SUPREME COURT OF QUEENSLAND

CITATION:	*Mbuzi v University of Queensland* [2010] QCA 336
PARTIES:	**JOSIYAS ZIFANANA MBUZI** (applicant/applicant) **v** **UNIVERSITY OF QUEENSLAND** (respondent/respondent) **MICHAEL KENIGER** (first respondent/not party to the appeal) **LAWRENCE GAHAN** (second respondent/not party to the appeal) **THE UNIVERSITY OF QUEENSLAND SECRETARY AND REGISTRAR** (third respondent/not party to the appeal)
FILE NO/S:	Appeal No 6218 of 2010 SC No 9449 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave/Judicial Review
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	1 November 2010
JUDGES:	Margaret McMurdo P and Fraser JA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused with costs**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – where the applicant was enrolled as a part-time PhD student – where a disciplinary board found the applicant guilty of misconduct and suspended him from the University for 12 months in August 2007 – where on the expiry of the suspension the University asked the applicant to lodge the necessary forms to recommence his studies – where the applicant did not do so and was notified that his doctoral candidature would be withdrawn and enrolment cancelled if he did not respond by 15 December 2008 – where the applicant did not respond – where in August 2009 the applicant filed a judicial review application relating to decisions connected with the 2007

disciplinary proceedings – where the applicant later amended his application and added a claim for an extension of time – where the respondents applied for the dismissal of the amended application and directions in February 2010 – where the Chief Justice dismissed the applicant's amended application and application filed 18 February 2010, and the respondent's application for directions, and ordered that the applicant pay the costs of the applications on the standard basis – where the applicant applied to this Court for leave to appeal against those orders – where the applicant argued the Chief Justice erred in refusing his application for an extension of time, contended that Applegarth J had impliedly granted him an extension of time and that an extension of time was not required as the relevant decision was a "continuing decision" – whether an extension of time was necessary – whether an extension of time was impliedly granted by Applegarth J – whether the Chief Justice erred in refusing the application for an extension of time – whether the Chief Justice correctly found that the application for judicial review was devoid of merit – whether the applicant should be granted leave to appeal to this Court

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – PARTICULAR CASES – CONTROL OVER PROCEEDINGS – ADMISSION OF EVIDENCE – where the applicant argued that the Chief Justice's refusal of his application to adduce further evidence in the form of documents produced under a subpoena by the respondent occasioned a miscarriage of justice – whether the Chief Justice erred in refusing the application to adduce further evidence

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – PARTICULAR CASES – CONTROL OVER PROCEEDINGS – REFUSAL OF ADJOURNMENT – where the applicant argued that the Chief Justice erred in refusing his application for an adjournment to further examine the subpoenaed documents – whether the Chief Justice erred in refusing the application for an adjournment

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – FOR BIAS IN JUDICIAL PROCEEDINGS – where the applicant contended apprehended bias arising from the Chief Justice's refusal to grant an adjournment – whether a fair-minded lay observer might reasonably apprehend that the Chief Justice might not bring an impartial mind to the resolution of the questions to be decided

Judicial Review Act 1991 (Qld), s 3, s 4, s 13, s 20, s 26(1), s 26(2), s 26(3), s 27, s 48(1), s 48(5), s 48(2)(b), s 49(5)

Uniform Civil Procedure Rules 1999 (Qld), r 222
University of Queensland Statute No. 4 (Student Discipline and Misconduct) 1999, s 6, s 8(1), s 10, s 10(7), s 13, s 13(6), s 14, s 15, s 18

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63, applied
Hoffman v The Queensland Local Government Superannuation Board [1994] 1 Qd R 369, cited
Ivers v McCubbin & Ors [2005] QCA 200, discussed
Kuku Djungan Aboriginal Corporation v Christensen [1993] 2 Qd R 663, cited
Lilypond Constructions Pty Ltd v Homann [2006] 1 Qd R 411; [2005] QSC 263, cited
Mbuzi v The University of Queensland [2010] QSC 153, related

COUNSEL: The applicant appeared on his own behalf
T J Bradley for the respondent

SOLICITORS: The applicant appeared on his own behalf
Brian Bartley & Associates for the respondent

[1] **MARGARET McMURDO P:** The applicant has not demonstrated any reasons warranting the grant of leave to appeal. I agree with Fraser JA's reasons for refusing the application for leave to appeal with costs.

[2] **FRASER JA:** The applicant was enrolled as a part-time PhD student in the School of Social Work and Applied Human Sciences at the University of Queensland. On 29 August 2007 a disciplinary board established under the *University of Queensland Statute No. 4 (Student Discipline and Misconduct) 1999* (the "University statute") found the applicant guilty of misconduct and suspended the applicant from the University for 12 months, from 31 August 2007 to 1 September 2008. After the expiry of the suspension the University asked the applicant to lodge the necessary forms updating the details of his advisory team and research project plan. The applicant did not do so. On 1 December 2008 the University notified the applicant that if it did not receive a response from him by Monday 15 December 2008 he would be withdrawn from his candidature and his enrolment would be cancelled. The applicant did not respond. On 15 December 2008 the University notified the applicant that his doctoral candidature had been withdrawn.

[3] On 27 August 2009 the applicant filed an application seeking review under the *Judicial Review Act* 1991 (Qld) of an alleged decision by the University not to provide him with a transcript of the disciplinary board proceedings. The application also sought a declaration that "defamatory and guilt statements by the university against me are baseless". On 9 November 2009 the applicant amended his application for judicial review and on 26 February 2010 he added a claim for an extension of time pursuant to s 26 of the *Judicial Review Act*. The amended application named as the respondents Professor Keniger, Associate Professor Gahan, and the University of Queensland Secretary and Registrar. The amended application omitted the defamation claim, which the applicant proposed to pursue in separate proceedings. He sought review of the following alleged decisions:

(i) Professor Keniger's decision on 17 April 2007, "to resurrect previous allegations against me for which determination had already been made, with the allegations dismissed by him as "based on mere perceptions and not to be pursued any further"";

(ii) Professor Keniger's decision "without facts or reasons… not to restore my status quo even after the period of suspension arising out of the resurrected allegations";

(iii) Decisions of the Secretary and Registrar;

a. "to constitute deliberations of the University of Queensland disciplinary board pursuant to the decision of the first respondent";

b. "to furnish the disciplinary board with a report on one-sided investigations done pursuant to the decision of [Professor Keniger]";

c. "to implement decision of suspending me for 12 months without an implementation direction by the disciplinary board";

(iv) Associate Professor Gahan's "decision… to suspend me for 12 months";

(v) "decisions… by [Associate Professor Gahan and the Secretary and Registrar] that I am guilty of the offence of sexual-harassment";

(vi) "failure… by [the Secretary and Registrar] to provide me with transcript of proceedings…".

[4] On 12 February 2010 the respondents filed an application for dismissal of the applicant's amended application on three grounds:

(a) The application was not made within the 28 day period required by s 26(2) of the *Judicial Review Act* 1991 (Qld);[1]

(b) Insofar as the application sought to review a decision of the disciplinary board, provision was made by the University statute for the applicant to seek review by the discipline appeals committee, but the applicant had withdrawn his appeal to that committee; and

(c) The application was vexatious.

[5] The respondents also filed an application for directions for the future conduct of the applicant's and respondents' applications. Subsequently the applicant filed an application seeking summary dismissal of the respondents' applications and for judgment on the applicant's judicial review application.

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[1] The further limb of this ground that the applicant had not sought an extension of time was superseded by the applicant's subsequent application for such an extension.

[6] On 19 May 2010 the Chief Justice held that the respondents had established the three grounds in their application for dismissal and made the following orders:[2]

> "1. On the respondents' application filed on 12 February 2010, order that the applicant's amended application for judicial review filed 26 February 2010 be dismissed.
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> 2. Dismiss the applicant's application filed 18 February 2010.
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> 3. Dismiss the respondents' application for directions filed 12 February 2010.
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> 4. On all applications, order that the applicant for judicial review, Mr J Mbuzi, pay the costs of all other parties, to be assessed on the standard basis."

Application for leave to appeal

[7] The applicant has applied for leave to appeal against the orders dismissing his applications and ordering him to pay costs. The application and the draft notice of appeal name the University as the only respondent. The University did not take any point about the absence of the other parties.

[8] The amended judicial review application sought a statutory order of review under s 20 of the *Judicial Review Act*. One ground upon which the Chief Justice dismissed that application was that it was vexatious.[3] The Chief Justice exercised the power conferred by s 48(1) to dismiss an application under s 20 if the court considers that it would be inappropriate for proceedings in relation to the application to be continued or to grant the application, or no reasonable basis for application is disclosed, or the application is frivolous or vexatious, or the application is an abuse of the process of the court. Subsection 48(5) provides that an appeal may be brought from an order under s 48 only with the leave of this Court.

[9] The applicant accepted that he required leave to appeal but he nevertheless argued that the power under s 48(1) had not been exercised "at the earliest appropriate time" within the meaning of s 48(2)(b). Section 48(2)(a) provides that the power given by s 48 "must" be exercised by order. That condition was fulfilled. Subsection 48(2)(b) provides that the power "may be exercised at any time in the relevant proceeding" but that the court "must try to ensure" that any exercise of the power to dismiss an application happens at the earliest appropriate time. I am not persuaded that any delay was attributable to non-compliance with s 48(2)(b). In any event the provision that the power "may be exercised at any time" makes it plain that delay in exercising the power does not bear upon the validity of its exercise.

[10] The applicant argued that if leave to appeal were granted the Court should give the applicant leave to inspect some documents which he had subpoenaed. The Chief Justice refused his application for an adjournment to allow him an opportunity to inspect those documents. The applicant argued that those documents would have assisted him at the hearing and would assist him in his proposed appeal. The Court heard full argument on that point and on the other points raised by the applicant in his application and in his proposed appeal.

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2 *Mbuzi v The University of Queensland* [2010] QSC 153.

3 *Mbuzi v The University of Queensland* [2010] QSC 153 at [51].

Refusal of extension of time

[11] Under ss 26(1) and (2) of the *Judicial Review Act* the applicant was required to make his application for a statutory order of review of decisions the terms of which were set out in a document given to him within 28 days after the day on which the document was given to him or within such further time as the court allowed. In relation to other decisions where no period was prescribed for the making of such an application, s 26(3) empowered the court to refuse to consider an application for a statutory order of review if the court was of the opinion that the application was not made within a reasonable time after the decision. In forming that opinion (under s 26(3)) the court must have regard to the time when the applicant became aware of the decision.

[12] The Chief Justice summarised the factual background in the following passage:[4]

> "(a) In April 2007, the applicant was enrolled at The University of Queensland as a part-time PhD student in the School of Social Work and Applied Human Sciences. The University received complaints from fellow students, alleging that the applicant had been guilty of sexual harassment.
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> (b) By letter dated 10 April 2007, Professor Keniger notified the applicant of the fact that the complaints had been made, and proposed a meeting on 12 April. That meeting occurred. The applicant swears that Professor Keniger said at the end of the meeting that the allegations "had been made on mere perceptions and that they were not going to be pursued any further". Following the meeting, Professor Keniger wrote to the applicant on 16 April saying that while he had not formed a judgment on the complaints which, for the moment, he had set aside, he proposed to move the applicant to another work area as a "circuit breaker". He asked the applicant in that letter "not to seek to establish the identity of the complainants who are entitled to confidentiality". That is the letter involved in the first challenge (Section A para [2](i) above).[5]
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> (c) On 17 April 2007, the applicant wrote to Professor Keniger asking him to withdraw his letter of 10 April, communicate that withdrawal to others who may have become aware of it, or face the prospect of a $50,000 defamation suit. On 14 May 2007, Professor Keniger wrote in response, observing that because the applicant apparently did not wish to accept the conciliatory approach he (Professor Keniger) had offered, he was activating the formal process for consideration of the complaint. He enclosed a copy of the complaint and invited a response.
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> (d) A Disciplinary Board met on 24 August 2007. It considered the statements of the complainants, and heard from the

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4 *Mbuzi v The University of Queensland* [2010] QSC 153 at [8].

5 See paragraph [3] (i) of these reasons.

applicant. The Board found the applicant guilty of misconduct, and the Acting Chairperson suspended him for 12 months, from 31 August 2007 to 1 September 2008. On 29 August 2007, Associate Professor Gahan notified the applicant of the decision. Professor Gahan advised the applicant of his right of appeal to the Discipline Appeals Committee.

(e) The applicant replied on 1 September 2007 demanding that the suspension be lifted. The suspension remained in place. The applicant instituted an appeal to the Discipline Appeals Committee, on 12 September 2007. There were subsequent communications between the applicant and officers of the University. On 10 October 2007, Mr Taylor, the Secretary of the Discipline Appeals Committee, wrote to the applicant referring to the applicant's earlier intimation that he intended to withdraw his appeal. Mr Taylor reminded the applicant that the hearing was scheduled for 31 October 2007. On 18 October 2007, the applicant wrote to Mr Taylor advising in essence that he would be pursuing his challenge before a court of law, saying that he no longer had confidence in the University process.

(f) Following the end of the 12 month period of the applicant's suspension, the applicant was advised on 14 October 2008 that his PhD candidature had been re-activated, and of steps he needed to take to update his "advisory team details" and to revise his "research project plan". He did not take those steps. On 1 December 2008, the applicant was advised that if he failed to do so by 15 December 2008, his candidature would be withdrawn and his enrolment cancelled. He did not respond. His candidature was withdrawn by the University.

(g) The applicant's next contact with the University was the service of his judicial review application which he had filed on 27 August 2009.

(h) It remains to mention that on 16 October 2008, the applicant requested a copy of a transcript of the Disciplinary Board hearing of 24 August 2007, and a record of its proceeding was emailed to him on 30 October 2008, at his student e-mail address, which the respondents' solicitor swears was then still accessible."

[13] The Chief Justice held that the alleged decisions or proceedings which the applicant challenged in his amended application occurred at the following times:[6]

(i) Professor Keniger's decision based on complaints subsisting though in abeyance: 17 April 2007.

(ii) Professor Keniger's failure to reinstate the applicant after the 12 month suspension: 1 September 2008.

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6 *Mbuzi v The University of Queensland* [2010] QSC 153 at [9].

(iii) the decisions of the Secretary and Registrar:

a. constituting a Disciplinary Board hearing: prior to 24 August 2007.

b. furnishing the Board with the investigative report: prior to 24 August 2007.

c. implementing the decision as to suspension: 31 August 2007.

(iv) the decision of Associate Professor Gahan in relation to the suspension: 29 August 2007.

(v) the decision, allegedly of Associate Professor Gahan and the Secretary and Registrar, re the applicant's guilt on the complaint: 29 August 2007.

(vi) failure to provide transcript: no later than 30 October 2008.

In what follows I will adopt that numbering of the alleged decisions.

[14] The applicant did not give evidence explaining his failure to apply within time or of any reason sufficient to justify an extension of time. The evidence showed that the applicant was speaking of judicial review as long ago as 10 September 2008. The Chief Justice held that the absence of an explanation was at least a persuasive factor against granting an extension: *Hoffman v The Queensland Local Government Superannuation Board* [1994] 1 Qd R 369 at 372; *Kuku Djungan Aboriginal Corporation v Christensen* [1993] 2 Qd R 663 at 665.

[15] The University contended it might be prejudiced in two respects if time were extended. If the applicant had successfully challenged decision (i) in a timely way the University could have avoided the appointment of an independent investigator to gather evidence and the proceeding before the disciplinary board. Secondly, the applicant served out the period of the suspension so that the University was now left in a position where, if time was extended and the challenge upheld, no effective remedial action could be taken. The Chief Justice held that the absence of any explanation for the delay, the very substantial magnitude of that delay, and though less telling, the possible prejudice were time to be extended, combined to warrant the refusal of the extension of time sought by the applicant.[7]

No extension was impliedly granted

[16] The applicant argued that the necessary extension of time was impliedly granted by a combination of directions made by Applegarth J on 26 October 2009, statements by his Honour foreshadowing those directions, a statement by the respondents' solicitor that those directions were appropriate, the applicant's compliance with the directions, the respondents' cooperation in taking the matters to a hearing, and their failure to file their application for summary dismissal until 12 February 2010.

[17] The argument is misconceived. The applicant had not even sought an extension of time when Applegarth J made orders. Those orders merely granted the applicant leave to amend his application, directed that if he pursued his application for

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[7] *Mbuzi v The University of Queensland* [2010] QSC 153 at [13].

a declaration about the University's alleged defamation he should provide particulars of those statements within 14 days, directed the exchange of affidavits, adjourned the application for further review, and reserved costs. The applicant delayed applying for an extension of time until he subsequently filed his further amended application on 26 February 2010. He made that application after a directions hearing in which Byrne SJA noted that the applicant apparently wanted leave to amend to make such an application. The respondents' solicitor then replied that there was no objection to the amendment, "as long as Mr Mbuzi understands that by accepting his application the Court is not giving any indication one way or the other as to whether the extension will be granted."

Was an extension necessary?

[18] The applicant argued that decision (ii) was a "continuing decision" which could be regarded as having occurred on 4 August 2009 rather than only on 1 September 2008 at the end of the 12 months suspension period. (I was unable to find in the record the applicant's letter of 4 August 2009 referred to in his argument before Byrne SJA on 23 February 2010, but on 31 August 2009 the applicant wrote to the University asking for the return of the keys to the office he had formerly occupied so that he could continue with his studies and that if this was not done he would include the failure as an additional ground of his court action. The applicant subsequently repeated his application for reinstatement.) However there was nothing to contradict the respondents' evidence that the applicant was notified on 15 December 2008 that his candidature had been withdrawn and his enrolment cancelled. That was not a continuing decision. It took final effect in December 2008. The applicant did not seek review of it until he filed his amended application in November 2009. There is no evidence that Professor Keniger made any decision about the restoration of the applicant's status quo at any time after the period of his suspension expired on 1 September 2008; and if there was such a decision, there is no basis for thinking that it was a decision under an enactment such as to enliven a right of review under the *Judicial Review Act*[8] or that it was affected by reviewable error.

[19] In relation to decision (vi) the applicant emphasised that the respondents initially contended that a transcript had been provided by an email dated 30 October 2008 but that, after Justice Applegarth asked the respondents' solicitor on 26 October 2009 to enquire whether there was any transcript,[9] the respondents' solicitor subsequently wrote on 2 November 2009 that the applicant had been provided with the University's record of the hearing. That record was not a verbatim transcript. The applicant criticised the earlier statements that a transcript had been supplied when only a summary was in fact supplied, but that did not meet the point that the alleged failure to provide a transcript occurred no later than 30 October 2008. The applicant knew by 30 October 2008 that he was not provided with a verbatim transcript when, in response to the applicant's request for a copy of a transcript, the record of the proceeding, which the applicant considered was not a "transcript", was emailed to the applicant. It is not easy to see how this involved any reviewable decision, but there is no ground for challenging the Chief Justice's conclusion that the applicant did not bring his application for review within a reasonable time of the alleged decision.

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8 *Judicial Review Act*, s 3 ("enactment"), s 4 ("a decision to which this Act applies"), s 20 ("Application for review of decision").

9 Transcript 26 October 2009 at 1-14, 1-15.

No error in the discretion to refuse to extend time

[20] The Chief Justice observed that the applicant was speaking of judicial review as early as 10 September 2008. I note also that by a letter dated 26 September 2007 the applicant threatened to bring a judicial review application "to suspend the suspension pending final determination of my application to totally nullify the suspension" and the applicant's letter of 18 October 2007 demonstrated that he knew that the law provided "a remedy before the courts of law to redress non-observance to act fairly and justly in administrative decision-making". The applicant made other threats to bring proceedings but he did not do so until long after the events. Instead the applicant served his period of suspension and he did not subsequently make the necessary arrangements to facilitate the resumption of his studies despite the University's invitation to him to do so. He did not bring proceedings when his enrolment was cancelled in mid-December 2008. He refrained from doing so until he filed his limited application about the transcript in late August 2009 and his amended application about the other matters in November 2009.

[21] If there was any explanation for the applicant's lengthy delay it must have been within his own knowledge but he did not advance any explanation in any of his affidavits. The applicant's challenge to the Chief Justice's refusal of an adjournment to allow the applicant to inspect the University's file could not assist him on this issue. Nor is it relevant whether, as the applicant argued, judicial review may remain available even where the only utility in the remedy is to vindicate reputation.[10]

[22] The applicant has failed to demonstrate any error in the Chief Justice's decision to refuse to extend time to enable the applicant to apply for judicial review of any of the alleged decisions. His application was correctly dismissed for that reason even if it be assumed, contrary to my view, that there was merit in that application. His application for leave to appeal should be refused for that reason.

Merits of the amended application for judicial review

[23] In my respectful opinion the Chief Justice was correct in finding that the application for judicial review was devoid of merit.[11]

[24] In relation to the alleged decisions leading up to and including the decision to suspend the applicant on 24 August 2007 the Chief Justice held that s 13 of the *Judicial Review Act* required the dismissal of the application. That section provides that the court must dismiss an application if satisfied, having regard to the interests of justice, that it should do so if provision is made by a law under which the applicant is entitled to seek a review of the matter by another court or a tribunal, authority or person. Such a review was available to the applicant under the University statute, which was "a law" within the meaning of s 13. The University statute provided for an appeal to the disciplinary board from decisions of other decision-makers and it provided for an appeal from decisions of the disciplinary board to a discipline appeals committee.[12] In each case the appeal was by way of a new hearing.[13] The applicant did appeal against the disciplinary board's decision but he abandoned that appeal in October 2007.

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10 The applicant cited *Ivers v McCubbin & Ors* [2005] QCA 200 at [19] to [20], but that passage did not concern an application to extend time.

11 *Mbuzi v The University of Queensland* [2010] QSC 153 at [14], [51].

12 *University of Queensland Statute No. 4 (Student Discipline and Misconduct) 1999*, ss 14 to 18.

13 *University of Queensland Statute No. 4 (Student Discipline and Misconduct) 1999*, s 15(1), (2).

[25] The Chief Justice held that the applicant could have challenged all of the alleged decisions in the discipline appeals committee except for alleged decisions (ii) and (vi).[14] His Honour held that there was no reason why the applicant should not reasonably have been required to pursue an appeal to the discipline appeals committee and the interests of justice did not tell otherwise.[15] The Chief Justice considered that if there was substance in the applicant's contention that Professor Keniger's decision to instigate the complaints process was infected by bad faith there might arguably have been a ground for court proceedings in lieu of an appeal to the University body, but there was no such bad faith.[16] The Chief Justice noted that Professor Keniger's letter of 16 April 2007 was written in terms which suggested that the complaints were subsisting.[17] (Professor Keniger wrote in his letter of 16 April 2007 that, "I emphasised [at the meeting on 12 April] that I had not formed a judgement concerning the complaint that I had received and for the moment had set the complaint aside".) Although there was some difference between that and what the applicant said that Professor Keniger said at the conclusion of the meeting, Professor Keniger was not barred from changing his mind on further consideration. Professor Keniger's letter of 14 May 2007 did not amount to an act of "revenge" as the applicant had contended and Professor Keniger's instigation of the complaint procedure was motivated by his interpretation of the applicant's querulous letter of 17 April 2007 as evidencing an unwillingness to cooperate in the "conciliatory approach" and the wish of the complainants to have their complaints processed.[18]

[26] The applicant argued that the Chief Justice should have held that Professor Keniger's conduct in purporting to "resurrect" the complaints by the letter of 4 May 2007 was an improper reaction to the applicant's letter of 17 April 2007 by which the applicant foreshadowed legal proceedings to vindicate his reputation, but it is clear from Professor Keniger's earlier letter of 16 April 2007 that at that time he regarded the complaints as being still current. The applicant also challenged the Chief Justice's finding that Professor Keniger's instigation of the complaint procedure was motivated by his interpretation that the applicant was unwilling to cooperate in the conciliatory approach Professor Keniger had suggested. The applicant argued that there was no ground for the statement in Ms Bird's affidavit that the applicant by his letter dated 17 April 2007 rejected the approach proposed to be adopted by Professor Keniger in his letter dated 16 April 2007 and that the evidence was therefore inadmissible. However the Chief Justice's conclusion that the interpretation of the applicant's 17 April letter given in Professor Keniger's letter of 4 May 2007 was one to which the applicant's letter was "reasonably susceptible"[19] turned upon the content of the correspondence rather than Ms Bird's statement. The applicant's correspondence made it clear that he did not wish to accept the conciliatory approach proposed by Professor Keniger.

[27] The applicant's arguments about Professor Keniger's statements exposed another difficulty in the application for judicial review. Professor Keniger was not a member of the disciplinary board. The applicant contended that Professor Keniger's authority to make a final and binding decision was conferred by the

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14 *Mbuzi v The University of Queensland* [2010] QSC 153 at [15].
15 *Mbuzi v The University of Queensland* [2010] QSC 153 at [18].
16 *Mbuzi v The University of Queensland* [2010] QSC 153 at [19], [25].
17 *Mbuzi v The University of Queensland* [2010] QSC 153 at [20].
18 *Mbuzi v The University of Queensland* [2010] QSC 153 at [20] to [24].
19 *Mbuzi v The University of Queensland* [2010] QSC 153 at [22] to [24].

University of Queensland Handbook of Policies and Procedures. Under clause 13 of the handbook, Professor Keniger, as Deputy Vice-Chancellor (Academic), was responsible for determining a complaint of sexual harassment if it was not resolved through mediation or conciliation. On the evidence there was no mediation or conciliation,[20] but even if Professor Keniger had authority to make a determination on the complaints, such a determination would not have precluded the disciplinary board from subsequently acting in the way it did. Clause 13.2 of the handbook provided that the parties must be informed of "their rights if dissatisfied with the decision." One such right was given by s 6 of the University statute, which provided that a person may report possible misconduct by a student to one of the decision-makers referred in s 10. Section 10(7) provided that one such decision-maker, the disciplinary board, may deal with the matter and, if a finding of misconduct is made, the chairperson of the board, on the advice of the board, may order suspension from the University. In light of the complainants' insistence that their complaints go forward, any alleged "decision" by Professor Keniger was of no enduring significance.

[28] The applicant also argued that he did not pursue his appeal from the board's decision because of the failure to provide him with a transcript of the hearing but that argument is not supported by evidence either that he required such a transcript for an appeal or that non-supply of it formed the reason for his failure to pursue his appeal. In any event the applicant was supplied on 30 October 2008 with the only record of the hearing.

[29] Further in relation to alleged decisions (i) and (ii), if there were any such decisions they were not made under the University statute and the applicant did not identify any other statutory authority for them.

[30] Further in relation to alleged decision (ii), the Chief Justice found that the applicant's candidature was in fact restored following expiration of the 12 month suspension but the University subsequently withdrew the candidature after the applicant failed to comply with the University's requirements to bring his "advisory team details" and "research project plan" up to date.[21] The Chief Justice also rejected the applicant's contention that the University appeared, deceitfully, to be suggesting that the applicant voluntarily withdrew from the course. In addition to pointing out that the University's letter withdrawing the applicant's candidature was addressed to the applicant at his street address, the Chief Justice noted that the University appeared to be amenable to receiving an application by the applicant for reinstatement, which ran against a suggestion that the University was, for improper reasons, bent on excluding the applicant.[22] In that respect the Chief Justice referred to a letter from the University's solicitor to the applicant dated 25 February 2010 which advised the applicant that should he wish to apply for re-enrolment then he should follow a procedure previously advised to him in a letter dated 15 December 2008. The evidence identified by the Chief Justice compelled his Honour's conclusions.

[31] In relation to alleged decision (iii) a, s 13 of the University statute established the disciplinary board as a standing board. Accordingly the Chief Justice found that the

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20 In Professor Keniger's 4 May 2007 letter he observed that the four complainants had confirmed that they did not wish to retract their complaints and that they did not wish to engage in mediation.

21 *Mbuzi v The University of Queensland* [2010] QCS 153 at [27], [28].

22 *Mbuzi v The University of Queensland* [2010] QCS 153 at [28].

applicant's complaint about this decision was misconceived because the Secretary and Registrar did not make any decision to constitute it.[23] The applicant referred the Court to a letter dated 3 August 2007 from the Secretary and Registrar which referred to the report of an investigation into the complaints by the post-graduate students against the applicant, attached a full copy of the report, expressed the opinion that there was prima facie evidence to support allegations of misconduct under the provisions of the University statute, noted that the Secretary and Registrar had referred only those sections of the report that specifically relate to allegations of misconduct to the University's disciplinary board, and concluded that a formal allegation notice relating to the complaints would be sent to the applicant in due course. That letter plainly did not amount to a decision to constitute the disciplinary board.

[32] In relation to alleged decision (iii) b, there was no arguable error in the provision of the relevant parts of the report to the disciplinary board. The Chief Justice did not accept the applicant's argument that the whole of the investigation report was placed before the disciplinary board.[24] That conclusion reflected the evidence. There was no evidence to support the applicant's contrary contention.

[33] In relation to alleged decision (iii) c, the application for review was misconceived for the reason given by the Chief Justice. The decision to implement the disciplinary board's decision was made by Professor Gahan as acting chairperson of the board in accordance with s 13(6) of the University statute.[25] The applicant did not identify any arguable error in Professor Gahan's decision which might justify judicial review.

[34] In relation to decisions (iv) and (v), the Chief Justice held that the applicant's challenge to the disciplinary board's finding that he was guilty of sexual harassment could not be sustained because the finding was supported by the complainants' evidence and the applicant's own account.[26] In the course of the applicant's oral argument in this Court he emphasised three challenges to this conclusion. First he pointed out that the complainants had lodged a joint complaint. From this he submitted that their evidence must have been "engineered" and the result of "collusion". There was no evidence of any such impropriety. It was not an available inference from the evidence. The argument is hopeless, particularly when the applicant had not denied the substance of the complainants' allegations of sexual harassment. Secondly, the applicant asserted that he was not supplied with the complaints until after the hearing before the disciplinary board. Professor Keniger's letter to the applicant of 4 May 2007, which the applicant acknowledged receiving, stated that the "statements of complaint are enclosed for your information together with the complainant's name in each case." In subsequent correspondence the applicant did not suggest that this was incorrect and nor did he ask for copies. In the affidavits sworn by the applicant he did not depose that he had not received the complaints before the hearing. Further, although the applicant made general allegations of a breach of the rules of natural justice, neither in his original application nor in his amended applications did the applicant contend that he had not been given a copy of the complaints. His assertion to that effect in this Court was unsupported by evidence and inconsistent with the only evidence on the topic.

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23 *Mbuzi v The University of Queensland* [2010] QSC 153 at [29].
24 *Mbuzi v The University of Queensland* [2010] QSC 153 at [52].
25 *Mbuzi v The University of Queensland* [2010] QSC 153 at [30].
26 *Mbuzi v The University of Queensland* [2010] QSC 153 at [31].

Thirdly, the applicant contended that other students who might have given evidence were not called to give evidence. The Board's decision was amply supported by the evidence of the complainants.

[35] The applicant also argued that he was denied justice by the board's decision because he had made substantial progress in his doctoral studies. The evidence on that point was to the effect that the University had accepted his thesis proposal. There is in any event no reason to think that the seriousness of suspending and later excluding the applicant was not fully appreciated by the relevant decision-makers.

[36] The applicant argued that the proceeding before the disciplinary board was pursued outside the 28 day period in s 8(1) of the University statute. That section provides that a "decision-maker" must not proceed against a student unless an allegation notice has been given to the student within 28 days of the facts necessary to establish misconduct first coming to the notice of a "decision-maker". The Chief Justice held that the applicant had not established that the hearing was more than 28 days after the facts necessary to establish misconduct first came to the notice of the disciplinary board.[27] The Chief Justice remarked that the evidence on this point was unclear and that had the applicant raised this as a ground in his application the University might have addressed it factually.[28] Presumably it was this remark which the applicant intended to challenge by his general argument that, contrary to s 27 of the *Judicial Review Act*, the Chief Justice erred by not considering an argument because it was not a ground of the application for judicial review. It is apparent, however, that the Chief Justice did consider the argument. His Honour rejected the point because it was based upon the premise that the time limit ran from when notice first came to the attention of any representative of the University, whereas under s 8(1) time ran from when the "decision-maker", the disciplinary board, first learned of the facts. The evidence did not establish any breach of that time limit. In any event the applicant could have advanced this argument in an appeal to the discipline appeals committee. It also has no bearing upon the decision of the Chief Justice to refuse to grant the applicant the extension of time he required to bring an application for judicial review.

[37] In relation to decision (vi), the Chief Justice held that the alleged decision not to provide a transcript of the board hearing could not succeed because the applicant was given the only record that was made of that proceeding.[29] The applicant's argument that he was at one point misinformed about the nature of that record is no answer to the point.

Refusal of adjournment

[38] The applicant argued that there was a miscarriage of justice because he was prevented from adducing evidence in the form of documents produced under a subpoena. The documents are those referred to in the affidavit of Ms Bird which was filed on 7 December 2009. In paragraph [1] of the affidavit Ms Bird deposed that she made the affidavit on the basis of her review of the University's records "relating to the applicant". She then exhibited an indexed bundle of the documents referred to in her affidavit. At the subsequent directions hearing before Byrne SJA on 23 February 2010 directions were made to get the matter ready for a final hearing

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27 *Mbuzi v The University of Queensland* [2010] QSC 153 at [42] to [48].

28 *Mbuzi v The University of Queensland* [2010] QSC 153 at [42], [44].

29 *Mbuzi v The University of Queensland* [2010] QSC 153 at [34] to [36].

set down for 4 and 5 May 2010. The directions required that the applicant file and serve any further affidavit upon which he proposed to rely at the hearing by 15 March 2010.

[39] After that directions hearing the applicant gave notice, purportedly under the *Uniform Civil Procedure Rules* 1999 (Qld), r 222, requiring the respondents to produce the documents referred in paragraph [1] of Ms Bird's affidavit. The University's solicitors replied on 17 March 2010 that the respondents did not accept that her reference to having reviewed the University's records provided a basis for the applicant to require access to the University's entire records.[30] The applicant's request was denied. He did not pursue it by any application.

[40] Monday 3 May 2010 was a public holiday. On Friday 30 April 2010, the last working day before the hearing, the applicant issued and served upon the respondents a subpoena requiring the production of the "complete records of the applicant held by the University of Queensland" from which Ms Bird prepared her affidavit. At 10 am on the first day of the hearing on 4 May the University had those documents in the court room ready to be produced in accordance with the subpoena. The respondents' counsel noted that the documents produced by the University comprised the University's entire file relating to the applicant. The University allowed the applicant to inspect the documents between 10 am and when the hearing commenced at 12 noon but it was not practicable for the applicant to look at all of the documents in that period. When the hearing commenced the applicant applied for an adjournment so that he would have time to examine the whole of the University's file. The Chief Justice refused the adjournment. After the applicant had adduced the affidavit evidence upon which he relied, he closed his case. When the Chief Justice enquired whether the applicant wished to cross examine Ms Bird the applicant responded that there was correspondence in the University files which he had wished to tender. The applicant did not identify any particular document in that category.

[41] In this Court the applicant referred to his subsequent cross examination of Ms Bird about the documents. In response to the applicant's first question upon that topic Ms Bird said that the applicant had the documents "I think are relevant before you in the affidavit."[31] Subsequently Ms Bird agreed that the reference in paragraph [1] of her affidavit to the University's records relating to the applicant was a reference to his complete University file. The applicant emphasised a subsequent answer by Ms Bird in which she agreed that she found the complete file "relevant in the course of preparing of your affidavit", and the following passage:

> "THE CHIEF JUSTICE: Well, what do you mean by that Mrs Bird? Are you - you mean - do you mean that you found every document in that complete file relevant to the matters in issue here?-- Yes.
>
> Every document?-- Yes.
>
> APPLICANT: Your Honour she has said "yes" to that?-- Well, what I have in my affidavit are the documents, as I said previously, that are relevant to the case.
>
> THE CHIEF JUSTICE: But they're not - they're not all the documents in the file?-- No, they're not."

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30 See *Lilypond Constructions Pty Ltd v Homann* [2006] 1 Qd R 411 at [12] to [15].

31 Transcript 4 May 2010 at 1-32, ln 8.

In further answers Ms Bird made it plain that the documents which she had exhibited to her affidavit were the only ones relevant to the proceeding.

[42] The applicant relied upon Ms Bird's first two answers in the passage quoted above for his submission that she had agreed that every one of the documents produced under the subpoena was relevant to the present proceeding. Reference to the whole passage makes it clear, however, that Ms Bird did not intend to convey that every single document concerning the applicant in the University's voluminous file was relevant to the proceeding. She made it clear that she had selected the relevant documents and exhibited them to her affidavit.

[43] Contrary to one of the applicant's arguments, it could not be inferred from the University's refusal to produce the documents in response to the applicant's notice purportedly under rule 222 that they were prejudicial to the University's case. The applicant also argued that the subpoena only required production of documents relevant to the proceedings, but the subpoena was not limited in that way. It also defies belief that the documents relevant to the proceedings occupied seven or eight large boxes.[32] The applicant was unable to identify the relevance of any particular document, either at first instance or in this Court, even though he accepted that he had inspected the documents in two of the boxes.

[44] The applicant's other arguments on this topic were frivolous. He argued that the Chief Justice erred because his Honour referred to the possibility that the University's complete file might contain "the results of assignments completed by Mr Mbuzi and the like…"[33] The applicant's contention was that doctoral students are not required to carry out "assignments". That contention could not establish error in the relevant conclusion then expressed by the Chief Justice that the voluminous file must contain numerous documents "which could have no conceivable direct relevance to the matters in issue in this proceeding". There is also no substance in the applicant's argument that the Chief Justice "unlawfully" prevented the applicant from adducing evidence obtained through the subpoena or that there was no jurisdiction for the decision. The applicant had been guilty of unreasonable and unexplained delay in issuing the subpoena and there was no ground for thinking that all of the relevant documents were not exhibited to Ms Bird's affidavit.

[45] There was no error in the Chief Justice's discretionary decision to refuse the adjournment sought by the applicant.

Apprehended bias or actual bias

[46] The applicant contended for apprehended bias arising from the Chief Justice's refusal to adjourn the proceedings to enable the applicant to inspect the documents produced under subpoena and from the Chief Justice's questioning of Ms Bird. The test for apprehended bias is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.[34] Apprehended bias is not established

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32 The applicant submitted in this Court that the University produced seven boxes of documents and that he had time to look at the documents in two boxes before the hearing commenced: Appeal Transcript 1 November 2010 at 1-54, ln 18 to 22. In the trial division the applicant informed the Chief Justice that there were "eight huge volumes of documents' and eight "very huge" files: Transcript 4 May 2010 at 1-8, ln 1, and 1-9, ln 14.

33 Transcript 4 May 2010 at 1-18, ln 33.

34 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 per Gleeson CJ, McHugh, Gummow and Hayne JJ at 344, [6].

merely by a ruling adverse to a litigant. The questioning of Ms Bird also did not justify an apprehension of bias. It was appropriate for the Chief Justice to intervene as he did to ensure that the witness did not misunderstand the questions. Those matters provide no support for the applicant's argument. The applicant argued for apprehended bias also on the basis of the applicant's assertions about the Chief Justice's social or political views, but that did not identify a matter that might have led the Chief Justice to decide the applications other than on their legal and factual merits.[35]

[47] The applicant argued that the Chief Justice was biased because the applicant had complained to the Crime and Misconduct Commission, the Attorney-General, and "Chairperson of the Parliamentary Safety and Judicial Committee" about the applicant's allegations that the Chief Justice had involved himself in a separate matter in the Supreme Court in which the applicant "was involved with litigants personally related to [the Chief Justice]". The applicant did not adduce any evidence that provided any support for this complaint. In his written submissions he contended that a factual basis for it was to be found in an attachment to his submissions but the attachment is uninformative. There is no substance in any of these arguments.

Conclusion

[48] The evidence demonstrated that the Chief Justice was correct in holding[36] that there was no foundation for findings that there was any breach of natural justice, failure to follow proper procedures, excess of authority, improper exercise of power, error of law, absence of evidence for the challenged decisions, bad faith or improper motive, or of any officer acting merely as a cipher for others. The application for judicial review could not succeed and it was rightly dismissed for the reasons given by the Chief Justice. The application for leave to appeal from that decision should be refused because the proposed appeal must fail.

Costs

[49] The Chief Justice ordered the applicant to pay the respondents' costs. The applicant argued that a different order was justified because he had a measure of success in that the respondents' application for directions was dismissed. That argument fails for the reason given by the Chief Justice on 19 May 2010. The directions application was dismissed only because it became unnecessary to consider it. The applicant relied also on the measure of success he had in a directions hearing when Byrne SJA declined to deny the applicant the opportunity of cross examining Ms Bird. The Chief Justice did not regard that as substantial because the respondent succeeded in limiting the potential extent of any cross examination by other orders made by Byrne SJA. In any event that issue had little bearing upon the appropriate costs order. The applicant also argued that he succeeded in getting an explanation about the transcripts and he got some belongings back after he had brought his application. However the explanation he was given about the transcripts did not cause him to abandon his proceedings and his application did not seek any order about his belongings.

[50] One of the reasons why the Chief Justice ordered the applicant to pay costs was that, as his Honour concluded, the application for judicial review was vexatious. That

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35 See *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 per Gleeson CJ, McHugh, Gummow and Hayne JJ at 345, [8].

36 *Mbuzi v The University of Queensland* [2010] QSC 153 at [49] to [50].

was a sufficient basis for the order. It is relevant that the applicant was impecunious and the University was relatively well resourced, but it was within the Chief Justice's discretion nevertheless to order the applicant to pay costs. An appeal against the costs order lies only by leave: see s 49(5) of the *Judicial Review Act*. Leave to appeal against that order should be refused.

[51] Despite the applicant's unrepresented status and the disparity in the parties' resources, the applicant should also be ordered to pay the respondent's costs of the application for leave to appeal. That order is appropriate because the proposed appeal was not reasonably arguable. The application for leave to appeal was frivolous and the applicant also conducted it in a vexatious way, making serious but wholly unsubstantiated allegations of impropriety against counsel and judges.

Proposed orders

[52] The application for leave to appeal should be refused with costs.

[53] **McMEEKIN J:** I have read and agree with the reasons of Fraser JA and the order that his Honour proposes.