REPORTABLE

CASE NO: SA 30/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

JOY SASMAN	**First Appellant**
ABIUS AKWAAKE	**Second Appellant**
and	
CHAIRPERSON OF THE INTERNAL DISCIPLINARY PANEL OF THE WINDHOEK INTERNATIONAL SCHOOL	**First Respondent**
WINDHOEK INTERNATIONAL SCHOOL	**Second Respondent**
TRUSTEES FOR THE TIME BEING OF THE WINDHOEK INTERNATIONAL SCHOOL	**Third Respondent**

Coram:	MARITZ JA, MAINGA JA and HOFF AJA
Heard:	**31 October 2014**
Delivered:	**12 December 2014**

APPEAL JUDGMENT

MAINGA JA (MARITZ JA and HOFF AJA concurring):

[1] The appeal before us is against an order of the High Court (Geier J) in terms of which that court had dismissed the appellants' review application with costs. The

matter arises from a review application brought by the appellants seeking to review and set aside the ruling by the first respondent, made on 6 March 2013, refusing legal representation for the appellants' minor child in a disciplinary hearing which was to be held by the school against the minor child and all rulings subsequently made in the course of the disciplinary proceedings. The appellants also sought an order authorising them to secure legal representation of the minor child's choice at the disciplinary hearing.

Background

[2] The minor child (T) was a Grade 7 student at a private school in Windhoek (the 'school'). He was 12 years old at the time. The appellants are his parents. On 4 February 2013, the appellants received notification from the principal that, in compliance with the school's protocols and policies on drugs, T would be excluded from school permanently as of the next day. As a result the appellants brought an application in the High Court challenging their son's expulsion from the school under Case No A 28/13. The second and third respondents opposed the application but before the application could be heard, the matter was settled. In terms of the settlement, the school withdrew the decision to expel T and his suspension was uplifted with immediate effect. In the letter advising the appellants of the school's decision to uplift their child's expulsion, the school noted its intention to re-initiate a disciplinary hearing against T. The appellants withdrew the application in terms of the settlement, which was made an order of court. The school and third respondents were ordered to pay costs of the appellants.

[3] On 19 February 2013, the appellants received notice in which T was suspended again pending the outcome of a disciplinary hearing, which was to be held on 25 February 2013. On the same day, the appellants and T received notice of the disciplinary hearing. In the notice, they were advised as to the composition of the disciplinary panel for the hearing, the initiator of the hearing and that T may be represented by his parents or by a school official. The notice also contained the charges against T. T was charged with two counts of misconduct, namely: (1) that on or about the end of November 2012, he dealt in marijuana on the school campus, or alternatively was found in possession of the said marijuana; and (2) that he brought the name and reputation of the school into disrepute when he dealt in, alternatively, was found in possession of marijuana on the school campus. Through their legal representative, the appellants caused a letter to be addressed to the school demanding an immediate withdrawal of their child's suspension, failing which, they noted their intention to seek legal redress in a court of law. In response, the school uplifted the suspension with immediate effect by a letter dated 21 February 2013.

[4] On 20 February 2013, the first appellant applied to the Principal of the school for T to be allowed to engage a legal representative of his choice. The Principal responded '. . . as this is an internal process, neither the school nor yourselves will require a lawyer'. The appellants sought legal advice on the issue and, as a result, they applied in writing to the Chairperson of the panel to be allowed to engage a legal representative of their son's choice. In the 30-page application, the appellants related the events preceding their request; requested additional information about the charges against their son; raised numerous legal

and other objections to the charges and proceedings and specifically stated that given the ‘offences’ preferred against their son, he would not enjoy a fair hearing unless he was permitted legal representation. They added that, as parents of T, they were too emotionally involved in the matter to effectively represent him; that they believed that T had a constitutional right to legal representation; and that the school policy does not prohibit legal representation. On 25 February 2013, when they attended the disciplinary hearing, they provided copies of the application to the disciplinary panel and to the initiator. They were also allowed to address the panel in support of the application.

[5] During the address, the Chairperson of the panel, cited in this appeal as the first respondent, cut their address short and ruled that the legal and other objections to the charges raised by them would be considered after the panel had heard evidence but postponed the hearing to 4 March 2013 for the requested particulars to be furnished to the appellants. Once the further particulars were furnished to them, the appellants say that they realised that the case against T was even more complicated; that the charges were of a criminal nature; and that according to its policy the school could hand T over to the police. It dawned on them that they had neither the knowledge nor the skills to represent T in relation to the charges.

[6] At the commencement of the hearing on 4 March 2014, the appellants renewed their son’s application for legal representation. The application was declined and the panel ruled that T should proceed without legal representation. The appellants allege that they were therefore obliged to proceed under protest. As

it happened, it started to rain quite heavily at that stage of the proceedings and, because verbal exchanges became inaudible because of the rain, the hearing was briefly adjourned. When the hearing resumed, the appellants informed the panel that they could not proceed without a lawyer. The appellants were informed that unless they continued without legal representation, the hearing would proceed without their participation. Not willing to proceed without legal representation, they left the hearing.

[7] The appellants consulted their legal representative of record later the same day and she immediately addressed another letter to the panel restating the need for T to be represented by a legal representative of his choice; informing them that she had received instructions to approach the High Court on an urgent basis to review the decision of the panel to deny T's right to legal representation; advising that the panel should suspend the hearing pending the outcome of the application for review and requesting that the written ruling refusing legal representation should be made available to the appellants for purposes of the review application.

[8] The requested ruling was made available on 6 March 2013. In the ruling, it was indicated that the hearing had proceeded *in absentia* of the appellants and T and that the ruling on the charges against T would be delivered on 13 March 2013. In the ruling, the panel mainly relied on the case of *Hamata and Another v Chairperson Peninsula Technikon Internal Disciplinary Committee and Others* 2002(5) SA 449 (SCA) to justify the manner in which it exercised its discretion. In that case, the South African Supreme Court of Appeal held that South African law does not recognise an absolute right to legal representation and that there are

circumstances under which legal representation may be excluded in the context of administrative proceedings.

[9] On 13 March 2013, the second appellant and T, on invitation of the panel, attended the proceedings during which the panel were to rule on the charges. The panel convicted T on the first charge. The second appellant and T were invited to advance a plea in mitigation. Initially, both did not understand what 'mitigation' was, but when it was explained in layman's language, T spoke in support of mitigation and requested not to be expelled. The second appellant declined to speak. The panel recommended that T should be placed on internal suspension until 20 March 2013, with this period to include counselling and a rehabilitation programme.

[10] Relying on paras G.4.2.1(f) and G.4.2.2(c) of the school policy (to which I shall refer below), the appellants maintained that the panel should not have interpreted the said paragraphs and school policy restrictively to deny T legal representation, but widely and in favour of students who are entitled to administrative due process.

High Court proceedings

[11] On 15 March 2013, the appellants launched proceedings in the High Court seeking to review and set aside the ruling by the Chairperson of the panel and all other subsequent rulings made in pursuance thereof. They also sought an order that the appellants (applicants then) were authorised to secure legal representation of the minor child's choice at the disciplinary hearing and costs.

[12] Both the Chairperson and the school opposed the application on grounds of lack of urgency; that the relief sought was not competent; that the appellants voluntarily chose not to participate in the hearing; and that they were able to represent T. Responding to the appellants' contention that the school's policy as formulated in paragraph G.4.2.2(c) (which provides for representation at such hearings) should be interpreted widely and in favour of students, the school stated that: 'the respondents do not accord with the interpretation rendered by the (appellants)'.

[13] In an extempore judgment delivered on 4 April 2013, the High Court held as follows:

> 'The [appellants] through their conduct which is plainly inconsistent with the right relied on now and which applicants threaten to enforce in correspondence and which they now seek to again enforce ex post facto, have waived this right through their participation in the proceedings of the 13th March 2013. Nothing prevented the [appellants] 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 position, which they must have appreciated, given the continuous engagement of the legal practitioner in this matter. The respondents have thus discharged their *onus* in this regard. As the effect of the waiver is that it has extinguished the right, relied upon by the applicants in this matter, it follows that no relief can be granted on the basis thereof'.

[14] The High Court accordingly dismissed the application with costs. The appeal lies against the whole judgment and order.

Submissions

[15] In the view I take of this matter, it is necessary to give a fairly detailed summary of submissions on behalf of the parties in this appeal. The thrust of counsel for the appellants' argument was that the court *a quo* misdirected itself when it found that the appellants waived their right to legal representation when they attended the ruling on the merits on 13 March 2013 because the issue of waiver was never raised in the answering affidavits by any of the respondents. I must interpose here to say that the reasoning and conclusions of the court *a quo* based on waiver are also not supported in this appeal by any of the respondents in whose favour the court *a quo* found. Counsel for the appellants further argued that, by finding that T had waived his right to legal representation, the court *a quo* by necessary implication found that T had such a right. In the absence of a cross-appeal against that implied finding, she submitted that the issue concerning his right to legal representation had been determined. Counsel further argued that the fact that T had been suspended twice before the commencement of the hearing it was necessary that he should be legally represented. On the meaning to be attributed to the word 'someone' in paragraph G.4.2.2(c) of the school policy, counsel argued that it should be given a wide interpretation and not a restrictive one. Counsel further argued that the case against T was so complicated that T's request for legal representation was justified. Counsel therefore submitted that the appeal should succeed with costs.

[16] The arguments and submissions of counsel for the first respondent are structured around questions that counsel had phrased as follows. The first of these is whether T should have been allowed legal representation at his disciplinary

hearing in the particular circumstances in this matter. Embodied in this question are a number of ancillary issues such as whether the panel or, ultimately, the Chairperson has a discretion to allow legal representation? If so, can a court, in the particular circumstances of this case, interfere with the ruling made by the Chairperson on legal representation? The second question is whether the panel's or, ultimately, the Chairperson's refusal to allow legal representation *per se* resulted in an unfair hearing meaning that the final ruling of 13 March 2013 should be set aside? Counsel pointed out that waiver was not raised in the first respondent's answering affidavit nor was it argued on the first respondent's behalf in the court *a quo.* She emphasised that the first respondent had no intention of raising it in this court either. Counsel rather relied on the same grounds she had argued on behalf of the first respondent in the court *a quo,* which were not decided. Counsel urged this court to decide on those issues. Counsel then submitted that the ruling on waiver aside, the application should have been dismissed with costs by the court *a quo*. Relying on the *Hamata and Another,* supra, and *Namibia Tourism Board v Kauapirura-Angula* 2009 (1) NR 185 (LC) para 9, she submitted that there is no entitlement, as of right, to legal representation in arenas other than courts of law and that the insistence of the appellants that they had an absolute right such representation was wrong. Counsel argued that the contractual framework between the parents, T and the school does not specifically provide for legal representation: it neither expressly includes legal representation, nor does it specifically exclude legal representation. It provides for the right to administrative due process which, according to her, means that students are entitled to have someone assist them in the representation of their case. Counsel pointed out that in the notice of the disciplinary hearing it was stated that T may be represented by

his parents or by a school official and she submitted that, as in the *Hamata* matter, the purpose of the school's policy was to exclude outsiders - whether they are lawyers or lay persons, as opposed to the total exclusion of lawyers as such. In this matter, she contended, a school official could very well have been an erstwhile legal practitioner. Counsel submitted that the panel had a discretion whether or not to allow legal representation, the discretion was duly exercised and that the refusal of legal representation did not *per se* result in an unfair disciplinary hearing or in the avoidance of the ruling on 6 March 2013. Counsel submitted that the appeal should be dismissed with costs.

[17] Counsel for the school and its trustees anchored his submissions on three bases upon which the conclusion reached by the court *a quo* to refuse the relief sought by the appellants should be supported, namely: (1) the panel properly exercised its discretion to refuse legal representation; (2) the court *a quo* correctly held that the right to legal representation had been waived; and (3) the appellants should have exhausted the internal remedy of an appeal before launching the application in the High Court. Counsel argued that the relationship between the school, the appellants, and T is one based in contract; that the school's Code of Conduct provides for a student's right to administrative due process; that the concept of 'due process' is given content in clause G.4.2.2. of the Code; that no right to legal representation is provided for and that the concept 'due process' means that students are entitled to have someone assist them in the presentation of their case. Counsel argued that as a general rule, the rules of natural justice apply to proceedings of a private domestic tribunal if those are included (expressly or by implication) in the provisions of the contract, rules or constitution which

establishes such a body. Counsel relied on the cases of *National Union of Namibia Workers v Naholo,* 2006 (2) NR 659 (HC) at 683, in *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 646 where it was held that:

> 'The principles of natural justice do not require a domestic tribunal to follow the procedure and to apply the technical rules of evidence observed in a court of law, but they do require such a tribunal to adopt a procedure which would afford the person charged a proper hearing by the tribunal, and an opportunity of producing his evidence and of correcting or contradicting any prejudicial statement or allegation made against him.'

Counsel argued that the appellants did not mount any challenge when advancing their application in the High Court on the basis that the panel had not complied with the principles of natural justice. He submitted that the panel constituted a private domestic tribunal and Article 12 of the Namibian Constitution does not in such circumstances find application to the school's internal proceedings. Counsel also relied on the judgment in *Hamata* and *Namibia Tourism Board,* referred to above, to submit that the appellants had no absolute right to legal representation and that the first respondent proffered a perfectly reasonable and acceptable explanation as to why external legal representation had not been permitted; and that the circumstances of the case did not require, as a *sine qua non* for due process and a fair hearing, that external legal representation should have been permitted; that the panel's decision to decline external representation was capable of objective substantiation and therefore should not be set aside. Counsel further argued that the school's policy is worded and phrased in such a manner to keep disciplinary proceedings 'within the family'; and that it was apparent that T's guardians were more than capable of representing him during the internal proceedings. He

submitted that the complexity of the matter was considered and that legal representation would not have assisted the panel in discharging its duty; that it was inappropriate at that stage of the proceedings because it would have intimidated the minor parties involved; and that it would not have been in the interest of fairness and just process.

[18] On the question of waiver as earlier stated, counsel for the school and its trustees indicated that he did not support the reasoning of the court *a quo* on waiver and that the waiver relied on by his clients was of a 'different kind'. Counsel submitted that the appellants waived their right to legal representation when they accepted advice not to proceed without legal representation and withdrew from the proceedings on a misconstrued view of the law, i.e. that T was constitutionally entitled to legal representation during the internal proceedings. Counsel relied on the matter of *Munetsi v Public Service Commission* 2007 JDR 1151 (ZH) in which the court found:

> 'By storming out of the hearing on the misconstrued view of the law, the appellant waived his right to dispute the evidence called against him, his right to cross-examine witnesses and call his own witnesses. He waived his right to be heard which he had been afforded. The disciplinary committee was quite entitled to proceed with the hearing of evidence and determination of the matter. No authority is required for this conclusion. On that basis alone I would dismiss the application for review'.

[19] Counsel referred to the fact that the appellants had been invited to attend the ruling on the merits on 13 March 2013; that the second appellant and T attended the proceedings, on which occasion he was found guilty; and T pleaded

in mitigation on the penalty that was to be imposed, and that the second appellant even complimented and thanked the panel for the manner in which it had conducted the hearing. Counsel submitted that this conduct of the second appellant and T was inconsistent with the relief they sought in the High Court. He contended that they acquiesced in the ruling and had thereby lost the right to seek review against it. Their conduct, he submitted, reflected approbation and reprobation whereby they waived the right to due process. Counsel finally contended that the school's policies that governed the proceedings, in effect, determined that the issues should be resolved 'within the family'. The appellants, he submitted, were unreasonable when they rushed to court before they had exhausted their internal remedies, and for these reasons the appeal should be dismissed.

The relevant provisions of WIS: Policy and Procedures Manual

[20] To appreciate the submissions made on behalf of the parties - and the concession made by counsel for the appellants that the appellants were not relying on Article 12 of the Namibian Constitution for their claim that T was entitled to legal representation in the hearing - the relevant provisions of the school's policy, which governs the legal relationship between the school, the students and their parents, requires a careful consideration:

> **'G.4 STUDENT RIGHTS AND RESPONSIBILITIES/STUDENT DUE PROCESS RIGHTS**
>
> **G.4.1.** …It is the intent of the School to afford vigilant protection of the rights of all School personnel and students, including the rights to free inquiry and

expression, the right to freedom of association, and the right to administrative due process….

G.4.2.1

f) Student Due Process Rights – Students are to have clearly established means by which 'administrative due process' is available to see that their rights are protected. Students are to be involved, singly and collectively, as citizens of the School with the attendant rights of such citizenship and corresponding responsibilities for the proper conduct of their own affairs and those of other students….

G.4.2.2 The concept of due process means that students are entitled:

a) To know what the rules are;

b) To be notified of charges against them, and be provided the opportunity to respond to those charges;

c) To have someone assist them in the presentation of their case;

d) To appeal a decision about the charges to a higher level;

e) To have the charges or penalties removed from their records, if their innocence or non-involvement is shown by the evidence…

L 8.2 Drug Abuse

For details see the comprehensive WIS Drug Policy and WIS Drug Policy Contract documents which can be found in APPENDICES B and B.1

SCHOOL POLICY STATEMENT

School policy further opposes both the inappropriate use of LEGAL drugs and the possession or use of prohibited substances.

G.8.2.1 THE POLICY APPLIES UNDER THE FOLLOWING CIRCUMSTANCES:

a) On school premises.

b) At or during functions, excursions or other activities organized by the school.

c) When members of the school community are representing the school.

d) When drug use affects, in any way, the performance or school life of a member of the school.

G.8.2.2 The school does not permit:

a) The use of prohibited substances

b) The inappropriate use of either prescribed or non-prescribed medicines

c) The inappropriate use of solvents, inhalants, and/or other chemical agents

d) The possession of drug-related paraphernalia such as cigarette rolling papers, pipes etc.

G.8.2.3 The consequences of breaching these requirements could include any or all of the following:

a) Drawing up a contract between all parties

b) Appropriate disciplinary and/or rehabilitation action relative to the breach

c) Expulsion of the student.

G.8.3. Confidentiality

The confidentiality of the child and the family will be safeguarded whenever possible throughout any procedures outlined in this policy.

G.8.4 PROCEDURES FOR DEALING WITH PROBLEMS OF DRUG ABUSE AND DEPENDENCY

G.8.4.1 When a student (or parent) acknowledges drug use

The student is exempt from disciplinary measures and confidentiality will be maintained between the student, the adult confidante and/or parent and the School Principal, provided that there is full, open and honest disclosure by the student of all drug or alcohol usage and related information.

G.8.4.2 Counselling and rehabilitation programmes will be initiated in consultation with parents/guardians and all parties will sign a contract.

G.8.4.3 When there is evidence that a student is dealing drugs to others

The School Principal will notify parents/guardians immediately of suspension of the student, pending a Disciplinary Hearing in accordance with school disciplinary policy. If evidence validates the claim of dealing drugs, parents will be notified that the student will be required to leave the school with immediate effect. In such

cases, school authorities will refer the matter to the police for further investigation and will assist the police in their investigation at the school.

G.8.4.4 Searches

Where a member of management reasonably suspects that a student has a prohibited substance in his or her possession, an appointed nominee (School Principal, police or representative of a security organization) may search that student, his or her possessions and/or locker. Should such a search be necessary, it will occur in the presence of the student.

G.8.4.5 Screening/Testing

If there is evidence of suspected substance abuse, the Principal may request a urine and/or Breathalyzer test. No testing will be conducted without the consent where practicable or (*sic)* parents or guardians and such consent will not be unreasonably withheld. Parents will be liable for the costs of testing in all cases where results are positive. It remains the prerogative of the school to proceed with appropriate disciplinary action even if consent is withheld and where there is sufficient evidence to warrant such action. It must be stated that screening should not be seen as victimization but as an honest attempt to identify a young person who may be moving into addiction which is a primary, chronic and progressive illness.

G.11 INTERROGATIONS AND SEARCHES

G.11.1 Interrogations

The Principal or Educational Director will make every reasonable attempt to notify parents prior to permitting any person outside the School – including law enforcement officials – to question or detain a student. Under no circumstances will a student be questioned or detained by outside persons without the presence of either a parent or a School Official: the School having legal custody of the student during the school day and during approved extra-curricular activities, must ensure that each student's rights are protected'.

[21] The 'representation rule' in the *Hamata* matter which the respondents relied on to advance the respondents' defences at 455B of that matter 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’.

The issues in this appeal

[22] Five questions arise for determination, namely:

1. Did the High Court err in finding that the appellants through their conduct waived the right to legal representation in the disciplinary hearing through their participation in the proceedings of 13 March 2013?

2. In terms of the contract between the appellants, T, and the school, was T entitled to legal representation at his disciplinary hearing?

3. Did the panel, in making the decision that T was not entitled to legal representation, exercise its discretion properly?

4. If T was entitled to appoint a legal representative, or the panel acted improperly or unfairly in the exercise of its discretion, did that invalidate the proceedings that followed?

5. Does the court need to consider whether the appeal is academic?

[23] The five questions will be considered in the order they appear above. The first question being whether the High Court erred in finding that the appellants, through their participation in the proceedings of 13 March 2013 waived T's right to legal representation at the disciplinary hearing by their conduct. In my view, the High Court erred when it decided the matter on a factual issue (waiver) not raised by any of the parties in the proceedings. Had the respondents raised waiver of T's right to legal representation in their answering affidavits, the appellants and T would have been in a position to respond to the factual allegation in their replying affidavits. In deciding the matter on an issue that was neither raised on the papers nor advanced in argument, without first according the parties an opportunity to ventilate the facts relevant to the determination of that issue on affidavit or in evidence, the court misdirected itself.

[24] I should add that none of the parties in this appeal sought to sustain the basis on which the court *a quo* disposed of the matter, neither as a matter of procedure or as one of substance. It must be remembered that the appellants made at least three applications for legal representation prior to or at the commencement of the proceedings, which were all declined. They made it very clear that when they briefly participated in the proceedings of 4 March 2013, they did so under protest. After the ruling of 4 March 2013 refused them legal representation, they resolved to launch a review application in the High Court. They unsuccessfully requested the panel to suspend the hearing pending the application for review. They thereafter requested and received the reasons for the refusal of legal representation on 6 March 2013. In the document comprising the reasons, they were informed that a ruling on the merits of the charges would be

handed down on 13 March 2013. They resolved to delay the launch of their review application until then. The second appellant and T attended the proceedings of 13 March 2013 on invitation and launched the review application two days later. Immediately after T was found guilty, the Chairperson invited the second appellant and T to plead in mitigation. It is apparent that they did not understand what mitigation entailed. It was explained to them. The second appellant declined to say anything and T, a minor with limited capacity to perform juristic acts who was obviously fearing the worst, simply asked not to be expelled. There is no evidence that he appreciated at that time that he had a right to legal representation or that his anxious plea not to be expelled could be regarded as a waiver of that right – not only in respect of the proceedings that followed the finding that he was guilty, but also in relation to the previous proceedings. It is common cause that T astutely refused to attend the earlier proceedings without legal representation on account of his parents' advice. In those circumstances, the court *a quo* also erred in construing the attendance of the second appellant and T at the proceedings on 13 March 2013, or the conduct of T and the appellants in the earlier proceedings, as constituting waiver.

[25] The second question for determination is, whether in terms of the school policy to which the appellants, T, and the school contractually bound themselves, was T entitled to legal representation in the circumstances of this case? The non-existence of an absolute right to legal representation in arenas other than courts of law may well be a salutary one under certain circumstances, but whether that right exists or not depends in my view on 'the representation rule' of each particular institution and the particular circumstances of each case. As was correctly spelt out

in the *Hamata* matter, ‘there will be cases in which legal representation may be essential to a procedurally fair administrative proceeding’ and that ‘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’.

[26] Clause G.4.2.2(c) of the school policy, intended to give content to the meaning of ‘due process’ to which students at the school are entitled, provides:

> ‘To have <u>someone</u> assist them in the presentation of their case’. (My underlining for emphasis).

[27] It was argued that this provision, particularly the word ‘someone’, should be interpreted restrictively to mean a parent or a school official, and that the school’s policy is worded and phrased in such manner to keep disciplinary proceedings ‘within the family’. The Concise Oxford English Dictionary defines the word ‘someone’ as: (1) an unknown or unspecified person; or (2) a person of importance or authority. On a plain and ordinary reading of the word ‘someone’ in clause G.4.2.2(c), the person in question is not specified in any way – not by age, gender, occupation, relation or affiliation, to name a few. Thus, a person who by occupation is a legal practitioner is not excluded from this unspecified category of persons who may represent a student. ‘Someone’ is a word of wide scope and general import and, had the school wished to limit the persons permitted to represent a student to a particular category when it formulated its policy, one would have expected it to

couch the clause expressly or by necessary implication in limiting terms. The only basis on which the respondents contends for a narrower interpretation is that, upon a reading of the policy as a whole, it must be inferred by necessary implication that disciplinary proceedings should be kept ‘within the family’. This contention, based on a broader reading of the school policy, is misplaced and unsustainable. The part of the policy G 5.4 on which such reliance is founded is headed: ‘Student complaints and grievances’. Its contents speak for itself. It contemplates that, if any matter cannot be resolved at the school level, the Principal may consult the Educational Director. Moreover, the drug policy - as is demonstrated by the provisions relating thereto in the provisions quoted above - is formulated in stringent terms and contraventions are clearly viewed in the most serious light by the school. If evidence validates the claim of dealing drugs, the policy requires that parents are notified that the student will be required to leave the school with immediate effect; that the school authorities will refer the matter to the police for further investigation; and that the school authorities will assist the police in their investigation at the school. That aside, the consequences attached to the crimes of dealing in or possessing a drug or prohibited substance are severe and the offender’s conviction in a court of law may include imprisonment. It is not your ordinary misdemeanour or mere trespass of a school rule such as one that prohibits late attendance to class.

[28] Another consideration that detracts from the restrictive interpretation of ‘someone’ sought by the respondents (i.e. that ‘someone’ is limited to the parents of students or staff members of the school) is that such an interpretation would undermine the principle of equality of representation to the entire body of students.

To confine the clause to parents and staff members of the school would place students whose parents are lawyers or who have experience or knowledge in legal matters at an advantage when compared to fellow students whose parents are not so qualified or experienced. The ambit of a restrictive interpretation contended for would also be uncertain. Would the elder brothers or sisters of students be permitted to represent them? If so, what about their uncles or aunts, their cousins or other persons more remotely related? Would it make any difference if any of them were a lawyer? Where should the line be drawn before it would no longer be in line with the notion of keeping the proceedings 'within the family' as contended for by the respondents?

[29] Counsel for the first respondent pointed out that it was stated in the notice of the disciplinary hearing that T could be represented by his parents or a school official. She further submitted that, as in the *Hamata* matter, the purpose of the school's policy was to exclude 'outsiders', be they lawyers or laypersons - as opposed to the total exclusion of lawyers as such. On this premise, she contended, if the school official had previously been a legal practitioner, he or she could have represented T. In my view, the parallel that counsel is seeking to draw between 'the representation rule' of the school policy in this instance and that of the Peninsula Technikon ('Pentech') in Hamata's case is misplaced. The rules of Pentech spelled out very clearly that a student might be represented by another student or a member of staff of Pentech. The purpose of the representation rule in that case was to expressly exclude representation as of right by persons falling outside the named categories. The representation rule of the school policy in this instance lacks that limitation and the wording of clause G.4.2.2.(c) suggests scope for a

broader interpretation. It is not within the province of the school to unilaterally accord an interpretation to the word ‘someone’ that suits the institution. By using the indefinite word ‘someone’ in the formulation of its policy and contracting with the appellants’ and T on that basis, the school is bound by the ordinary contextual meaning of the word, which, for the reasons that I have given, cannot be limited in the manner contended for by the respondents. When the school sent out a notice to the appellants, purporting to prescribe to them who should represent T, it violated its own policy on due process and the contract concluded with the appellants and T on that basis. In terms of the contract, T was entitled to representation by ‘some’ person. Inasmuch as the person would represent him, the selection and appointment of that person was up to T and it was not within the purview of the school’s powers to prescribe to him who that person should be or limit the categories of person from which T could choose. In the view I take, the respondents were unable to demonstrate why the word ‘someone’ should be limited to a person ‘within the family’ and that, upon a proper interpretation of the school policy incorporated in the contract between the school and the appellants (acting in person and on behalf of T), T was entitled to appoint any person to represent him. Consequently, T’s right to representation of his choice was provided for in terms of the contract he had with the school and no question of a discretion on the part of the school, the disciplinary panel, or its Chairperson arose. So regarded, the issue of whether the panel exercised its discretion fairly or reasonably falls away: it had no discretion to say that T could not engage the services of a legal representative to assist him in the presentation of his case. He was entitled to appoint a person of his choosing as per the terms of the contract.

[30] In any event, even if I am wrong, and the disciplinary panel did in fact have a discretion as contended for by the respondents, I am satisfied that the panel did not exercise its discretion properly. It is not disputed that the students at the school were entitled to 'administrative due process'. The question that arises is whether the panel exercised its discretionary power in accordance with the requirements intrinsic to that principle. To answer the question, the court must examine, amongst others issues -

> 'whether the administrator had the necessary power to act, whether the correct procedure was followed, whether relevant and permissible factors were taken into account and irrelevant factors were disregarded.'
> (See also Yvonne Burns, *Administrative Law,* 5th ed at 32-33).

[31] Ordinarily, there are very good arguments to be made against involving lawyers in school disciplinary proceedings. The presence of lawyers introduces the risk that students may find questioning and cross-examination by lawyers to be overwhelmingly stressful and that once-straightforward school proceedings may become increasingly litigious and drawn out as a result of lawyers' involvement. In fact, Ms Christina Gemmell who deposed to an answering affidavit on behalf of the school stated that 'as an educator it pains me that an internal disciplinary process conducted in respect of the applicants' minor child T and which should and could have been concluded swiftly and fairly (that being in the best interests of all involved), has burgeoned into protracted and unnecessarily technical proceedings, and now the present application. This, even before the internal process was completed'.

Ms Gemmell's sentiments are some of the considerations the panel took into consideration to deny T legal representation, namely, to protect the minor witnesses and the members of the panel who were non-lawyers from intimidation and to avoid lawyers hijacking the proceedings etc. But the question which arises, even on the respondents' contention that the policy document contemplates for proceedings to be kept 'within the family' is, would these concerns not apply equally if a parent of a student appearing before the panel was a lawyer?

[32] The panel also considered the seriousness of the charges against T but found that, the seriousness notwithstanding, he should not be permitted legal representation because the panel was not interested in the potential criminal nature of the case, only in finding whether T possessed or dealt in marijuana or not. This case, like any other case concerning the unlawful possession of or dealing in prohibited dependence-producing drugs, constitutes by its mere nature a criminal offence under the existing criminal justice system. It is not simply a misdemeanour to be considered on an equal footing with ordinary transgressions of school rules. This is also evident from the provisions of the school policy incorporated in the contract applicable in this instance. According to the contract, if the student is found guilty of dealing drugs, he or she <u>will</u> be expelled, the matter <u>will</u> be referred to the police for further investigation, and the school <u>will</u> assist the police with that investigation (Clause G.8.4.3). On the face of the school policy, there is no discretion on the part of the panel to avoid these consequences. In this case, the school involved the police even before T was found guilty by the panel: Police Officer Farmer and Chief Inspector De Klerk were invited by the school to

assist in the investigation against T, and Chief Inspector De Klerk threatened T, amongst other things, with jail and testified at the hearing against T.

[33] Due to the severe (and potentially criminal) and non-discretionary nature of the consequences for a student who is found to have contravened Clause G.8.4.3 of the school policy, and the devastating impact such a finding may have on T's future, the panel should have found in this particular instance that T was entitled to legal representation at the hearing. This consideration should have weighed heavily: what was at stake was not only disciplinary sanctions at school level, but serious potential punishment in the criminal justice system as a consequence of the contract and the actual involvement of senior members of the narcotics branch of the Namibian Police.

In addition, the particular subject matter of the proceedings was not only important but also forensically complicated. In the absence of an admission that the substance which T allegedly dealt in or possessed was a prohibited dependence producing drug, expert witnesses had to be called to identify the allegedly illegal substances and evidence had to be produced to the effect that the chain of evidence had been preserved to link the analysed substance to that which T had allegedly possessed or dealt in. These questions are of a technical nature and lawyers are trained to make these types of challenges. It is unfair to expect of the appellants, who are both laypersons in matters of law, to challenge expert evidence in these kinds of cases in a meaningful or competent manner.

[34] It makes no difference that the school had apparently made a decision to resolve the matter internally. No evidence was presented to demonstrate that the appellants (and T) were aware of such a decision. Furthermore, even if it had, the mere fact that it had already involved the police in the investigation against T raised the real possibility that the members of police, in complying with their statutory duty to investigate any alleged offence in terms of s 13(c) of the Police Act, 1990, could have continued with the investigation against T in the public interest, irrespective of the school's attitude. In the course of such an investigation and potential prosecution, the statements made and evidence given at the disciplinary hearing could have been used against T.

[35] None of these important factors and consequences were properly considered by the panel. It follows that, even if the panel had a discretion to grant or refuse T's application to be allowed legal representation at his disciplinary hearing, the panel's decision to refuse his application was unreasonable and unfair in the circumstances.

[36] The next question is, if T was entitled to appoint a legal representative, but was denied that right, did that invalidate the proceedings that followed? The question should be answered in the affirmative. The unfair denial of T's right to legal representation is an issue that permeates the fairness of the disciplinary proceedings in their entirety, more so, because T lacked the forensic skills and experience to meaningfully challenge the expert and other technical evidence that was about to be adduced regarding the prohibited substance in the course of the

proceedings. It is significant that the appellants stated at the outset that they did not regard themselves as competent or able to represent their child due to their emotional involvement in the matter and other factors. When his parents walked out of the proceedings, T was faced with the choice to either stay at the hearing by himself or to follow his parents. When T absented himself from the hearing as a direct result of the panel's refusal to grant his request for legal representation, the proceedings continued in his absence. In the circumstances, this cannot be said to constitute a fair hearing.

[37] The question whether this appeal became academic because T was recently placed in another school was, to his credit, not pressed by counsel on behalf of the school and its trustees. Aside from the order of costs in the High Court that remains alive, the finding of the panel that T had dealt in a dependence producing drug would stand and, until or unless it is set aside, may remain an albatross around his neck in later life.

[38] The parties agreed that Article 12 of the Constitution of Namibia finds no application in the disciplinary proceedings. I agree.

[39] So far as the costs of the appeal and the High Court proceedings are concerned, the appellants succeeded in prosecuting the appeal and there is no reason why the costs of this appeal and that of the High Court should not follow the result.

[40] The following orders are made:

1. The appeal succeeds with costs, such costs to be paid by the respondents jointly and severally, the one paying the other to be absolved;

2. The order of the High Court is set aside and the following order is substituted:

‘(a) The ruling made by the first respondent on 6 March 2013, refusing the applicants’ minor child legal representation and all other subsequent rulings made in the disciplinary proceedings against him are set aside.

(b) The applicants are authorised to secure legal representation of their minor child’s choice at the disciplinary hearing, if any, to be held by the second respondent.

(c) The respondents are to pay the costs of the applicants, jointly and severally, the one paying the other to be absolved.’

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MAINGA JA

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MARITZ JA

_____
HOFF AJA

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