the panel, under the 1st respondent's guidance, found that it was obliged to consider the applicant's request for legal representation in the light of the circumstances which prevailed in the particular case and that it should consider factors such as the nature of the charges brought, the degree of factual or legal complexity, the potential seriousness of the consequences of an adverse finding, the availability of legal representation to the student and the staff body, the fact that a legally trained officer presided at the case against the student and any other relevant factor relevant to fairness.

[61] The panel then considered and took the following factors into account:

'… the age of T, the age and vulnerability of the witnesses to be called, the emotional distress the hearing may and will have on all parties involved, the seriousness of the charges against T and the result they may have, if found guilty, the environment within which the alleged offences taking place and consequences of not acting, the degree of factual and legal complexity of the matter, the consequences the case may have on both parties, including public policy issues no matter what the outcome of the hearing was going to be.'

[62] It was also borne in mind that the applicants had already introduced a lot of legal issues and principles as a result of which the panel members Black and Pandora felt uncomfortable and who, as lay persons, 'merely wanted to get to the bottom of the allegations'.

[63] The panel did not view the matter as complex nor did it feel that any legal issues were involved. The panel considered that its task was to establish whether T had dealt in Marijuana on the school campus towards the end of November 2012, alternatively whether he possessed such substance as well as the further charge.

[64] The members of the panel failed to see how legal representation would assist them in their duty. It was stated that legal representation, at that stage, was considered to be inappropriate, especially in view of the minor parties' involved, which the members considered to be in the interest of fairness and a just decision.

[65] The panel acknowledged that a finding against T might lead to his expulsion but the panel could not see how legal representation could assist it in conducting its duty particularly as the panel had already experienced how the process could be hijacked by legal representation if regard was had to 'Document 6'.

[66] The panel then went on to consider some of the legal technical objections raised and why same were in its view without substance and also were irrelevant to the facts the panel was tasked to establish. The panel also considered the argument mounted on the basis and that the panel was chaired by a duly admitted legal practitioner and found that the chairperson's qualifications should have no bearing and no influence on any individual's participation at the hearing. The chairperson's role was perceived to be to ensure that T would get a fair hearing.

[67] On the issue of the applicants' emotional involvement in the case of their son and that they will not, therefore, be able to provide adequate representation, that argument was rejected on the basis that other parties were similarly so involved and the applicants were therefore assured that they would be allowed to remain in attendance throughout save in the instance where one of them would testify in which event the other would have to leave the room. It was found that this arrangement, akin to that of parties in civil proceedings, would address the applicants' concerns.

[68] The panel took note that the learned Judges of Appeal in the referred to *Hamata* decision had acknowledged that there had been *'a growing acceptance of the view that there will be cases in which legal representation might be essential to a procedurally fair administrative proceeding'*.

[69] The panel felt that the contrary would also be true and that in the absence of an express rule against legal representation the panel would have a discretion whether to allow or disallow legal representation and that it would be on that level - meaning that it would disallow legal representation - that the application was refused.

ARGUMENT ON BEHALF OF APPLICANT'S

[70] It is against the backdrop of the *Hamata* decision that Mrs Angula acknowledged that the right of her client's to legal representation was not absolute as originally contended. She submitted that, taking into account, that the contractual relationship between the parties provided for fairness and due process expressly, that the panel should have exercised its discretion in favour of the applicants, particularly as the element of the decision, faced by them, was punitive in nature.

[71] She submitted with reference to the *Netherburn Engineering cc t/a Netherburn Ceramic v Madan NO*[12] and *Lunt v University of Cape Town & Another*[13] that the proceedings before a domestic tribunal have to conform with the principles of natural justice to ensure procedural fairness.

[72] She submitted with reference to the following factors: 'the nature of the charges brought, the degree of factual legal complexity upon considering them, the potential seriousness of the consequence of an adverse finding, the age of the minor child charged with the offence, the age of the witnesses, the fact that there is a qualified attorney to adjudicate on the matter and who recognises and deals appropriately with legal issues, the availability and sustainability of other persons to provide such representation - that the dictum of the *Court a quo* in the *Hamata*[14] matter was of application:

'I cannot accept his contention. The plaintiff is here facing a serious charge. He is charged with either giving the dog drugs or with not exercising proper control over the dog so that someone else drugged it. If he is found guilty, he may be suspended or his licence may not be renewed. The charge concerns his reputation and his livelihood. On such an enquiry,

[12] 2009 ICJ 269 (LAC)
[13] 1989 (2) SA 438 (C) at p 276
[14] 2000 (4) SA 621 (C)

I think that he is entitled not only to appear by himself but also to appoint an agent to act for him.

(O)nce it is seen that a man has a right to appear by an agent, then I see no reason why that agent should not be a lawyer. . . . I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitor.'[15]

[73] She thus emphasised the seriousness of the matter which could lead to T's expulsion and criminal charges and that this was akin to an employee facing dismissal in the labour context. She criticised the panel's approach which indicated that it seemed that the panel had placed more weight on the fact that legal representation would complicate the matter and that children would be subject to cross-examination. She pointed out that whereas lawyers might complicate matters on the one hand, the opposite was also true.

[74] She clarified that the option of representation by a school official was no option at all as there might be a perception of bias from T's side and because a school official might not be objective given the history of this matter.

[75] She submitted also that the reasoning of the panel could not be sustained as the panel was chaired by a legal practitioner and that his appointment was not 'within the family'.

[76] She also argued that the matter was more complex than the panel made out as was shown by the panel's subsequent ruling on the merits.

[77] In reply she again emphasised the constitutional imperative in the background of this matter and that the rules of natural justice had to be applied. She criticised the panel's decision to interpret the representation clause in the governing contract narrowly and contended that a liberal interpretation should have been adopted. She considered the decision to keep the matter 'within the family' as unreasonable and that the panel did not afford the circumstances of the matter due weight.

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[15] At p 636 quoting Lord Denning MR in *Pett v Greyhound Racing Association Ltd* [1968] 2 All ER F 545 (CA) at 549B - G

[78] She closed her argument by re-iterating that the Supreme Court of Appeal had allowed legal representation in the *Hamata* case as the livelihood of the complainant there was at stake.

THE ARGUMENTS ON BEHALF OF RESPONDENTS

[79] Mrs de Jager, on behalf of 1st respondent, pointed out that the applicants had not taken issue with any specific aspect other than mounting a general attack on the panel refusing T legal representation nor had they pointed out any irregularity within the proceedings which would render the process unfair. Accordingly it was submitted that no case had been made out for the relief applied for by the applicants. She emphasised that the panel had exercised a discretion, and that such discretion was properly exercised.

[80] She submitted that it was unlikely that there was no school official who had no goodwill towards T and who could thus not meaningfully represent T.

[81] With reference to the decisions of *Turner v Jockey Club of South Africa*[16] and *Dladla & Others v Administrator Natal & Others*[17] she submitted that the court would only interfere in the decisions of domestic tribunals if the tribunal had acted *ultra vires* or *mala fide* or if a rule of natural justice had been breached. She emphasised that no such case had been made out.

[82] She then went on to argue that the panel had exercised its discretion properly and that the court should in such circumstances not interfere. She stressed that the panel had delivered a reasoned ruling on the issue. The application should thus be dismissed with cost.

[83] Also Mr Obbes, on behalf of 2nd and 3rd respondent, pointed out that there are limits and a reluctance of the courts to encroach too freely on the decisions of domestic tribunals, subject to the limitations referred to by Mrs de Jager

[16] 1974 (3) SA 633 (A)
[17] 1995 (3) SA 769 (N)

[84] He argued that 'Document 6' demonstrated that the applicants were more than capable of representing their son. He pointed out that 'Document 6' not only contained numerous legal points but also a catalogue of some 112 questions, which had been meticulously compiled.

[85] He then analysed the participation of the applicants in the proceedings, which showed that the applicants had participated on the 25th of February and that they made submissions to the panel on the 4th of March, regarding the issue of legal representation, and that they continued to partake in such proceedings, even after the ruling on this had gone against them, until such proceedings became rain-interrupted, where after they communicated that they had changed their mind - which decision they did not change - despite being urged to remain - and even after the consequences of further non- participation had been explained to them – they nevertheless left the hearing. They then returned for the sanctions hearing. He thus submitted with reference to *Munetsi v Public Service Commission*[18] that the applicants' conduct reflected a waiver of the applicants' right now relied upon.

[86] He also pointed out that no case had been made out – as was also the underlying argument made by Ms de Jager - that no one else could effectively represent T and that – on closer analysis - the applicants' case was categorically and unwaveringly one of representation by a legal practitioner or nothing else.

[87] He also submitted that the applicants' case was fundamentally flawed in that they had failed to show anything in the ensuing process that was unfair. It therefore did not follow that the 'domino principle' should apply as it was not shown that all subsequent proceedings were also tainted by material irregularity.

[88] He re-iterated that the applicants concerns could have been raised during the appeal hearing and that - viewed as a whole - the circumstances of this matter did not require - as a *sine quo non* - that external legal representation should be allowed. Also he urged the Court to dismiss the applicants' case with costs.

[18] 2007 JDR 1151 ZH

THE DEFENCE OF WAIVER

[89] It is indeed so, as submitted by Mr Obbes, that there was a degree of participation in the disciplinary proceedings, by applicants, subsequent to the ruling made on legal representation, until the proceedings became rain- interrupted.

[90] It is undisputed that the applicants, on the resumption of the hearing, indicated that they would no longer participate for as long as legal representation would not be allowed.

[91] Applicants informed the panel that this step was taken on account of legal advice received. All the attempts by the panel to persuade the applicants otherwise failed.

[92] The proceedings were then completed *in absentia* of the applicants and T until the 13th of March 2013, when the applicants were again invited to attend the hearing at which the ruling on the merits would be delivered.

[93] Contrary to the legal advice received 2nd applicant and T attended.

[94] After having found T guilty on the main count the 1st respondent explained that a recommendation would now have to be made on the sanction to be imposed.

[95] The 2nd applicant and T were asked if they wanted to make submissions in mitigation and it appeared that 2nd applicant did not know what was meant thereby. The 1st Respondent then explained that they should make submissions to convince the panel not to recommend to 2nd Respondent to expel T. 2nd applicant indicated that he was not prepared for that and he then repeated applicants' complaints against 2nd respondent.

[96] Mr Black of the panel then asked T whether he wanted to say something, to which T replied 'yes'. The panel then left the room and gave T and the 2nd respondent time.

[97] When the panel returned after some time T requested not to be expelled. The 2nd respondent thereupon complimented the panel on the way they had conducted themselves during the process and he further thanked the panel. All this occurred on 13 March 2013.

[98] The panel then retreated and after a while delivered their recommendation - on the sanction to be imposed - in 2nd applicant and T's presence.

[99] For completeness sake it should be mentioned that immediately after the delivery of the ruling, without reasons on the 4th of March 2013, the legal practitioner of the applicants indicated by letter, that she then already had received instructions to bring an urgent review of the panel's decision not to allow T legal representation. This letter also requested written reasons for the ruling for purposes of bringing the threatened review application.

[100] It will have been noted by now that the requested reasons were then indeed delivered on 6 March 2013.

[101] On 11th of March 2013 applicants' legal practitioner then informed the 1st respondent further that the applicants had afforded themselves the indulgence to challenge the said ruling only after the ruling on the merits.

[102] I pause to mention that the detailed exposition by respondents of what had transpired during the hearing and particularly the account of the conduct of the applicants and their participation therein, was not challenged on the papers. The respondents' detailed narration of the events and the aforesaid participation of the applicants and T therein must therefore be accepted.

[103] From the case history so placed on record it does indeed appear, as contended for by Mr Obbes, that the conduct of applicants and T begs the answer as to whether or not there was a waiver of the right - absolute or not - to insist on legal representation during the disciplinary hearing of T, on which the applicants now rely.

[104] The requirements for a party to succeed in the defence of waiver have been restated by Maritz AJ (as he then was) in *Grobbelaar & Another v Council of the Municipality of Walvis Bay*[19], which the learned Judge set out as follows :

'To succeed in such a defence the respondents had to allege and prove that, when the alleged waiver took place, the first applicant had full knowledge of the right which he decided to abandon; that the first applicant either expressly or by necessary implication abandoned that right and that he conveyed his decision to that effect to the first respondent See: *Netlon Ltd and Another v Pacnet (Pty) Ltd* 1977 (3) SA 840 (A) at 873; *Hepner v Roodepoort-Maraisburg Town Council* (supra)[20]; *Traub v Barclays National Bank* Ltd 1983 (3) SA 619 (A) at 634.'[21]

[105] In view of the factual presumption that a person is not likely deemed to have waived his or her rights, 'the onus to prove the applicant's alleged waiver on a balance of probabilities rests on the respondent. (See: *Hepner v Roodepoort-Maraisburg Town Council* 1962 (4) SA 772 (A); *Borstlap v Spangenberg en Andere* 1974 (3) SA 695 (A).).'[22]

[106] If one then turns to the facts of this matter it becomes clear that the applicants and T - right from the outset - had the benefit of legal advice and legal assistance - not only during the bringing of the previous urgent application – (the various lawyers' letters, preceding this application, and 'Document 6' – also prove this point) – in addition it is also beyond doubt that the applicants' decision, to abort their further participation in the disciplinary process, occurred as a result of direct legal advice, received on this aspect.

[107] Applicants expressly communicated to the panel that, 'upon receiving legal advice, they had been advised not to proceed without legal representation'.

[108] Applicants understood that the hearing would thereafter continue without them. They accepted this situation. After clarifying their position to the panel, applicants and T, heeding the advice received, left.

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[19] 1997 NR 259 (HC)
[20] 1962 (4) SA 772 (A)
[21] at p263 D - E
[22] *Grobbelaar & Another v Council of the Municipality of Walvis Bay at 262*

[109] The hearing thereafter continued until its conclusion (on the merits) in applicants and T's absence.

[110] In the premises it was further incumbent on the respondents to prove a decision on the part of the applicants to abandon the right not to continue to participate in the disciplinary process without legal representation.

[111] But is this not precisely what the applicants did once they accepted the invitation to attend the ruling on the merits without legal representation. Even when they were invited to make submissions in mitigation on the imposition of sanctions neither the 2nd applicant nor T insisted on the right to legal representation nor did they indicate that they would only participate in this phase of the disciplinary process if legally represented.

[112] The only objection emanating from the 2nd applicant was that he was not prepared for this.

[113] This stance is a far cry from the repeated insistence on legal assistance and the proclaimed unwillingness to further participate in the hearing, unless represented.

[114] What is more is that the 2nd applicant was given time to consider his position in which time he could have reflected on the consequences of his actions or, as had been done before, he could have phoned his legal practitioner for advice, for which there was ample opportunity.

[115] It is against this background that I consider the 2nd applicant and T's further participation at the disciplinary hearing - culminating in the thanking of the panel for their conduct therein - as a clear communication and expression of their intention to no longer to insist on the right to legal representation as a pre-condition for further participation in the disciplinary process.

[116] I, therefore, find on the facts of this matter, that the applicants - through their conduct - which is plainly inconsistent with the right relied upon now - and which applicants threatened to enforce in correspondence - and which they now seek to

again enforce - *ex post facto* – through this application - have waived this right through their participation in the proceedings of the 13th of March 2013.

[117] Nothing prevented the applicants to continue to persist with their stance as adopted on the 4th of March, yet they failed to do so, in the full knowledge pertaining to the underlying legal position, which they must have appreciated, given the continuous engagement of their legal practitioner in this matter.

[118] The respondents have thus discharged their *onus* in this regard.

[119] As the effect of this waiver is that it has extinguished the right, relied upon now by the applicants in this matter, it follows that no relief can be granted on the basis thereof.

[120] In such circumstances the need for the determination of the remaining issues falls away.

[121] The application is therefore dismissed with costs, such costs to include the costs of one instructed- and one instructing counsel.

H GEIER

Judge

APPEARANCES

APPLICANTS:	EN Angula AngulaColeman, Windhoek.
1st RESPONDENT:	B de Jager Instructed by Theunissen, Louw & Partners, Windhoek
2nd and 3rd RESPONDENTS:	D Obbes Instructed by LorentzAngula Inc., Windhoek