IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)

CASE NO. 1072/2012

In the matter between

CATHERINE BRINK	**FIRST APPLICANT**
DAAN BRINK	**SECOND APPLICANT**
SUE BRINK	**THIRD APPLICANT**

and

DIOCESAN SCHOOL FOR GIRLS	**FIRST RESPONDENT**
MRS. SHELLEY FRAYNE	**SECOND RESPONDENT**
ADV. T. PATERSON S.C.	**THIRD RESPONDENT**
PROFESSOR D. WILMOT	**FOURTH RESPONDENT**
COLIN MEYER	**FIFTH RESPONDENT**
MRS. M. KEETON	**SIXTH RESPONDENT**
MR. BRIN BRODY	**SEVENTH RESPONDENT**

JUDGMENT

ROBERSON J:-

This is an application for interim relief, pending an application for the review of the decision of the appeal tribunal (the tribunal) of the first respondent (DSG), an independent school, dismissing the appeal of the first applicant (Catherine) and confirming her expulsion from DSG. The second and third applicants are

Catherine's parents. The second respondent is the headmistress of DSG, the third, fourth and fifth respondents were the members of the tribunal, the sixth respondent is the Chair of the DSG Council, and the seventh respondent was the Chair of the initial disciplinary hearing. The application was opposed by the first, second and sixth respondents. The matter was argued on 26 April 2012 and in view of the subject matter I indicated I would give my decision on 30 April 2012. In the relatively short time available to me I have not been able to give as full and comprehensive a judgment as I would have liked, but I have considered all the submissions which were made on behalf of all the parties.

The relief claimed by the applicants is that, pending the finalisation of the review proceedings, the decision of the tribunal is suspended and Catherine is allowed to attend DSG (not as a boarder). The application for review is to be instituted within ten days of such relief being granted.

Background and common cause facts

Catherine was enrolled as a pupil and boarder at DSG in 2007. She is presently in Grade 12, her final year of school. In applying for Catherine's enrolment, her parents agreed, on behalf of themselves and Catherine, to comply with the rules, regulations, policies and procedures of DSG. DSG has a discipline policy which applies to serious misconduct and which provides *inter alia* for a formal disciplinary hearing and an internal appeal procedure. The policy contains an unlimited list of what is regarded as serious misconduct. Included in this list is

"bunking-out". Sanctions which may be imposed (I do not mention all of them) include a written warning, close gating, community service, suspension from school activities, expulsion from boarding, and expulsion from DSG. The policy further provides that an appeal must be brought on "reasonable grounds."

On the night of 18/19 February 2012, at about 23h30, Catherine placed a teddy-bear in her bed, left her boarding house through the fire escape door which she left open, crossed the DSG campus, climbed an eight foot wall or gate, entered an unlit area of the campus of a neighbouring school, St. Andrew's College (SAC), let herself into one of the boarding houses by entering the numbers of the security code, and went to the room of a SAC boarder, Matthew Alexandré. Her absence from her house was discovered at about 00h30 after the house mistress found the fire escape door open. A message was sent to Catherine that she should return to her house immediately. At about 01h30 she was found hiding under a desk in Matthew's room.

Following this event, Catherine was required to appear at a disciplinary hearing and was charged as follows:

> "You are charged with serious misconduct in that on 18/19 February 2012 you:
> Put yourself and the sustainability of the school at risk by leaving your house very late at night;
> Compromised the safety of the House by leaving a fire escape door open;
> Entered a St. Andrew's Boarding House and were discovered in a boy's room."

Catherine was initially assisted by her father at the hearing. After acknowledging that she understood the charge, she pleaded guilty. Her father agreed that this plea was in accordance with his understanding.

The second respondent then addressed the Chair in aggravation, and referred to facts given to her by Catherine. In addition to the facts of the event mentioned above, she said that Catherine had begged Matthew to go to him as she was distressed and worried about her workload and her future. Matthew was just a friend. She had earlier telephonically fought with her parents. Catherine had deleted messages on her cellphone which could have corroborated her version. She had told Matthew that she was thinking of committing suicide and that if she could not see him, the feeling would escalate. Matthew had repeatedly told her not to come but she was not prepared to wait. In her address the second respondent said that she did not understand why Catherine had not spoken to her friends or the house mistress, although she agreed that Catherine did not want to be a burden to her friends. She said that on at least three occasions in 2012 she had advised the girls that they risked their lives and the sustainability of the school if they left their house without permission at night, and that they risked their place at DSG. The second respondent requested that Catherine be expelled.

In mitigation, Catherine said that she had been diagnosed with depression, high anxiety and attention deficit disorder (ADD). She was tapering off her medication

for depression and began doing and feeling well. On the night in question she wanted to get away as she thought that she would kill herself. When asked by the Chair if she did not think that her actions would result in expulsion, she said she that did think strongly about what would happen if someone found out, and that she had dodged security guards. She said that she had deleted the messages on her phone because Matthew tried to stop her coming to the house and she felt that what was on her phone would result in people judging her. She did what she did in a state of distress and was masking her emotional state with her psychologist. When questioned by the second respondent about how long she had been in Matthew's room, she said that after an hour he had calmed her down and then she stayed for another hour. She admitted that she had twice lied to the other girls before admitting where she was.

Catherine's father said that he had received a call from Catherine and that he could hear there was something wrong with her and that she was very anxious. They did not fight and he asked her to pull herself together.

The Chair then said that the argument in mitigation related to Catherine's mental condition and that he needed expert advice from a psychologist. He called Mrs. Jane Jarvis, an educational psychologist employed at DSG. She did not know that Catherine had been diagnosed with ADD and did not think that she could use depression as an excuse. She said depression could escalate anxiety but doubted that it would result in impulsive behaviour. She said that Catherine's

mental condition could result in her misbehaving. She added that she was not an expert in depression and anxiety and suggested that someone else be utilised.

The Chair then requested reports from Catherine's psychologist, Ms Mariaan Mavro, and a psychologist appointed by the school. His purpose in requesting the reports was that he could be advised whether depression and high anxiety, possibly with ADD, could diminish the responsibility of a person to the extent that they did not understand what they were doing. The proceedings were then postponed. At the resumed hearing Catherine and DSG were legally represented. The attorneys agreed between themselves that the reports would not assist them and they would not be handed in. After hearing further address in mitigation and aggravation, the Chair gave his judgment. The sanction he imposed was expulsion from DSG.

At the hearing of the appeal, an application was made to lead the evidence of Ms Mavro, Dr. Murray Gainsford, Catherine's physician, and SAC's letter recording Matthew's sanction (he was suspended from the boarding house and given a final written warning). The affidavit of Catherine's mother was used to support this application. In her affidavit she referred to the agreement not to hand in the psychologists' reports, as well as the need to complete the disciplinary hearing and the unavailability of Ms Mavro to testify. Paragraph 10 of her affidavit was as follows:

"The evidence in person of Mariaan Mavro, Dr. Gainsford (the treating

> physician) and the St. Andrew's College sanction letter of Matt Alexandre in mitigation of sentence was not led at the disciplinary hearing, but such evidence is now sought to be led as being directly relevant to the question of mitigation of sentence and an appropriate sanction for the Learner. This is done against the background of the said Mavro having been my daughter's psychologist since July 2011 and she thus has the necessary qualifications, experience and understanding of my daughter's situation to assist the Appeal Board in determining an appropriate sanction in this matter for my daughter. This intention is foreshadowed in the said Notice of Appeal as required by the School's Discipline policy. Dr. Gainsford is my daughter's treating physician and has prescribed her the medication. This has been incorporated into a report by Dr. Gainsford and which only now has come to hand. The St. Andrew's College sanction letter of Matt Alexandre has only come to hand after the Notice of Appeal in this matter was delivered."

In her founding affidavit in the present application, Catherine, in addition to referring to the agreement not to submit the reports, mentioned the need to complete the hearing, Ms Mavro's unavailability to testify that evening because she was bathing her child, the lateness in the evening, and the fact that her father had to fly back to Zambia the following day owing to business commitments.

Reasons for the tribunal's decision

The application to lead further evidence was dealt with in two stages. The first stage dealt with whether or not the tribunal could hear new evidence. It decided that it could not. There is no attack on this decision. The second stage dealt with the application for evidence to be heard by a reconvened disciplinary committee. Section 4.4(e) of the discipline policy provides as follows:

> " In case of either party wishing to bring new evidence to light, such party will in the written appeal be required to make an appropriate

> application to the Appeal Tribunal for leave to introduce such new evidence. Such application must explain the nature of such evidence and why such evidence was not presented at the Disciplinary hearing. If the Appeal Tribunal in its discretion, grants the application to introduce further evidence the investigating Officer must investigate the new evidence and make a decision on whether or not to pursue the disciplinary action in the light of such new evidence. If the Investigating Officer elects to pursue the charges the disciplinary hearing must be reconvened in order to hear the new evidence. If this happens the disciplinary hearing process outlined above shall be repeated to the extent necessary in the particular circumstances."

The tribunal refused the application and gave detailed and considered reasons for doing so. The tribunal decided that the word "new" especially when connected with the requirement of an explanation of why the evidence was not presented at the disciplinary hearing, meant that it was not previously available, or, if available, there had to be good reason why it was not led. The tribunal also decided that the requirement that the nature of the evidence be explained indicated that the tribunal had to be satisfied that the new evidence had some degree of probability to influence the outcome of the proceedings and that the evidence had to be material. The tribunal decided that Sue Brink's affidavit did not indicate the content of the new evidence or how it could materially affect the sanction of expulsion. The tribunal also considered the facts disclosed at the disciplinary hearing, namely that Catherine was tapering off her medication for depression, may have been anxious, was seeing a psychologist and once weaned off the depression medication, Mrs. Jarvis would be in a better position to diagnose ADD. The tribunal found that there was nothing in the application to indicate that the new evidence would materially alter those facts, which it accepted. The tribunal also considered the application in the light of the decision

by Catherine and her father, represented by an attorney, not to hand in Ms Mavro's report. The tribunal dealt with the reasons given by Catherine not to lead the evidence of Ms Mavro, namely that there was a conflict between the opinions of the two psychologists, that there was a need to complete the hearing, and that Ms Mavro was not immediately available to testify. The tribunal was of the view that none of these reasons were satisfactory. If there was a conflict between the opinions of the psychologists, they could have been submitted to the Chair who could have made a finding on the opinions. The need to complete the hearing indicated that the reports were considered not to be material. If Ms Mavro's evidence was material, her unavailability would have justified a request for a postponement. The tribunal concluded that the only inference to be drawn from the events at the hearing in this regard was that Catherine, her father and her attorney regarded the evidence as not material to the outcome.

The tribunal accepted that there were reasonable grounds for an appeal and considered all the evidence afresh, as well as the submissions made by the parties' legal representatives. It took into account that Catherine was a Grade 12 pupil without any previous disciplinary record, and that she had played a positive role in the school, particularly in drama. With regard to Catherine's medical and psychological condition, it was of the view that there was an important factual dispute, namely that Catherine had said the cause of her distress that evening was a fight with her father whereas her father said that they did not fight. The tribunal was of the view that if her father had thought that Catherine was suicidal

he would not merely have told her to pull herself together. If Catherine's condition was so serious, Ms Mavro or her doctor would have alerted the school. The tribunal accepted that "perhaps due to the weaning off of the anti-depressant medication, the appellant became anxious and upset on the night in question."

In aggravation, the tribunal took into account the fact that Catherine was a senior pupil with a greater degree of responsibility than a younger learner, that she exposed herself and other girls in the house to risk by leaving the fire escape door open, that there had been warnings by the second respondent, that DSG cannot fulfil its duties to parents if the learners do not co-operate, and failure strictly to enforce rules about bunking out would lead to unfavourable publicity and a serious erosion of the reputation of the school.

The tribunal acknowledged that in assessing an appropriate sanction the interests of Catherine and DSG needed to be considered. It considered that the primary purpose of the sanction was educational and that the misconduct had to be considered as an opportunity for learning and growth and that punishment has to be directed towards the development of insight and character. Seen in this light, the interests of the offender and the school were two sides of the same coin. A sanction directed towards insight and development of character coincides with the school's social compact and policies.

The tribunal was of the view that Catherine throughout conducted herself

deliberately and rationally and knew all along that her conduct was wrong. In considering to what extent her distress and anxiety could lead to a lesser sanction, the tribunal was of the view that the offence had to be considered in the context of the education of Catherine and that the school's policies are directed towards the development of women of character who assume full responsibility for themselves and contribute meaningfully to wider society. One has to learn that one has to be responsible for oneself, and this includes learning to master periods of upset and not to allow them to be an excuse for irresponsible behaviour. The fundamental question, so it was stated, was what sanction would most probably result in that lesson being learned. The purpose of the disciplinary policy with regard to bunking out was not just to safeguard learners, but also to facilitate the assumption of responsibility for self, friends and the whole school. Community exists because its members assume responsibility for each other and Catherine's misconduct was therefore not just serious misconduct but a violation of the social compact between parents, learners and the school. The lesson to be learned from such a violation is best learned by expulsion from the community.

The tribunal considered a combination of lesser sanctions as submitted by Catherine's Counsel, but concluded that such a combination did not address the essence of the offence. The tribunal was of the view that Catherine should not be treated differently from other learners merely because she was in her final year of school. It accepted that a change of school at this stage would be

disruptive but did not believe it would be as devastating as contended. It was of the view that a lesson properly learned would stand her in better stead in the future than her immediate academic grades. The tribunal also considered the question of consistency in sanctions for this type of conduct and concluded that it is an important element of school discipline. It had been referred to another case where two fifteen year old learners had been expelled for bunking out. They too had left the fire escape door open. The tribunal found that the fact that these learners had been on public land as opposed to Catherine being on school grounds, was a very small ground of distinction and in addition, what Catherine did affected Matthew, and as an older learner she should have been more responsible.

Interim or final relief

It was submitted on behalf of the respondents that the relief sought was in substance and effect, final relief, in that such relief would amount to a final determination of rights. Reference was made to the case *BHT Water Treatment (Pty) Ltd v Leslie and Another* 1993 (1) SA 47 (WLD). The applicant in that case had applied for an interim interdict enforcing a restraint of trade agreement. In finding that final relief was in fact sought, Marais J said at 55E:

> "The Court should look at the substance rather than at the form. The substance is that an interdict is being sought which will run for the full unexpired time of the restraint. In substance therefore final relief is being sought although the form of the order is interim relief."

Applying this test to the present case, if the interim relief sought is granted, the

applicants will achieve in substance what they seek in final relief, namely a lesser sanction than expulsion. By the time the review application is finalised, even on the applicants' reckoning, the academic year will be almost over. In effect, Catherine will not have been expelled. Put another way, the order would be appealable because the sanction of expulsion would have been neutralised. I am therefore of the view that in substance final relief is sought, and the matter should be adjudicated accordingly.

Law applicable to the review

It was submitted on behalf of the applicants that the tribunal's decision could be reviewed on three possible bases. The first was by application of the law relating to common law reviews, as extended, so it was submitted, by the decision in *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid Afrika en Andere* 1976 (2) SA 1 (AD), that mere unreasonableness was a sufficient ground for interference. The second was by application of the common law as developed in terms of s 39 of the Constitution. The third was the application of the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

The respondents accepted that the decision was subject to review in terms of the common law.

Common law

The rules of natural justice apply. In *Turner v Jockey Club of South Africa* 1974

(3) SA 633 (AD) at 646F-H, the following was said (authorities omitted):

> "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. The tribunal is required to listen fairly to both sides and to observe "the principles of fair play". In addition to what may be described as the procedural requirements, the fundamental principles of justice require a domestic tribunal to discharge its duties honestly and impartially. They require also that the tribunal's finding on the facts on which its decision is to be based shall be "fair and *bona fide*". It is, in other words, "under an obligation to act honestly and in good faith"."

The judgment in *Theron* (*supra*) to the effect that mere unreasonableness was a sufficient ground for interference on review was a minority judgment of two judges, with which two other judges disagreed. I therefore cannot agree that *Theron* extended the grounds for review at common law. In *Batho Star Fishing (Pty) Ltd v Minister of Enviromental Affairs* 2004 (4) SA 490 (CC) at paragraph [43] O'Regan J said:

> "It is well known that the pre-constitutional jurisprudence failed to establish reasonableness or rationality as a free-standing ground of review. Simply put, unreasonableness was only considered to be a ground of review to the extent that it could be shown that a decision was so unreasonable as to lead to a conclusion that the official failed to apply his or her mind to the decision."

In the footnote to this statement she included a reference to the "minority judgment" in *Theron*.

Development of the common law

The argument relating to s 39 of the Constitution was to the same effect: namely

that the common law should be developed to include the requirement that a decision be reasonable. Reference was made to what was said by Levinsohn DJP in *National Horseracing Authority v Naidoo* 2010 (3) SA 182 (NPD) at 200 paragraph [11]:

> "In these circumstances it seems to me taking the cue from counsel's submission in the Turner case, supra, that it would not be inappropriate to introduce a further ingredient into the fundamental principles of justice concept and that is one of rationality. This would particularly be apposite in a complex case where a reviewing court would be in exactly the same position to assess the objective evidence in the case and would be able to conclude that the decision made is rational. In my opinion this would be a development of the common law which would be wholly in accordance with the values encompassed in the Bill of Rights."

That is as far as the judgment went on the development of the common law. Wallis J (as he then was) in a minority judgment expressed reservations about such a development of the common law, and posed various difficulties in the path of such a development. He did not however reach a definite conclusion on the point.

In the time available to me to prepare this judgment, and having considered the *dicta* of both Levinsohn DJP and Wallis J, I find I am unable to decide whether or not the common law should be so developed. However I shall assume, without deciding, that I may include rationality in the "fundamental principles of justice concept".

PAJA

In *Khan v Ansur NO and Others* [2009] JOL 23080 (D), the applicant sought to review the decision of a private school not to re-register him for a further academic year. One of the grounds of review was that the school had performed a public function and thus had infringed his right to procedurally fair administrative action in terms of s 3 of PAJA. Swain J dealt with this argument at paragraph [32] of the judgment:

> "As I understand the argument, the effect is to transform the nature and identity of a private school into that of a public institution whose officials, when exercising the power not to re-register the applicant, exercised a public power and performed a public function. The leap of logic inherent in such reasoning only has to be stated to be rejected. It is clear that there is a fundamental statutory distinction between a public school and an independent school in terms of the South African Schools Act No. 84 of 1996. The administrative control over an independent school by the executive branch of government, lies in the power to register and de-register such a school. The object is obviously the maintenance of educational standards in independent schools. There is however no control over the administrative decisions taken by officials of an independent school in the exercise of their functions. Such officials therefore do not exercise a public power, nor perform a public function, when doing so."

Similarly in *Klein v Dainfern College and Another* 2006 (3) SA 73 (TPD), Claassen J had to decide whether or not the provisions of PAJA applied to the decision of the chairperson of the disciplinary committee of a private school, finding the applicant guilty of misconduct and imposing the sanction of a written warning. In this case the applicant, a teacher, had concluded a contract with the school which incorporated its disciplinary code. At paragraph [30] Claassen J, after referring to the definitions of "administrative action" and "empowering provision" in s 1 of PAJA, concluded as follows:

> "An agreement is only relevant insofar as it permits of an 'administrative

> action', which as shown above, refers to actions by an organ of state or natural or juristic persons performing public functions. None of these apply to the present case as neither the first nor the second respondents performed any public function. I therefore conclude that the review cannot be based upon the provisions of PAJA."

I am not only in respectful agreement with the reasoning in both the *Khan* and *Klein* judgments, but am also of the view that it directly applies to the present case.

I would also refer to the judgment in *Calibre Clinical Consultants v National Bargaining Council for the Road Freight Industry* 2010 (5) SA 457 (SCA) where Nugent JA said at paragraphs [39], [40] and [41]:

> "[39] …….. I do not find it surprising that courts both abroad and in this country – including the Constitutional Court in *AAA Investments* – have almost always sought out features that are governmental in kind when interrogating whether conduct is subject to public-law review. Powers or functions that are 'public' in nature, in the ordinary meaning of the word, contemplate that they pertain 'to the people as a whole' or that they are exercised or performed 'on behalf of the community as a whole' (or at least a group or class of the public as a whole), which is pre-eminently the terrain of government.
>
> [40] It has been said before that there can be no single test of universal application to determine whether a power or function is of a public nature, and I agree. But the extent to which the power or function might or might not be 'governmental' in nature, even if it is not definitive, seems to me nonetheless to be a useful enquiry. It directs the enquiry to whether the exercise of the power or the performance of the function might properly be said to entail public accountability, and it seems to me that accountability to the public is what judicial review has always been about. It is about accountability to those with whom the functionary or body has no special relationship other than that they are adversely affected by its conduct, and the question in each case will be whether it can properly be said to be accountable, notwithstanding the absence of any such special relationship.
>
> [41] A bargaining council, like a trade union and an employers' association, is a voluntary association that is created by agreement to perform functions in the interests and for the benefit of its members. I have considerable difficulty

seeing how a bargaining council can be said to be publicly accountable for the procurement of services for a project that is implemented for the benefit of its members – whether it be a medical-aid scheme, or a training scheme, or a pension fund, or, in this case, its wellness programme."

In the present case, I have difficulty in seeing how DSG is publicly accountable for its decisions in disciplinary matters. The disciplinary code is there for the benefit of the school, the learners and the parents. Learners are not obliged to enroll at DSG and if they are expelled, they are not prevented from obtaining further education elsewhere.

I have also had regard to cases where the decisions of sporting bodies are considered to be subject to PAJA. (See *Daniels and Others v WP Rugby and Another* (15468/11) [2011] ZAWCHC 481 (4 November 2011), *Tifu Raiders Rugby Club v South African Rugby Union* [2006] (2) All SA 549 (C), as well as Wallis J's minority judgment in *National Horseracing Authority* (*supra*) (he assumed without deciding that PAJA applied).) In my view the scope and reach of such sporting bodies and the public interest their decisions attract, are very different from the position of DSG, which enrolls a relatively few numbers of learners and is responsible to them and their parents, and as already mentioned, does not deprive a learner of her education by expelling her.

I therefore conclude that PAJA is not of application to the present matter.

For the above reasons, the success or otherwise of a review of the decision of the tribunal falls to be considered against the principles of natural justice,

developed, as I have accepted without deciding, in accordance with s 39 of the Constitution, to include rationality as a ground for interference.

Before considering the requirements for a final interdict, I deal with the tribunal's refusal of the application to lead new evidence. This decision was criticised on a number of grounds. It was submitted that the interpretation of "new evidence" in the policy should be restricted to evidence which was not led at the initial hearing, whether it was available or not. I can only agree with the interpretation of the tribunal as contained in the reasons. One cannot consider the words "new evidence" in isolation. If one did so, it would render the requirement of an explanation of the nature of the evidence and why it was not previously led, meaningless. The tribunal was criticised for considering whether or not the evidence was material. Again, I agree with the tribunal's reasoning that the requirement of an explanation of the nature of the evidence indicates that the tribunal should be satisfied that the evidence is material. A different interpretation would render the requirement of an explanation of the nature of the evidence meaningless. It is also a logical interpretation. If the tribunal were not to consider the materiality of the evidence, it could result in a situation where the disciplinary hearing would be reconvened for no purposeful reason.

I do not think that the tribunal's reasons for dismissing the application to lead further evidence can be faulted. All the indications were that there was a deliberate and considered decision not to lead the evidence of Ms Mavro at the

hearing. The explanation for not leading the evidence at the hearing was therefore correctly found not to be sufficient. I also agree that Sue Brink's affidavit did not indicate the nature of the evidence sought to be led or how it would materially affect the sanction.

The report of Ms Mavro was not before the tribunal. Even if it had been, I do not think that it would have taken the matter further. In my view, the high point of Ms Mavro's report was at paragraph 6 where she said:

> "In my opinion, having regard to her history, once Catherine began to talk to her friend about her feelings, the need to continue the discussion was intense. This would have made her less able to think rationally and more vulnerable to making unsound decisions and to taking risks that she would not normally have taken. Most adolescents in Catherine's frame of mind would have felt the need to continue this discussion intensely."

When one considers this paragraph against the evidence of Catherine's apparently planned and rational behaviour, her awareness that what she was doing was wrong, her lies about where she was, and the deletion of the cellphone messages, I am of the view that the nature of such evidence was not material to the question of an appropriate sanction. Significantly, Ms Mavro said little about suicide. At paragraph 11 she said:

> "She also has no history of self-harming behaviour or suicidality, except for the one incident relating to the current matter."

Dr. Gainsford's letter related to the medication he had prescribed for Catherine

and did not relate to her condition at the time of the misconduct.

Matthew's sanction letter was admitted.

The applicants are required to demonstrate a clear right, namely that the decision of the tribunal will on the probabilities, be successfully reviewed. In my view, the prospects of success are poor. There is no question that the principles of natural justice, as referred to in *Turner* (*supra*), were not observed. At the disciplinary hearing and on appeal, the applicants had the opportunity to be heard, and both proceedings were conducted impartially, honestly and *bona fide*. The criticism of the ultimate sanction was really based on unreasonableness. In other words, the sanction was not rationally connected to the facts of the case, or the decision reached was such that a reasonable decision maker would not have reached.

It was submitted that the tribunal's decision was unreasonable because of the following:

It overemphasised the need for the sanction to be directed towards the development of character; it underemphasised the mitigating factors; in finding that Catherine acted deliberately and rationally it failed to appreciate that her behaviour could have been affected by her psychological condition; by overemphasising the educational context of the sanction; in finding that the sanction was necessary to teach Catherine responsibility for herself; in failing to

appreciate that a lesser sanction would teach her the same lesson; in not finding that the sanction needed to be adjusted because Catherine was in matric and failing to recognise that expulsion had a greater impact on her than on a younger learner; and in failing to balance the sanction against the importance of academic grades.

The criteria for determining whether or not a decision is rationally connected to the evidence have been set out in a number of cases. In the *Bato Star Fishing* case (*supra*) O'Regan J said at paragraph [45]:

> "What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."

In the *Calibre Clinical Consultants* case (*supra*) Nugent JA said at paragraph [59]:

> "On the second count – whether the decision was one that was so unreasonable that no reasonable person could have made it – there is considerable scope for two people acting reasonably to arrive at different decisions. I am not sure whether it is possible to devise a more exact test for whether a decision falls within the prohibited category than to ask, as Lord Cooke did in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* – cited with approval in *Bato Star Fishing (Pty) Ltd v Minister of Enviromental Affairs and Others* – whether in making the decision the functionally concerned has 'struck a balance fairly and reasonably open to him [or her]'."

The submissions made on behalf of the applicants and the decision of the tribunal fall to be considered in the light of these *dicta*.

It was apparent from the tribunal's reasons that it considered both the interests of Catherine and DSG, and the offence itself. It did not ignore the fact that Catherine was in her matric year, her emotional state, her contributions to the school or her unblemished record. It did not lose sight of the fact that she is a young person, and alluded to the fact that the members of the tribunal all have children of their own. Its conclusion that the sanction had to have an educational purpose was supported by its reference to the following provision in the discipline policy:

> "The Discipline Policy is to be read in conjunction with the DSG Mission statement school rules, policies and protocols, and the unwritten values and ethos of the DSG."

Clearly an educational purpose went beyond academic achievement, and included the development of character and the assumption of responsibility. The tribunal therefore considered the impact of the sanction on Catherine. It was also however obliged to consider the impact of a sanction on DSG and others to whom DSG owed an enormous responsibility.

It cannot be disputed that the offence was serious and warranted a sanction on the more severe end of the scale. Catherine put herself and other girls in danger

and betrayed the trust of DSG and her parents. The tribunal was correct to view these factors in a serious light, and to consider their broader implications. The tribunal did not overlook lesser sanctions and, as I understand the reasons, was of the view that they would not teach Catherine the lesson she had to learn, namely responsibility towards the community.

I do not think that it can be deduced from the tribunal's reasons that in the light of the second respondent's warnings expulsion was inevitable and that it closed its eyes to the particular circumstances of the offence and alternative sanctions. Nor do I think, as was submitted, that undue or disproportionate emphasis was put on the damage to the reputation to the school. The reasons disclose that all relevant factors were considered.

Even if another decision-maker might reasonably have imposed a lesser sanction after putting all the factors into the mix, this does not mean that the tribunal reached a decision which no reasonable decision-maker could have reached. In my view it "struck a balance fairly and reasonably".

It follows that the applicants have not demonstrated a clear right and it is not necessary to consider the other requirements of a final interdict. I would add, that even applying the less onerous test for interim relief, namely demonstrating a prima facie right although open to some doubt, the applicants would not succeed. In all the circumstances of the case, which were fully presented, the fair, impartial, honest and reasonable conduct of the tribunal, casts serious doubt

on the prospects of success on review.

Costs

The respondents requested the costs of two counsel. This judgment reveals the considerable number of aspects to the application which had to be decided in addition to the prospects of success on review. The employment of two counsel was in my view justified.

In the result, the application is dismissed with costs, such costs to include the costs of two counsel.

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J.M. ROBERSON
JUDGE OF THE HIGH COURT

Appearances

Applicants: Advocate M.J. Lowe SC, instructed by Borman & Botha,

Grahamstown.

Respondents: Advocate E.A.S. Ford SC, with Advocate D.H. de la Harpe, instructed by Rushmere Noach Inc, c/o Netteltons Attorneys, Grahamstown.