



**IN THE HIGH COURT OF THE KINGDOM OF ESWATINI**

**JUDGMENT**

**HELD AT MBABANE**

**Civil Case No. 1129/2018**

**MAMBA ZAMOKUHLE & OTHERS**

**APPLICANTS**

and

**THE REGISTRAR  
SOUTHERN AFRICA NAZARENE UNIVERSITY**

**RESPONDENT**

**Neutral citation:** *Mamba Zamokuhle & Others v The Registrar Southern Africa Nazarene University (1129/2018)* [2018] SZHC 196 (05 September 2018)

**CORAM**

**MASEKO J**

**FOR APPLICANTS: L.N. DLAMINI**

**FOR RESPONDENT: F. TENGBEH**

**DATE OF HEARING: 14 AUGUST 2018**

**DATE OF DELIVERY: 05 SEPTEMBER 2018**

**Preamble:** *Administrative law – Review – Decisions of the University – functionary – Audi Alteram partem principle applicable thereto – Right to a fair hearing – the right to a fair hearing implies the rights to be informed of facts and information which may be detrimental to the interests of the Applicants – Regulations of the University – The University is obliged to implement the Regulations as contained in 2017/2018 Calendar – Ad hoc Disciplinary Committee – Applicants ought to have been charged for Academic Malpractice and brought before an ad hoc disciplinary tribunal to answer to these allegations before their NUR 306 Results were nullified by the University who then ordered them to rewrite the examination without affording them the opportunity of a fair hearing.*

*Held: That the Applicants were denied a fair hearing in terms of the Regulations and natural justice and that the decision of the University is reviewed and set aside with costs.*

[1] On Thursday the 25<sup>th</sup> July 2018 the Applicant who is a student at the 2<sup>nd</sup> Respondent institution of Higher learning together with eighty-one (81) colleagues launched these motion proceedings on urgency seeking the following prayers:

1. Dispensing with the normal requirements set out in the Rules of the above Honourable Court relating to service of documents and time limits and that this matter be heard as one of urgency.

2. That a rule nisi do issue returnable on a date to be determined by the above Honourable Court, calling upon the Respondent to show cause why an order in the following terms should not be made final.
3. Compelling and directing the Respondent to issue NUR 306 results for Bachelor of Science in Nursing and Midwifery for level 3 of 2017/2018 forthwith.
4. Review and setting aside the memo dated 9<sup>th</sup> July 2018 and the attached decision for the rewriting of NUR 306 by the Applicants/students in BSN level 3.
5. Costs of this application.
6. Further and or alternative relief.

[2] The Respondent duly filed its Notice of Intention to Oppose the proceedings on the same day the 25<sup>th</sup> July 2018.

[3] The matter appeared before me on the 26<sup>th</sup> July 2018 and I ordered that the Respondent was to file its Answering papers by the 30<sup>th</sup> July 2018 and the Applicants to file their Replying papers by the 3<sup>rd</sup> August 2018. The Applicants were further ordered to file their Heads

and Bundle of Authorities by the 7<sup>th</sup> August 2018 and the Respondent to file theirs by the 8<sup>th</sup> August 2018. The matter was then postponed to the 10<sup>th</sup> August 2018 for hearing. Indeed both parties duly filed their respective pleadings, however, the matter did not proceed on the 10<sup>th</sup> August 2018 since the Book of Pleadings had to be attended to and the matter was eventually heard on the 14<sup>th</sup> August 2018.

- [4] Owing to the extreme urgency of the matter and having gone through the submissions by both Counsel, I granted prayers 1, 3 and 4 of the Notice of Motion and reserved prayer 5 on costs of this application to be delivered with the main judgment, and which I hereby now deliver.

#### **FACTS OF THE MATTER AS PER THE FOUNDING AFFIDAVIT**

- [5] It appears from the Founding Affidavit that the Applicants are all year 3 students in the Bachelor of Science in Nursing and Midwifery BSNM Level 3 at the Respondent institution. The lecturer in this course is referred as C.P. Mashwama and the moderator and or External Examiner is Professor N.A. Sukati. I must state that lecturer C.P. Mashwama has been the lecturer of this course and setting the final examination papers since 2014. I say since 2014 simply because of the papers filed in this matter not because she/he was employed by the Respondent in 2014.

- [6] On the other hand, according to the papers filed in this matter the Moderator and/or External Examiner Prof N.A. Sukati has been the Moderator since 2015, and again this does not mean that she was engaged by the Respondent in 2015.
- [7] During the second semester commencing in January 2018, the NUR 306 students were all provided with the Course Outline – Annexure C by the lecturer C.P. Mashwama. For ease of reference and due to its importance in these proceedings I will reproduce the course outline verbatim:
- [8] The Heading in the Course Outline appears as follows:

***‘SOUTHERN AFRICA UNIVERSITY***

***FUCULTY OF HEALTH SCIENCES***

***PARENT CHILD HEALTH II***

***NUR 306***

***LECTURER: C.P. MASHWAMA***

***PLACEMENT: YEAR 3, SEMESTER II***

***CREDIT HOURS: 5 HOURS***

***COURSE DESCRIPTION***

***This course is designed to provide the learner with advanced skills in managing children with chronic conditions and special needs. The learner will utilise various roles of a child health nurse to provide anticipatory and ongoing advisement and counselling to children and their families. Learners are placed***

*in selected community settings for clinical practice. The course is evaluated through continuous assessment and final examination. The ratio is 40% for continuous assessment and 60% final examination.*

#### **COURSE OBJECTIVES/LEARNING OUTCOMES**

*At the end of the course the learner will be able to:*

- 1. Discuss the scope and overview of chronic illness and disability in Swaziland.*
- 2. Analyse common chronic conditions and disabilities of the child.*
- 3. Discuss management of child and family at the end of life.*
- 4. Utilize advanced skills in health assessment and management of children with special needs.*

#### **TOPICAL OUTLINE**

*Unit 1 scope and overview of chronic conditions and disabilities*

- 1.1 Scope and overview.*
- 1.2 Impact of chronic illness on the child, parent, family and community.*
- 1.3 Services offering special care for children and families with special needs.*

*Unit 2 Common chronic conditions and disabilities*

*Child with disability*

*Terminally ill child*

*Paediatric neoplasm*

***The child undergoing surgery***

***Respiratory conditions***

***Oxygenation conditions***

***Cystic fibrosis***

***Respiratory failure***

***Pneumothorax***

***Chronic bronchitis***

***Blood Conditions***

***Hemophilia***

***Sickle cell trait/anaemia***

***Cardiovascular conditions***

***Congenital disorders***

***Myocarditis***

***Endocarditis***

***Fluid and Electrolyte Conditions***

***Burns***

***Nutritional conditions***

***Cleft lip and palate***

***Gastro-oesophageal reflux***

***Pyloric stenosis***

***Intussusception***

***Celiac disease***

***Enteritis***

***Hirschsprung's disease***

***Imperforated anus***

***Hepatitis***

***Cirrhosis***

***Hepatic coma***

***Fluid waste conditions***

***Nephritic syndrome***

***Renal insufficiency and failure (Acute and Chronic)***

***Test 27/02/2018***

***Safety and Security***

***Hydrocephalus***

***Congenital anomalies Myomeningocele***

***Diabetes mellitus***

***Brain abscess***

***Encephalitis***

***Rabies***

***Rye's syndrome***

***Minimal brain dysfunction***

***Seizures***

***Cushing syndrome***

***Cerebral palsy***

***Autism***

***Attention deficit syndrome***

***Sensory conditions***

***Blindness***

***Trachoma***

***Eye trauma***

***Hearing impairment***

***Communication disorders***

***Manier's disease***

***Activity conditions***

***Juvenile rheumatoid arthritis***

***Scoliosis***

***Congenital clubfoot***

***Legg-calve-perthes disease***

***Muscular dystrophy***

***Systemic lupus erythematosus***

***Sexuality conditions***

***Sexual abuse/rape***

***Vulvovaginitis***

***Precocious puberty***

***Hydrocele***

***Undescended testes***

***Hernias***



**Ferguson, D. 2008. Clinical assessment and monitoring in children (essential clinical skills for nurses) 1<sup>st</sup> ed. Wiley Blackwell.**

**Integrated Management of childhood illness (IMCI) strategy 2006**

**Pilitteri, A. 2007. Maternal and child health nursing: care of the child bearing and child rearing family. 6<sup>th</sup> ed. Philadelphia: Lippincott.**

**Prevention mother to childhood transmission PMTCT guidelines, 2006**

**Swaziland Paediatric HIV care 2006.'**

[9] I must state that the course outline is so comprehensive in that it provides extensive detail to the learner of the contents of the course NUR 306.

[10] I must state further that the Applicants were in possession of study material in the forms of the past examination papers dating back to 2014. The importance of the course outline and in particular the influence of the past examination papers on the 2018 NUR 306 Final Examination will be clearly demonstrated later in this judgment.

[11] It is common cause that during the second semester the Applicants were made to write two tests to attain the continuous assessment and this includes the test written on the 27<sup>th</sup> February 2018 and a copy thereof is attached to these proceedings and marked Annexure F.

Again it will be noted later how much impact Annexure F had on the final examination written on the 16<sup>th</sup> April 2018, a copy of that final examination paper is marked Annexure J. The continuous Assessment is provided for in the Course Outline Annexure B at page 21 of the Book of Pleadings.

### **THE FINAL EXAMINATION NUR 306**

[12] The Applicants sat for the final examination NUR 306 paper on the 16<sup>th</sup> April 2018. This paper is attached as Annexure J at page 62-72 of the Book. Its course name is Parent Child Health II, Course Code NUR 306, time allowed 3 hours, total marks 100, Examiner: C.P Mashwama and Moderator was Prof N.A. Sukati.

[13] The instructions of the bottom of this page are as follows:

***‘This paper consists of 11 printed pages numbers in brackets indicate marks for each question. Do not open this question paper until permission to do so has been granted by the Chief Invigilator.’***

[14] The Final Examination Paper, Annexure J, consist of two sections as follows:

***‘(i) Section 1 consists of twenty-five (25) multiple choice questions worth 25 marks.***

**(ii) Section 2 consists of Question 1, Question 2 and Question 2 respectively.**

- Question 1 consists of sub question A worth 10 marks, sub question B worth 5 marks, and sub question C worth 10 marks and the total marks being 25.**
- Question 2 consists of sub question A worth 15 marks and sub question B worth 10 marks, the total marks being 25.**
- Question 3 consists of sub question A worth 15 marks and sub question B worth 10 marks and the total being 25 marks**

[15] The summary total marks of the two sections is therefore as follows:

- Section 1 – Multiple choice questions = 25 marks.
- Section 2 – Question 1, 2 and 3 = 75 marks.

This makes the total marks for the final examination to be 100 marks as per Annexure J.

[16] It is common cause that the Applicants passed the final examination NUR 306 with higher marks and suddenly attracted the attention of the Moderator and or External Examiner Prof N.A. Sukati.

[17] The cumulative effect of these NUR 306 Final Results is that, on the 9<sup>th</sup> July 2018, the Registrar addressed a letter to the Applicants and copied same to the Dean Faculty of Health Sciences and Head of

Department, Bachelor of Science Nursing and Midwifery (BSNM). This memorandum is Annexure B hereto and is at page 17 of the Book. It is framed as follows:

**'FROM: REGISTRAR**  
**TO: BSNM LEVEL 3**  
**CC: DEAN FOHS**  
**HOD BSNM**  
**DATE: 9<sup>TH</sup> JULY 2018**  
**SUBJECT: REWRITING OF NUR 306 – BSNM LEVEL 3**

- 1. Students are kindly advised that the External Examiner noted an anomaly in the students' responses for NUR 306 final examination paper, which indicated academic malpractice.**
- 2. As much the BSNM 3 students will have to rewrite the NUR 306 paper.**
- 3. The Registry will advise of the date for re-writing this paper.**

**Thank you'**

[18] As a reaction to this memorandum (Annexure B) the Applicants responded on the 10<sup>th</sup> July 2018 through correspondence addressed to the Registrar. This correspondence is marked Annexure D and is found at page 20 of the Book. Its contents are as follows:

**'FROM: BSNM LEVEL 3**  
**TO: REGISTRAR**

**CC: DEAN FOHS**  
**HOD BSNM**  
**DEAN OF STUDENTS AFFAIRS**

**DATE: 10<sup>TH</sup> JULY 2018**

**RE: REWRITING OF NUR 306 BSNM LEVEL 3**

*This letter is in response to the memorandum dated 9<sup>th</sup> July 2018 that was addressed to BSNM 3 students stating that an anomaly that indicated malpractice was discovered on the NUR 306 paper.*

*Here is our response to that: we are not aware of any malpractice as a class or individually and as such we would like for the office of the Registrar to explain what exactly the anomaly is and how it indicates malpractice.*

*Secondly, the memorandum states that we have to rewrite the paper. The question is why should we? Was there any investigation carried out to prove malpractice? If yes, when and how was it carried out and where is the evidence that was discovered to conclude that there was malpractice? If not we would like the office of the Registrar to conduct a formal investigation on the matter, because unless there is proof of malpractice, **WE WILL NOT REWRITE THE PAPER.** To do so would be to admit guilt on a presumed action that we do not know of.*

*Due to the urgency of this matter and seeing as that the academic year is soon coming to an end we kindly ask the office of the Registrar to work quickly on this matter and to respond as early as 11<sup>th</sup> July 2018 (tomorrow) before the end of business hours.*

*We ask that the office of the Registrar work with us on this matter to prove or disprove any anomaly failing which we will be forced to seek external professional advice to assist on this matter.*

*Yours faithfully*

**MAMBA MPHUMELELO**

*(Signed)*

**NTJANGASE NOMPENDULO**

*(Signed)*

[19] The Registrar responded to the Applicants' correspondence on the 11<sup>th</sup> July 2018 in the following manner as appears at page 26 of the Book being Annexure E:

**'FROM: REGISTRAR**

**TO: BSNM LEVEL 3**

**CC: DEAN FOHS**

**HOD BSNM**

**DATE: 11<sup>TH</sup> JULY 2018**

**SUBJECT: SENATE RESOLUTION ON REWRITING PAPER NUR**

**306 BY THE BSNM YEAR 3 STUDENTS**

- 1. Reference is made to your memorandum dated 10<sup>th</sup> July 2018, in which you demand clarification on the contents of the memo issued by the Registry on 9<sup>th</sup> July 2018.**
- 2. You may be advised that Section 2 and Statutes VIII THE UNIVERSITY SENATE, the academic activities of the University shall be the responsibility of the University Senate Section G6 Confirmation of Results, Subsection 6.4 All grades must be confirmed by Senate before they are**

*official. "Subsection 6.5" Senate cannot alter any grades awarded by the Examination Board" It should be noted that Registrar's mandate is to report a Senate Resolution hence informed BSNM 3 on examination outcome of paper NUR 306 as approved by Senate.*

3. *Section G4, External Examiner 5.15 of the calendar states that the External Examiners shall have the right to review all work contributing to summative assessment including coursework, examination scripts, project reports and placement reports. "Section 5.15 read alongside Section G4 Examination Board 4.1 "the grades agreed by the External Examiner after any moderation will not be altered by the Examination Board".*
4. *Your attention is drawn to Regulation G15 Academic Malpractice – in the SANU calendar. Particular emphasis is drawn to Regulation G15.1, G15.2 and G15.4 in which the act of collusion is presented “---as an individual or group to gain a mark or grade to which they are not entitled---”*
5. *However, you are advised in accordance with Section G16 Misconduct in Formal Examinations 16.9 “A candidate who wishes to appeal against a penalty imposed by the Examination Board for misconduct in an examination shall do so in writing to the Senate within two (2) weeks of the Examination Board’s ruling. No further appeals are possible.*
6. *Whereas the right to seek external professional advice is acknowledged, you are advised to act in accordance with the academic appeal procedures. Section G17 Academic*

***Appeals should inform your actions in appealing the Examinations Board recommendation to Senate. This shall help have your appeal heard by the proper structures of the University.***

***Thank you'***

[20] Acting on the advice of the Registrar to lodge an appeal in compliance with Section G17, the Applicants lodged the Appeal to Senate on the 12<sup>th</sup> July 2018. The Appeal is herein marked Annexure L and is found at pages 74-75 of the Book and also at page 101 of the Book. For ease of reference it is framed as follows:

***'FROM: BSNM LEVEL 3***

***TO: SENATE***

***CC: DSA***

***DEAN FOHS***

***HOD BSNM***

***DATE: 12<sup>TH</sup> JULY 2018***

***SUBJECT: AN APPEAL TO THE SENATE RESOLUTION ON THE EXAMINATION BOARD RECOMMENDATION***

***This letter serves to appeal the Senate's resolution that the NUR 306 course was not completed by the BSNM 3 class.***

***We are failing as a class to understand why the Senate decided was incomplete when we completed all the course requirements which are; tests, examination and practical exam. In the course of these activities we completed the full hours required of us to***

*complete the course. We request that the Senate review its ruling on the matter.*

*We understand that the Senate made its decision based on the recommendations from the Examination Board. Unfortunately as a class, we are having difficulty understanding the conclusion drawn by the External Examiner saying there was malpractice during the NUR 306 paper mainly because of the following reasons:*

- *No proper investigation was done by the External Examiner to prove any malpractice or anomaly in our responses. On what grounds was the decision based on?*
- *The External Examiner failed to consult our continuous assessment to see how students have been progressing in the NUR 306 course. As per Section G5, External Examiner 5.15 of the University Calendar states that the External Examiners shall have the right to review all work contributing to the summative assessment including course, examination scripts, project reports and placement reports.*
- *The External Examiner is not aware of our academic capabilities thus we felt the decision made was unjust.*
- *As a student you are given a chance to score 100%, so thus there should be no penalty for reaching such grades. We fail to understand why passing should come with a punishment. Students were given enough time to prepare for their examinations.*
- *The NUR 306 Moderator failed to note that the NUR 306 examination paper was a repetition of previously written examination*

*and test papers. Please see attachment for evidence of the mentioned point.*

- *The Examiner said they noticed a similarity in the answers of our scripts. That is because we are using one prescribed book “HOCKENBERRY WILSON’S ESSENTIALS OF PEDIATRIC NURSING” from which the lecturer specifically told us she wants her answers from. We know from experience that should our answers be any different, even in presentation from that which is written in the book, no mark is given. Hence we would advise the Examiner to cross check those similarities with text from the book, because that is where we got our answers from.*
- *Section D2, 2.8 The Senate cannot overturn the recommendation of the Board of Examiners. Senate may, however, ask a Board of Examiners to review a case for just cause.*
- *Students fail to understand why they were not consulted pertaining the issue at hand before false accusations were made.*

*We would like to thank the Senate for accepting our request for appeal, we would appreciate if close attention will be given to this issue as this has a negative impact on our academic welfare.*

*Yours sincerely*

**BSNM LEVEL 3**

*Signed by Sakhile N. Dlamini and Siphesihle Gina.’*

[21] It appears that the Appeal by the Applicants was urgently actioned by the Respondent because on the 20<sup>th</sup> July 2018 the Registrar

addressed a memorandum to the Applicants. The memorandum is Annexure M and appears at page 76-77 of the Book. It reads as follows:

**‘SUBJECT: SENATE RESOLUTION ON REWRITING PAPER  
NUR 306 BY THE BSNM YEAR 3 STUDENTS**

- 1. On its meeting 19<sup>th</sup> July 2018, the University Senate reviewed the BSNM year 3 letter of appeal dated the 13<sup>th</sup> July 2018. The appeal was received by the Registrar on the 16<sup>th</sup> July 2018, appealing against the Incomplete “1” result for NUR 306 Course.**
- 2. Senate upheld the initial Incomplete “1” result for NUR 306 on the strength of the External Examiner’s academic sound judgment and lack of substantial evidence to substantiate why the Incomplete “1” result should be set aside.**
- 3. The letter of appeal failed to meet the legitimate grounds for appeal as stated in the University calendar at paragraph G17.3.**
- 4. Senate noted that the appeal by BSNM year 3 questioned the academic judgment of the External Examiner, contrary to regulation G17.4. This is informed by paragraph 3 of the appeal which reads “we are having difficulty understanding the conclusion drawn by the external examiner in saying there was a malpractice ---” and bullet 1, 2, 3 and 5, in which 3 states that “the External Examiner is not**

*aware of our academic abilities thus we feel the decision was unjust.*

5. *BSNM year 3 is to proceed and adhere to the earlier Senate resolution to award an Incomplete “1” result for NUR 306 and you are to rewrite the examination on this course.*

*Thank you’*

[22] I must state that the other documents attached to the Founding Affidavit are the following:

- ‘Annexure F - 27<sup>th</sup> February 2018 NUR 306 Test 1 - Lecturer CP Mashwama.*
- Annexure G - May 2014 Final Examination NUR 306 – Lecturer CP Mashwama.*
- Annexure H - May 2015 Final Examination NUR 306 – Lecturer CP Mashwama – Moderator Prof N.A. Sukati.*
- Annexure I - 27<sup>th</sup> April 2017 Examination NUR 306 – Lecturer CP Mashwama – Moderator Prof N.A. Sukati.*
- Annexure J - 16<sup>th</sup> April 2018 Final Examination NUR 306 – Lecturer CP Mashwama – Moderator Prof N.A. Sukati.’*

[23] There is also Annexure K at page 73 of the Book which is a schedule prepared by the Applicants to demonstrate that from 2014-2018 almost the same questions were set by the Lecturer CP Mashwama during the tenure of Moderator and/or External Examiner Prof N.A. Sukati.

**THE ANSWERING AFFIDAVIT** (page 80 – Book)

[24] The Respondent's Answering Affidavit was deposed to by Mr Stanley Ngqwane, the Registrar of the Respondent. I must state that no points in *limine* were raised by the Respondents and the matter was therefore argued on those basis.

[25] Mr Ngqwane states that the Respondent is a University and mandated by its statutes to always act in accordance with the principles of academic freedom and to always ensure that high quality academic standards are maintained. He states further that to this end, it is imperative to that the Respondent acts decisively to ensure that any suspected form of academic malpractice is detected and rooted out. Further that during examination periods this task is duly performed by an independent External Examiner acting together with the University's Examination Board.

[26] At paragraph 3.2-3.3 pages 81-82 of the Book the Registrar deposes as follows:

**“3.1 I state that for the purposes of ensuring that the highest standards of academic integrity are not jeopardized, the decision of the Examination Board which emanates from its assessment and review of examinations is final and even binding on the University Senate which has no power to alter any such decision.”**

**“3.2 I state in this present matter at hand, the External Examiner in the course of reviewing the examination in question came across a very glaring anomaly with regards to the students answers in this specific examination paper, which from her vast experience in the field of education led to the suspicion that the students had access to the examination paper and its marking guide before they wrote the paper. I attach hereto the External Examiner’s report in respect of her observations marked Annexure SANU 1”** (found at page 91 of the Book)

[27] It is imperative that at this stage that I deal with Annexure SANU 1 and SANU 2 because these two deal with the source of these proceedings and will provide a clear timeline of the events leading to the institution of these proceedings.

**ANNEXURE SANU 1 EXTERNAL EXAMINER’S REPORT PAGE 91 – BOOK**

[28] On the 10<sup>th</sup> June 2018, Prof N.A. Sukati, the External Examiner and Moderator of NUR 306 Course wrote correspondence making comments about the Final Examination paper NUR 306. For ease of reference, the correspondence reads thus:

**‘EXTERNAL EXAMINER’S COMMENTS ON NUR 306 – SANU**

- 1. I moderated about 25% of the almost 90 marked scripts.**
- 2. An observation made was that all the candidates, even those not moderated, passed the examination with unusually high marks, including those who had continuous assessment grades way below 20.**
- 3. What was further surprising was that the candidates gave responses that were almost verbatim to the marking guide and in almost the same sequence with the marking guide. This created an impression in me that the candidates, most likely had an access to the examination paper and its marking guide before they wrote the paper.**
- 4. In view of this observation, I suggest that the Faculty of Health Sciences’ Nursing Department conduct an investigation of what transpired among the candidates before writing this examination in relation to this paper. It is unusual that candidates pass an examination with such high marks, with the lowest being a B grade and almost 90% of them obtaining A and with responses that are almost a copy of the marking guide.**

**PROF N.A. SUKATI (signed)**

**EXTERNAL EXAMINER**

**JUNE 10, 2018’**

[29] It appears that on the 19<sup>th</sup> June 2018 there was a meeting of the Faculty of Health Sciences Examination Board wherein Prof N.A. Sukati was present. The minutes of this meeting were duly recorded and are filed in these proceedings as Annexure SANU 2 found at page

91-96 of the Book. Amongst those in attendance was CP Mashwama the lecturer/Examiner of NUR 306.

[30] At page 92 of the Book, Prof N.A. Sukati made comments and observations. For ease of reference I will only refer to her observations and discussion relevant to NUR 306 final examination paper and extract same verbatim:

- ***‘She first thanked the University for entrusting her to be one of the external moderators.***
- ***According to her observations, examiners have greatly improved in setting and grading examination papers.***
- ***In conclusion, she suggested that the University should improve the handling of examination papers in order to prevent any leakages of examination papers.’***

[31] I must state that both Prof N.A. Sukati and Examiner C.P. Mashwama made the following observations and recommendations as regards the marks obtained by the Applicants in the final examination of NUR 306. The discussion and recommendations are quoted verbatim from the Examination Board minutes as per pages 92-93 of the Book –

- ***‘Both examiner and moderator noted that the paper NUR 306 seems to have leaked as evidenced by about 75% of students getting extremely high marks and responses were similar to the marker guide. It was recommended that each time an external moderator suspects that a paper has somehow leaked to students, the results of that paper should be nullified. The examiner should set***

**another paper (special examination). Hence, in this meeting it was recommended by the moderator that students should write a special examination of NUR 306 and Examination Board resolved that the paper should be set and written during supplementary time.**

- **It was also observed that students did not perform well in the compensatable courses. It was concluded that the regulation for compensation and referral should be revisited as it allows students who would have otherwise, gotten a Fail and Repeat grade in a course to be referred for example. It was resolved that the matter is to be reviewed through the curriculum committee.'**

[32] It is worth mentioning that the Registrar in his Answering Affidavit at paragraphs 11 page 85 of the Book denies emphatically that the NUR 306 final examination written by the Applicants in April 2018 had the same questions set in the academic year of study 2014, 2015, 2017 and the 2018 Test 1 paper that the 16<sup>th</sup> April 2018 examination paper was a verbatim reproduction of past papers. I will deal with this contention by the Respondent when analysing the 16<sup>th</sup> April 2018 Final Examination *vis-à-vis* the past final examination and test papers dating back to 2014 as annexed in these proceedings.

[33] The Registrar further states that the Senate is the sole custodian of academic activities and has dully made its decision and that the Applicant is legally bound to abide by the decision as a student of the Respondent. The Respondent denies further that its action were

unconstitutional or a violation of the rules of natural justice as this is purely an academic matter exercised by the Respondent and thus no unlawful and or wrongful conduct may be imputed on the Respondent.

### **ANNALYSIS OF THE EVIDENCE – THE EXAMINATION PAPERS**

[34] In order to fully understand the Applicant's contention that the final examination NUR 306 written on the 16<sup>th</sup> April 2018 contained questions from past papers verbatim and dating back to 2014 one needs to conduct the task of making the comparisons.

[35] I have decided that the control sample should be 16<sup>th</sup> April 2018 herein marked Annexure J compared against the other papers going back to 2014.

[36] For ease of reference and for the proper sequence of the events I start by analysing the 16<sup>th</sup> April 2018 Final Examination NUR 306 Annexure J against the 27<sup>th</sup> February 2018 Test 1 Annexure F for the semester that commenced in January 2018.

1. 16<sup>th</sup> April 2018 Final Examination Annexure J at page 62 of the Book compared with 27<sup>th</sup> February 2018 test 1 Annexure F at page 28 of the.

**ANNEXURE J**

**ANNEXURE F**

(i)	Question 3	is posed verbatim as question	8
(ii)	Question 4	is posed verbatim as question	9
(iii)	Question 5	is posed verbatim as question	10
(iv)	Question 15	is posed verbatim as question	20
(v)	Question 17	is posed verbatim as question	2
(vi)	Question 18	is posed verbatim as question	1
(vii)	Question 20	is posed verbatim as question	4
(viii)	Question 22	is posed verbatim as question	13
(ix)	Question 23	is posed verbatim as question	11
(x)	Question 24	is posed verbatim as question	12
(xi)	Question 25	is posed verbatim as question	14

[37] I must state therefore that of the twenty-five 25 multiple choice questions written in the final examination NUR 306 on the 16<sup>th</sup> April 2018, eleven (11) multiple choice questions as seen in the schedule above were contained verbatim in the NUR 306 Test 1 for the semester written by the Applicants on the 27<sup>th</sup> February 2018. Not only was

the wording of the 11 questions verbatim even the sequence of the answers was exactly the same sequence as contained in Test 1 written on the 27<sup>th</sup> February 2018 Annexure F.

[38] I must point out that a student who wrote the test on the 27<sup>th</sup> February 2018 and studied that paper before the final exam written on the 16<sup>th</sup> April 2018 had no difficulty at all in answering those multiple choice questions. The question becomes, why did the Examiner CP Mashwama repeat 11 same questions and answers in the Final Examination of NUR 306 on the 16<sup>th</sup> April 2018 when those same questions had been in the 27<sup>th</sup> February 2018 Test 1 hardly a month and a half apart? And secondly why did the External Examiner Prof N. Sukati approve such repetition. It must be noted that the 27<sup>th</sup> February 2018 Test 1 Annexure F contained only twenty (20) multiple choice questions and more than half of those, in fact eleven (11) of those questions and answers were transferred verbatim into the 16<sup>th</sup> April 2018 NUR 306 Final Examination which had twenty-five (25) multiple choice questions.

[39] Owing to the above calculations it means the Applicants were only left with fourteen (14) fresh questions. This is a comparison of Annexure J at page 62 of the Book and Annexure G found at page 35 of the Book –

**ANNEXURE J****ANNEXURE G**

(i)	Question 8	is posed verbatim as Question	9
(ii)	Question 11	is posed verbatim as Question	10
(iii)	Question 15	is posed verbatim as Question	14
(iv)	Question 17	is posed verbatim as Question	7
(v)	Question 20	is posed verbatim as Question	8
(vi)	Question 22	is posed verbatim as Question	3
(vii)	Question 23	is posed verbatim as Question	1
(viii)	Question 24	is posed verbatim as Question	2

[40] I must state again that Annexure J being the NUR 306 course Final Examination paper written on the 16<sup>th</sup> April 2018 has eight (8) multiple choice same questions and answers with Annexure G being the NUR 306 course Final Examination written by NUR 306 students in May 2014. The Examiner again was CP Mashwama.

[41] Herewith is a comparison for Annexure J with Annexure H being the Final Examination NUR 306 course written in May 2015 found at page 45 of the Book.

**ANNEXURE J****ANNEXURE H**

- (i) Section II – Question 1 (A) in Annexure J page 69 of the Book same with Annexure H page 51 of the Book.

- (ii) Section II – Question 1 (B) page 70 of the Book same with Annexure H page 52 of the Book.
- (iii) Section II – Question 2 (B) in Annexure J page 71 of the Book same with Annexure H page 53 of the Book.

[42] These same questions and answers which carry 75 marks per paper were simply transferred from the May 2015 Final Examination NUR 306 course to the 16<sup>th</sup> April 2018 Final Examination NUR 306 written by the Applicants in verbatim form. It must be noted that I only examined the past papers Annexures F, G, H, I and J. The other past examination and test papers mentioned in Annexure K at page 73 were not filed before court. But if what they say is true, then the situation is even more complicated for the Respondent.

[43] On what basis then can the Applicants be blamed and let alone be accused of academic malpractice if this is the state of affairs where there is a **“cut and paste”** of questions from previous final examinations into this 16<sup>th</sup> April 2018 final examination. It must be borne in mind that the Applicants were not involved in setting these NUR 306 Final Examinations – 16<sup>th</sup> April 2018 questions but it was the Examiner and Lecturer CP Mashwama working in collaboration with the Moderator/External Examiner Prof N. Sukati.

[44] I must highlight further that the comparisons that I have found in these examination papers that I have examined are all **“cut and paste”** word for word i.e. verbatim, otherwise as a lay person in the medical profession, there is a high possibility that there are more questions which require the same answer but maybe a different medical term was used in posing the question which otherwise is familiar and or known by the medical students and thus easy for such questions to be answered. For example in the legal profession, there is the Opposing Affidavit which is also referred to as the Answering Affidavit, these two are one and the same, but for a lay person in law, it appears to be two different affidavits.

[45] I have dealt with the past examination papers and all in comparison to Annexure J being the NUR 306 Final Examination written on the 16<sup>th</sup> April 2018 being the subject matter of these proceedings. Before I deal with the bulky Southern Africa Nazarene University Calendar for Academic year 2017/2018, I must highlight the timeline of events in *casu* to try and put all the issues in perspective. The timeline is very crucial because it determines and points out the history of the events in *casu*.

### **THE TIME LINE**

1. The NUR 306 Final Examination was set by the lecturer and Examiner CP Mashwama – this court is not aware when he/she

did that but this court is aware that Prof N. Sukati was the Moderator and or External Examiner.

2. The NUR 306 Final Examination was written by the Applicant on the 16<sup>th</sup> April 2018.
3. The NUR 306 Final Examination scripts were marked by the Examiner and Lecturer CP Mashwama. This court is not aware as to when he/she did the marking and finish same before the Moderator and External Examiner Prof Sukati became aware of these results.
4. However it is important to point out that on the 10<sup>th</sup> June 2018 Prof N.A. Sukati prepared and submitted her report as External Examiner and Moderator as regards her attitude towards the Results of the NUR 306 Course. This report is Annexure SANU 1 that I have included in this judgment verbatim and where at paragraph 4 of the Report she suggests that an investigation be conducted to unearth what caused the Applicants to pass the paper with high marks.

I will deal with the issue of non-filing of Confirmatory Affidavits by C.P. Mashwama, Prof N.A. Sukati and the invigilators for that matter later in this judgment.

5. Whether the investigation was carried out or not remains a mystery as no evidence of such was ever placed before court by the Registrar and the Examiner and External Examiner. The marked scripts of NUR 306 written by the Applicants on the 16<sup>th</sup> April 2018 were themselves not placed before Court to verify the correctness of their allegations.
6. On the 19<sup>th</sup> June 2018, the Examination Board held its meeting as per Annexure SANU 2 at page 91 of the Book.
7. On the 9<sup>th</sup> July 2018, the Registrar wrote to the Applicants that they had to rewrite NUR 306 Final Examination because of the suspected academic malpractice.
  - (i) It must be noted that the External Examiner Prof N.A. Sukati filed her Report on the 10<sup>th</sup> June 2018 and recommended an investigation. On the other hand the Applicants were only made aware of nullification of their results only on the 9<sup>th</sup> July 2018, almost a month after the Examination Report. This delay is unreasonable and unfair on the Applicants.

- (ii) It appears nothing was done in terms of investigating this alleged academic malpractice because a Report would surely have been filed in the Answering Affidavit of the Registrar, stating the findings of the investigation of same was conducted per the recommendation of Prof Sukati.
  
- (iii) All that the Registrar says in his Answering Affidavit on paragraph 3.2 page 82 of the Book is that the External Examiner discovered the alleged academic malpractice when she was reviewing the examination in question and came across a very glaring anomaly with regards to the student answers, which from her various experience in the field of education led to suspicion that the students had access to the examination paper and its marking guide before they wrote the paper.
  
- (iv) These are very serious allegations because it means that students obtained the NUR 306 Final Examinations Paper and the marker's guide before the 16<sup>th</sup> April 2018. Further that the students then shared the exam paper and the marker's guide amongst all 83 or so of them. This is why the External Examiner ordered or recommended an investigation on the 10<sup>th</sup> June 2018, and which unfortunately was never conducted to

establish the merits of the allegations of academic malpractice levelled against Applicants.

7. It appears therefore that the students only became aware of this state of affairs surrounding the final results of NUR 306 a month after the External Examiner became aware. In fact there is no information placed before this court that the anomaly was noted by the Examiner CP Mashwama because by the look of things, common sense dictates that he/she should have been the one to raise the alarm first, but no, it's the External Examiner who has at all material times for the past three academic years been the Moderator and External Examiner responsible for these NUR 306 Exams, where so many questions have been "cut and pasted" from one academic year final examinations and semester tests to the following academic year final examinations.
  
8. The unilateral decision of the Respondent to nullify these NUR 306 results led to the Applicants addressing correspondence to the Respondent trying to make sense out of it, and which was not successful as the Respondent insisted on the rewriting of the NUR 306 exam during the supplementary period.

9. In their quest to get to the bottom of the matter the Applicant's through various correspondence referred to supra were at all material times requesting for an investigation and explaining that the examination in issue was wholly based on past examination papers which they obtained legitimately together with the detailed Course Outline (Annexure C) and a certain textbook which the lecturer CP Mashwama always insisted and instructed that they use.
  
10. There was no formal investigation conducted to establish the alleged academic malpractice allegedly committed by he Applicants either individually or jointly and in the furtherance of a common purpose in allegedly obtaining the NUR 306 final paper and Marker's guide before the 16<sup>th</sup> April 2018. All that the Respondent had was a suspicion based on the high marks by the External Examiner.

[46] Academic malpractice is dealt with by REGULATIONS G15 and G16 of the 2017/2018 SANU Calendar. It is found at page 15 of the Regulations which were furnished by Counsel for Respondent Mr F. Tengbeh and for which this court is truly indebted.

#### **REGULATION G15 – ACADEMIC MALPRACTICE**

## **REGULATION G16 – MISCONDUCT IN FORMAL EXAMINATION**

[47] I must state that these regulations dealing with academic malpractice are very comprehensive and actually characterise such malpractice as Misconduct in Formal Examinations and this is dealt with by Regulation G16 under the heading **MISCONDUCT IN FORMAL EXAMINATIONS**. This basically means that these two Regulations (G15 and G16) are to be dealt together because they compliment each other.

[48] **REGULATION G15 ACADEMIC MALPRACTICE** provides as follows:

**G15.1** *Academic malpractice is any activity – intentional or otherwise – that undermines the integrity of the learning and assessment processes. It included plagiarism, collusion, fabrication or falsification of results, and anything else that could result in unearned or undeserved credit for those committing it.*

**G15.2** *Academic malpractice can result from a deliberate act of cheating or may be committed unintentionally.*

**G15.3** *Plagiarism is the presentation, intentionally or unwittingly, of the ideas, work or works of other people without clear and unambiguous acknowledgment. It included the copying of the work of any other person, including another student, and the submission, in whole or in part, of a student’s own work (self-plagiarism) where, for*

*example, such work may have been previously submitted for a different assessment.*

**G15.4**      *Collusion is when a student or students collaborate with another student or students, as an individual or group to gain a mark or grade to which they are not entitled. Students who allow another student to copy their work are also committing collusion and both the copier and the provider of the work are liable to be penalised.*

**G15.5**      *Fabrication or falsification of data or results by individual students or groups of students is the presentation or inclusion in a piece of work of figures or data which have been made up or altered and which have no basis in verifiable sources.*

**G15.6**      *Cases of Academic Malpractice shall be adjudicated according to the Policy on Academic Malpractice approved by Senate and amended from time to time.*

**G15.7**      *Regulations concerning misconduct in formal examinations are set out below.'*

## **REGULATION G16 MISCONDUCT IN FORMAL EXAMINATIONS**

[49] **G16.1**      *provides that the University sets high priority on the integrity of all its assessment procedures, including formal examinations.*

**G16.2**      ***The following misconduct in examinations, if proven (my underlining and emphasis), shall result in a grade of F on the Examination paper.***

- 1. Taking into the examination room or possession whilst in that room, any books, notes, duffle bags, cellular phones, briefcases, handbags, calculator covers or other material, which has not been authorised.***
- 2. The use of any answer book, writing or blotting paper other than that supplied. Aiding or attempting to aid, soliciting or attempting to solicit aid from another candidate directly or indirectly.***
- 3. Writing information or possession of written information, regardless of relevance, on any part of a candidate directly or indirectly.***

**G16.3**      ***The following misconduct in examination, if proven my emphasis) shall result in a grade F on the Examination Paper and suspension from the University for one academic year.***

- 1. Such behaviour as may be in the view of the invigilator prejudice the performance of other candidates.***
- 2. Destroying or swallowing any foreign material that might constitute evidence of academic misconduct.***
- 3. Impersonating another candidate or allowing one to be impersonated.***
- 4. Any other misconduct deemed to be very serious by the Examination Board.***

**G16.4**      ***provides that failure to follow the instructions of the invigilator may result in a verbal warning or expulsion from the examination room.***

[50] I must state that the operative and instructive phrase in Regulation G16.2 and G16.3 is **“if proven”**. This means that for every suspected case or allegation of academic malpractice resulting in misconduct in a formal examination, it must be proven against that individual or group of students as the case may be. **In casu there was no proven case against the Applicants, in fact all of them.** (My underlining and emphasis)

[51] The following Regulation G16.5 deals with the mechanisms or procedures to be followed by the University in the case of an alleged misconduct in an examination:

***‘G16.5 In all cases of alleged misconduct in an examination, the University will proceed as follows:***

- 1. The Chief Examinations Officer or his/her alternate shall, in the presence of another invigilator, verbally inform the candidates that he/she has committed an act of misconduct. A written report shall be produced within the next working day by the Chief Invigilator on any case of misconduct in all the examinations and sent to the Dean of Faculty with a copy to the Pro Vice Chancellor – Academics and Registrar.’***

In *casu* there was never compliance with this regulation simply because the Applicants were never caught committing any act of misconduct.

- ‘2. Upon receipt of a written report from the Chief Examinations Officer, the Dean shall inform the candidates in writing that his/her conduct shall be reported and that the decision as to whether his/her conduct shall be reported and that the decision as to whether his/her work shall accepted rests with the Examination Board. The Dean will inform the Department of the student concerned, through the Head of Department.’**

In *casu* none of the Applicants were caught committing any act of misconduct and subjected to this regulation.

- ‘3. The Dean and the Head of Department shall establish an ad hoc disciplinary committee chaired by the Head of Department and including two senior members of academic staff to adjudicate in the case and made recommendations to the Examination Board’**

(My underlining and emphasis)

- ‘4. A candidate who has committed an alleged act of misconduct shall be invited to submit a written report of his/her side of the case to the Dean within two (2) working days of the letter being sent to the Dean. Such a report shall be taken to the respective Department, through the Head of Department for consideration by the ad hoc disciplinary committee.’** (My underlining and emphasis)

In *casu* there was no ad hoc disciplinary committee ever established to be chaired by the Head of Department and comprising two senior

members of the academic staff to adjudicate in the case and make recommendations to the Examination Board.

[52] I must emphasize that this fundamental regulation was violated by the Respondent resulting in the Applicants being denied the right to present their side of the story through adjudication and or due process. This resulted in a bare denial of justice. All that the Respondents acted on to nullify the NUR 306 Final Results was the suspicion by the External Examiner Prof N.A. Sukati. This was a gross violation of this regulation promulgated by the Respondent Senate to address or adjudicate on allegations of misconduct levelled against students (in this case the applicants) in a fair, neat and just manner, and in compliance with the recognised standards of administrative justice expected of administrative institutions like the Respondent. Prof N.A. Sukati and Lecturer C.P. Mashwama made the recommendation to the Examination Board on the 19<sup>th</sup> June 2018 see Annexure SANU 2 at page 92

[53] In *casu* the Applicants were never invited to submit any written report as per Regulation G16.4 for the ultimate consideration of the ad hoc disciplinary committee. In fact no such ad hoc disciplinary committee was ever set up to deal with this case. In fact what happened on the 11<sup>th</sup> July 2018 was that the Registrar per Annexure E (pages 26-27 of the Book) advised the Applicants to file an appeal against the

unilateral decision of the Respondent to nullify the NUR 306 Final Results and ordering that the said Final Examination be rewritten by the Applicants.

[54] The Applicants out of desperation appealed to the Senate on the 13<sup>th</sup> July 2018 per Annexure L (pages 74-75 – Book) and such appeal was dismissed by the Respondent Senate on the 20<sup>th</sup> July 2018. I must state that it is this appeal which the Registrar deposes to in his Answering Affidavit and alleging that the Applicants were given a fair hearing as per paragraph 19.1 (page 88 – Book), wherein he states:-

***‘19.1 I state that the Respondent did give students a right to be heard, hence their lodging of an appeal which put forth their “side of the story”. The appeal was duly heard and dismissed.***

***19.2 The Respondent denies that its decision on a purely academic matter is in any way unconstitutional or violation of the rules of natural justice. The First Applicant is ill-advised and is misapplying very elementary principles of law.’***

[55] As stated above the Respondents violated the basic rules of natural justice. They never established the ad hoc disciplinary committee to adjudicate on the allegations of academic malpractice resulting in misconduct. One wonders what the intention was on the part of the Registrar to invite the Applicants to lodge an appeal when there was no hearing in the first place wherein they were found guilty of academic malpractice, instead there was flagrant disregard of the

disciplinary procedures by the Respondent in not complying with Regulation G16.5.5 which provides as follows:

**‘5. The ad hoc disciplinary committee shall review the evidence and make an appropriate recommendation to the Examination Board for its final decision.’**

[56] I state again that the Respondent’s Examination Board acted on the External Examiner and Moderator Prof N.A. Sukati to nullify the NUR 306 Final Results and order same to be rewritten without the matter having been heard by the ad hoc disciplinary committee, and without the Applicants being afforded the opportunity to present their defence more particularly because of the adverse unilateral decision of the Respondent in nullifying the results and ordering the Applicants to rewrite the NUR 306 final examination.

[57] In fact I must point out that the External Examiner Prof Sukati together with the Examiner CP Mashwama are members of the Examination Board as per Annexure SANU 2 (page 91 – Book) and thus it defeats logic why the Examination Board made a recommendation to itself and thereby conflicting their interest in the matter. Further the Examination Board itself violated Regulation 16.5 (5) because it is only empowered to act on the recommendation of the ad hoc disciplinary committee and not on its own recommendations, as it were, in this case. Independent people ought to have been

engaged to deal with the investigation in a transparent, fair and just manner.

[58] In *casu* the Examination Board also acted as the ad hoc disciplinary committee. With the greatest of respect this resulted in extreme conflict of interest and violation of the rules natural justice in that the Applicants were never afforded the opportunity to present their side of the story and the Examination Board also acted as a judge in its own cause. The situation is unfortunate and resulted in grave injustice and was as such grossly unreasonable and unfair.

[59] I must state that the regulations dealing with misconduct are very extensive and transparent. There is no explanation forthcoming from the Respondent why there was no transparency and compliance with the Regulations in dealing with these serious allegations of academic malpractice levelled against the Applicants. The Respondent was duty bound to comply with Regulation G16.6 to G16.8 which provided as follows:

16.6 The University reserves the right to investigate the source of, and take appropriate action on, any unauthorised material on a candidate's seat, desk or immediate vicinity thereof during the examination, and after the candidate has left the examination

16.7 The University reserves the right to install surveillance cameras and recording equipment in examination centres. In cases of alleged misconduct, information recorded by such equipment may be used as evidence in support of the invigilator's report.

[60] In *casu* there is no invigilator's report filed before this court which may have shed some light on the serious allegations levelled against the Applicants. I say this because in any examination situation there is an invigilator who is basically the first port of call as it were. He/she is the one who supervises the writing of the paper from start to finish. Any anomaly is sure to catch the attention of the invigilator or invigilators. The Applicants are over eighty (80) in number and any unusual action involving such a large group would surely have attracted their attention (invigilators). In the absence of any evidence proving any wrong doing or misconduct on the part of the Applicants **in compliance with Regulations 16.2 and 16.3 which dictate that such allegations shall be proven creates a great difficulty for the Respondent to sustain its defence.**

[61] Regulation 16.8 provides as follows:

16.8 **A proven charge of academic misconduct** shall remain on a student's file in the Registrar's office for one year, or until the student graduates, whichever is longer.

Again the mandatory instructive burden of proof standard – ***“a proven charge of academic misconduct”*** is used in this regulation.

I have no doubt in my mind that the sole intention of formulating these regulations in the manner in which they were formulated was basically to ensure transparency and accountability in the conduct of administrative justice to avoid acts of maladministration and the denial of a fair trial to those suspected of having committed acts of academic misconduct..

[62] For ease of reference I hereby refer to the Respondent's 2017/2018 Calendar at page 47 which is headed as General Administrative Regulations. Regulation C1 provides for the Statement of Commitment as follows:

- a. When students sign their University registration forms, they subject themselves to the rules and regulations of the University.
  
- b. All staff members share the responsibility of ensuring that students comply with these rules and regulations of the University.

- c. Formal disciplinary measures may be implemented by the Vice Chancellor in accordance with SANU statutes (statute 26), the Student Disciplinary Committee SRC Constitution and other disciplinary bodies, **in accordance with the procedure prescribed**. (My underlining and emphasis)

[63] In *casu*, notwithstanding the serious allegations of academic malpractice levelled against the Applicants, no formal disciplinary measures were ever instituted against them, again the said regulations were violated by the Respondent.

- d. A student commits a transgression if he/she transgresses any of these regulations, any university rule or any transgression as defined in the Common Law of the country.

[64] I must state that after the Registrar's memorandum of the 9<sup>th</sup> July 2018 Annexure A found at page 17 of the Book, the Applicants indicated willingness to subject themselves to the University procedures including suggesting in writing that an investigation be conducted to establish whether the allegations of academic malpractice levelled against them had any substance. Despite

numerous suggestions and requests from the Applicants on actions they felt would shed some light on these serious allegations, the Respondent was not forthcoming. It appears that the Applicant's last resort was to launch these proceedings which they eventually did.

[65] I have demonstrated *supra* that the Respondent failed to adhere to their own Regulations as designed by the Respondent Senate to adjudicate on allegations of academic malpractice levelled against the Applicants.

[66] The Respondent is a public administrative body that is subject to review by this court in the event it commits an irregularity and or exercises its powers in a manner that is not consistent with the rules of natural justice.

[67] **CORA HOEXTER** in her **WORK ADMINISTRATIVE LAW IN SOUTH AFRICA, JUTA 2010** states as follows at page 9:

*'Administrative law covers a vast area. This is because it is potentially relevant whenever there is any action involving the use of public powers or the performance of public functions – that is, in almost every case. As BAXTER explains, administrative law is ubiquitous; it is a branch of the law that "permeates virtually every facet of the legal system". For instance, it applies to public procurement, licencing, town*

***planning, expropriation, the provision of education and health services, the allocation of welfare benefits ----***

At page 8 she states as follows:

***'General administrative law, which is the focus of this book, is thus concerned with a great variety of administrative fields and a plethora of administrative institutions and agencies, from immigration officials to disciplinary tribunals. The most important legal machinery of general administrative law ---- consists of the constitutional rights to administrative justice ----***

***As BAXTER's description indicates, general administrative law does a great many things. It describes the powers of the administration and the ways in which those powers may be exercised and are controlled. It prescribes what the administration must do, its obligations, as well as what it may do the permissible area of administrative activity. Finally administrative law provides a number of remedies for maladministration, a broad term encompassing the improper exercise of administrative powers and the failure to carry out legal obligations ----'***

[68] In *casu* I have no doubt that the Respondent failed to carry out their legal obligations in properly investigating these serious allegations of academic malpractice levelled against the Applicants and further violated the Regulations on how to conduct disciplinary processes and procedures. The Respondent therefore committed gross irregularity in this regard.

[69] The Regulations are very clear and emphatic on what the Respondents were supposed to do in these circumstances. The failure by the Respondent to subject the Applicants to due process resulted in gross violation of the rules of natural justice. The failure by the Respondent to investigate these allegations and set up the ad hoc disciplinary committee as per the dictates of the Regulations, resulted in their unilateral and unfair decision to cancel the NUR 306 results and further order rewriting the said exam paper was procedurally flawed, arbitrary, misdirected and grossly unreasonable. These words were used by **STEYN JA** in the then Court of Appeal Case NO. 51/2004 judgment of the case of *The Senate of University of Swaziland v Tiyamike Rudolph Nduna Maziya* sitting with **BROWDE JA** and **ZIETSMAN JA** both concurring.

[70] In this case, **STEYN JA**, **BROWDE JA** and **ZIETSMAN JA** dealt with this matter wherein the Appellant – The Senate of the University of Swaziland had refused to reschedule a final examination paper despite a passionate and timeous request to reschedule the said exam because it fell on a Saturday and the Respondent being a devout Seventh Day Adventist consider Saturday a Sabbath and for religious reasons therefore could not take the exam on that Saturday.

[71] At paragraphs 22, 27, 28 and 36 page 16-26 of the judgment **STEYN JA** opined as follows:

[22] *In the circumstances we have to examine the decision of the University and test its processes and its reasoning to see whether it exercised its powers in a manner consistent with the principles of natural justice. In order to do so we must have due regard to the provisions of its charter as formulated in its statute and in the regulations issued thereunder. (Underlining my emphasis)*

[27] *Clearly regulation 011:07 confers a discretion on the University. It has that discretion both generally under its statutes as indicated above and specifically in respect of requests made for purposes of sitting for an examination. It gives the University the right to grant relief to a candidate on good cause shown or as the Regulation puts it “good reason”. This discretion is one to be exercised by the University and the Court will not readily interfere with the exercise of such a discretion simply because it may have a different opinion. Provided that it appears that the discretion was exercised reasonably and with due consideration of the facts the court would not be inclined to substitute its discretion for that of the authority charged with the responsibility to adjudicate on the matter. The administration of a University makes complex and multi-faceted demands on its staff – both administrative and academic. It knows and understands what is practically possible and what is not and will by and large be trusted by the courts to act sensibly and in a properly informed manner.*

[28] *Having said that however, it cannot act arbitrarily, dogmatically or inflexibly. It must also have due regard to all the facets of the problem such as a request poses. There should be no bias and there should be evidence that all the criteria laid down by the regulations have duly*

been considered and evaluated. (Underlining my emphasis)

[36] *For all these reasons I conclude that the Court a quo was right when it found that the University's decision to deny the student in casu any relief was procedurally flawed, arbitrary, misdirected and grossly unreasonable. In the result, the appeal must fail'.*

[72] In *casu* the Applicants have argued that the Respondent acted unilaterally and without hearing their side of the story in its action which resulted in cancellation of the NUR 306 Final Results and ordering them to rewrite the paper. I have no doubt in my mind that the Respondent took an adverse decision affecting the Applicants' academic interests without affording them a fair hearing. There is a lot of bias in the unilateral actions of the Respondent which has resulted to grave injustice to the Applicants.

[73] **S B MAPHALALA J** (as he then was) in the case of ***Siima Leona Mushala & Another v The Vice Chancellor of the University of Swaziland, High Court Case NO. 2121/2003*** in dealing with review proceedings stated as follows at pages 7-8 of the Judgment:-

*'In order to succeed in the application for review, the Applicants must have common grounds for review. HERBSTEIN et al, THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA (4<sup>TH</sup> ED) at page 929 lists the following grounds for review;*

- (a) *Absence of jurisdiction on the part of the court.*
- (b) *Interest in the cause, bias, malice or corruption on the part of the presiding officer.*
- (c) *Gross irregularity in the proceedings, and*
- (d) *The admission of inadmissible or incompetent evidence, or the rejection of admissible or competent evidence.*

*In the present case the Applicants have alleged that the Respondents did not apply their mind and/or that there was a gross irregularity in the manner the Respondents acted.*

*The Applicants to have a cause of action in the present case, for the relief sought, must show that there was a clear right, which has been violated (see Siphon Mngadi's supra case). Alternatively that there was a legitimate expectation arising from a violation of the rule and/or from practice commonly accepted at the University ---"*

[74] **SB MAPHALALA J** continued in his judgment and referred to the case of *Administrator, Transvaal & Others v Traub 1989 (4) SA 731 (A)* where **CORBETT CJ** stated the following at page 758.

*'The legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such a person without prior consultation or prior hearing, and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person*

**concerned is taken. As Prof Riggs puts in the article of which I have referred at 404:**

**“The doctrine of Legitimate expectation is construed broadly to protect both substantive and procedural expectation. In practice the two forms of expectation may be interrelated and even tend to merge. This, the person concerned may have a legitimate expectation that the decision by the public authority will be favourable, or at least that before an adverse decision is taken he will be given a fair hearing.”**

[75] In *casu* the Respondent has failed to act fairly and reasonably. It is this failure to afford the Applicants the *audi alteram partem* that entitles this court to exercise its review powers to review and set aside the decision of the Respondent cancelling the NUR 306 Final Results and ordering that the said exam be rewritten by the Applicants.

[76] The Applicants in their argument have also submitted that the conduct and actions of the Respondent have grossly violated the provisions of Section 33 of the Constitution of the Kingdom of Eswatini Act NO. 1 of 2005 which provides as follows:

**‘33 (1)A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirements imposed by law including the requirements of fundamental justice or fairness and has a right to apply to a court of law in respect of any decision taken against that person with which that person is aggrieved.**

***(2) A person appearing before any administrative authority has a right to be given reasons in writing for the decision of that authority.'***

[77] Both Counsel for the Applicants and Respondent respectively addressed me at length on their respective positions in the matter and I appreciate their professionalism in dealing with this matters.

[78] In the case of ***Johannesburg Consolidated Investment Co. v Johannesburg Town Council 1903 TS 111 at 115 INNES CJ*** described this common-law review power as follows:

***'Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of this duty, this court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the legislature; it is a right inherent in the court.'***

[79] In the case of ***Pharmaceutical Manufacturers Association of South Africa in re Ex parte President of The Republic of South Africa 2000 (2) SA 674 (CC) at paragraph 66, CHASKALSON P*** stated the following:

***'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be***

*arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.'*

[80] In the case of *Union Government v Union Steel Corporation 1928 AD 220 at 237*, **STRATFORD JA** stated the following in dealing with the issue unreasonable administrative decisions:

*'Nowhere has it been held that unreasonableness is sufficient ground for interference; emphasis is always laid upon the necessity of the unreasonableness being so gross that something else can be inferred from it, either that it is inexplicable except on the assumption of the mala fides or ulterior motive ---- or that it amounts to proof that the person on whom the discretion is conferred has not applied his mind to the matter.'*

[81] In dealing with the *Audi altrum partem*, **GOLDSTONE J** stated the following in the case of *Janse Van Rensburg NO v Minister of Trade and Industry NO 2001 (1) Sa 29 (CC) paragraph 24*:

*'In modern states it has become more and more common to grant far-reaching powers to administrative functionaries. The safeguards provided by the rules of procedural fairness ensures that an administrative functionary has an open mind and a complete picture of the facts and circumstances within which the administrative action is to be taken. In that way the functionary is more likely to apply his or her mind to the matter in a fair and regular manner'*

[82] As regards the issue of bias, **DE VILLIERS J** opined as follows in the case of *Hamata v Chairperson, Peninsula Technikon International Disciplinary Committee 2000 (4) SA 621 (c)* at *paragraph 67*:

*‘It is not bias per se to hold certain tentative views about a matter. It is human nature to have certain prima facie views on any subject. A line must be drawn, however, between mere dispositions or attitudes, on the one hand, and pre-judgment of the issues to be decided, on the other. Bias or partiality occurs when the tribunal approaches a case not with its mind open to persuasion nor conceding that exceptions could be made to its attitudes or opinions, but when it shuts its mind to any submissions made or evidence tendered in support of the case it has decided. No one can fairly decide a case before him if he had already prejudged it.’*

[83] In the case of *Bhembe Centry v Chairman Civil Service Board 1987 – 1995 SLR (s) page 218 at 219*. HULL CJ stated as follows whilst dealing with the duty to comply with disciplinary Regulations:

*‘The procedure for disciplinary action is set out in the regulations. It is set out in the part headed “B Disciplinary Proceedings” from Regulation 41 onwards. In the Civil Service Board (General) Regulations, that procedure does not abrogate the rules of natural justice at all. It is compatible with them. That procedure first of all sets out in Regulation 41 that the departmental head is to cause a department preliminary investigation to be made, so that he can decide whether or not to prefer formal charges ----’.*

[84] In casu the Applicants were not given a proper opportunity in accordance with the rules of natural justice and the Regulations governing the conduct of a disciplinary hearing to answer the allegations of academic malpractice in a trial situation.

[85] It is common cause that the Applicants were never subjected to due process as per the dictates of the disciplinary regulations. They never appeared before the ad hoc disciplinary committee yet a decision adverse to their academic interest was taken whereby they were accused of having committed academic malpractice. The treatment meted to the Applicants was unfair and unjust and thus contrary to the dictates of Section 33 of the Constitution.

[86] The Respondents were not furnished with written reasons why the Respondent concluded that they were guilty of academic malpractice because the marks were unexpectedly high. The Respondent was supposed to act in accordance with the Regulations and deal with the matter as per the laid down structures of appointing the ad hoc disciplinary committee to afford the Applicants due process and thereby comply with the dictates of Section 33 of the Constitution dealing with administrative justice. I will repeat that the failure to observe the basic and fundamental requirements of natural justice has resulted in unfair and grossly unreasonable treatment of the Applicants. That the Applicants are students of the Respondent does

not in law and in particular at administrative justice level give the Respondent the right to treat them in the unfair manner with bias in disregarding their very own regulations prescribing how a matter of this nature is to be dealt with. This court cannot condone this complete disregard by the Respondent of its own regulations.

[87] I will repeat that allegations of academic malpractice in particular obtaining the exam paper NUR 306 and the marker's guide before writing the exams are very serious and damning on the personalities and dignities of the Applicants, more particularly where no tangible evidence is placed before court to prove such allegations. No matter how difficult the circumstances may be, the Respondent was duty bound to adhere to the laid down procedures in terms of the Regulations in dealing with this issue, so that even if the Applicants take the matter to court, the court would appreciate that the rules and regulations of the very Respondent were adhered to and that the principles of natural justice were observed, because as things stand and with the explanations of the use of past papers which is a fact and proven, it becomes difficult to appreciate the defence of the Respondent.

[88] In *casu*, the Respondent filed the Answering Affidavit of the Registrar and no confirmatory and or supporting affidavits of Prof N.A. Sukati, the External Examiner, C.P. Mashwama, the Examiner and the Invigilator or invigilators were ever filed. It is my considered view that

these three officers of the Respondent ought to have filed the aforesaid affidavits in order to clarify the pertinent issues of repeating exam questions verbatim in successive or consecutive years – what I referred to as the “**cut and paste**” scenarios *supra*.

[89] The absence of any explanation from those tasked with invigilating the exams would have assisted a great deal in dealing with this matter as to what they may have perceived or observed during the few hours when this examination was written.

[90] The evidence of the Registrar in the absence of any confirmatory or verifying affidavits from Prof N.A. Sukati and C.P. Mashwama is in my view hearsay evidence and of no value. As Registrar he has nothing to do with the actual lectures, tests and writing of examinations. He has his administrative duties and the technocrats are C.P. Mashwama and Prof N.A. Sukati who were to explain fully as to the prevailing state of affairs in particular why past examinations’ questions are ‘**cut and pasted**’ into current examinations and why such a detailed course outline is made available to students and also why students are advised to use one text book.

[91] It is my considered view that the External Examiner Prof N.A. Sukati and the Examiner C.P. Mashwama have a direct and substantial interest in these proceedings and ought to have filed verifying and or

confirmatory affidavits in this matter with a view to explain fully the concerns raised herein and in the process put everything in perspective regarding the NUR 306 course and how questions for final examinations in those proceedings were repeated and cut pasted, as it were, in the manner in which it was done.

[92] In dealing with issue of verifying affidavits, **HERBSTEIN** *et al*, in **THE CIVIL PRACTICE OF THE HIGH COURTS OF SOUTH AFRICA (5<sup>TH</sup> ED) JUTA 2012 at page 444** state as follows:

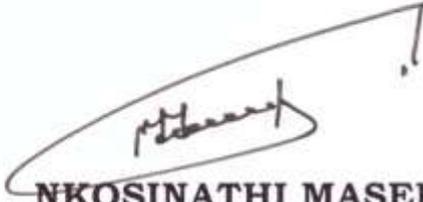
*‘As a general rule --- hearsay evidence is not permitted in affidavits. It may accordingly be necessary to file affidavits of persons other than the Applicant who can depose to the facts. Indeed this is very often done. Alternatively when a deponent includes in an affidavit facts in respect of which he does not have first-hand knowledge a verifying affidavit may be annexed by a person who does have knowledge of those facts’.*

[93] The Registrar is not a member of the Examination Board which held a meeting on the 19<sup>th</sup> June 2018, as can be seen from the minutes herein attached by the Registrar and marked Annexure SANU 2 of the Respondent’s Answering Affidavit found at page 91 of the Book. This is unprocedural and unacceptable. I is the members of the Examination Board in particular C.P. Mashwama in the capacity of lecturer and Examiner and Prof N.A. Sukati in her capacity as Moderator and External Examiner that can properly address these

issues and not the Registrar. He does not have first-hand information of the facts to be verified herein.

[94] I am of the considered view that the prayers as sought by the Applicant have merit and I accordingly grant the prayers in terms of 1, 3 and 4 of the Notice of Motion dated the 25<sup>th</sup> July 2018.

[95] I also order that the Respondents pay costs of this application in the Ordinary Scale.



**NKOSINATHI MASEKO**  
**JUDGE OF THE HIGH COURT**