**REPUBLIC OF SOUTH AFRICA**

**IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

**JUDGMENT**

Reportable/ Not Reportable

Case no: D1141/11

In the matter between:-

**PRUSHOTHMAN SUBRAMONEY PILLAY** **Applicant**

and

**COMMISSIONER FOR CONCILITIAN, MEDIATION AND ARBITRATION** **First Respondent**

**DR. HILDA GROBLER N.O** **Second Respondent**

**UNIVERSITY OF KWAZULU-NATAL** **Third Respondent**

**Heard:** **16 July 2014**

**Delivered:** **28 October 2014**

**Summary:**

**Procedural aspect of dismissal- An anonymous complaint lodged by employees against fellow employee- Management escalated matter to investigative committee- Employee lied under oath to investigative committee on peripheral issue- Committee's recommendation that employee be reprimanded-**

**Recommendation put before Council for conformation or rejection- Council voted to dismiss employee- matter send up to second inquiry- council voted to dismiss employee- matter send to disciplinary inquiry- Arbitrator found that the trust relationship broke down and employ to be dismissed- Employee not given an opportunity to present mitigating factors at hearing- Non-compliance with Code of Good Practice- Employer not complying with procedural fairness no separation of powers- witnesses allowed to vote on council resolution to dismiss employee- the ten golden rules of procedural fairness discussed.**

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**JUDGMENT**

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FOUCHÉ, AJ:-

Introduction

[1] This is an application in terms of Section 145 of the Labour Relations Act ("LRA") 66 of 1995, to review and set aside the amplified award KNDB11631-07, where the Second Respondent ("Commissioner Grobler") held that the dismissal of the Applicant was procedurally fair, alternatively, to correct the arbitration award of the first Respondent dated 18 October 2011. The review before me deals only with the procedural fairness of the dismissal of the Applicant. Van Niekerk J found on 1 September 2013 that the dismissal was substantively, but not procedurally fair and ordered that:-

> '2. The matter is remitted to the second respondent. The second respondent is directed to determine whether the applicant's dismissal was procedurally fair'.

[2] The First Respondent issued the amplified award on 1 October 2011. The Applicant was represented during the arbitration hearing by Attorney Denny.

After receiving the outcome of the Arbitration hearing, the Applicant noted the application for review to the Labour Court on 12 December 2011.

[3] The Respondent opposed the matter on 20 December 2011. The Answering Affidavit was filed on 20 January 2014.

[4] The application for review had to be noted within 6 weeks after the amplified award was handed down. The Applicant noted the Application for review four days late. Applicant sought condonation for the late noting of the application for review at this Court. After hearing both parties, condonation was granted.

Relief sought

[5] In the Applicant's Founding Affidavit, the following relief is sought:-

> '1. the applicant's late filing of the applicant's application for review, be and is hereby condoned;
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> 2. The arbitration award issued by the First Respondent, acting under the auspices of the Second Respondent on 18 October 2011, under case number KNDB 11631-07, be and is hereby reviewed and set aside, *alternatively*, corrected with a finding that the dismissal of the Applicant was procedurally unfair and the Third Respondent be ordered to pay compensation to the Applicant equivalent to 6 months remuneration, *alternatively*, such compensation as the above Honourable Court deems appropriate;
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> 3. In the event of the above Honourable Court not substituting the award with the prayer sought in paragraph 2 above, the above Honourable Court make such order as to the further conduct of the matter as the above Honourable Court deems fit;
>
> 4. The Respondent to pay the costs of this application, in the event of their opposition thereto.'

[6] In the Answering Affidavit, the Third Respondent prayed that the Application for review be dismissed with costs.

Grounds of review

[7] The Applicant did not list the grounds of review together in the Founding Affidavit. From the reading of the Founding Affidavit, the grounds of review are as follows:-

[7.1] Firstly, that the Commissioner found there is no need to have a separate hearing on mitigation, neither before Pretorius, nor before the University Council[1];

[7.2] Secondly, that the Pretorius report related only to the breakdown of trust and employment relationship and not to other issues[2].

[7.3] Thirdly, the Council voted on the chairperson's findings and recommendations and not the full report[3].

[7.4] Fourthly, the Bawa and Majid Tribunal reports were placed before the Council. The history of the matter was clear to the Council[4].

[7.5] Fifthly, Dr. Mamphai, Prof Makgoba and Prof Mia testified at the Majid Tribunal and Pretorius inquiry, and subsequently voted at the Council with other Council members, to dismiss the Applicant[5].

[7.6] Sixthly, the Council based the vote to dismiss the Applicant, on the Pretorius report[6].

[7.7] Seventhly, the process and procedures applied by the Council in voting to dismiss the Applicant was irregular and unfair[7].

[7.ii] The grounds for review set out in Section 145 of the Labour Relations Act are:-



[1] Paragraph 7.1 of the Founding Affidavit.
[2] Paragraph 7.2 of the Founding Affidavit. Paragraph 24.3 of the Amplified award.
[3] Paragraph 7.3 of the Founding Affidavit. Paragraph 24.4 of the Amplified award.
[4] Paragraph 7.4 of the Founding Affidavit. Paragraph 56 of the Amplified award.
[5] Paragraph 7.5 of the Founding Affidavit. Paragraph 56 of the Amplified award.
[6] Paragraph 7.7 of the Founding Affidavit. Paragraph 58 of the Amplified award.
[7] Paragraph 8.3 of the Founding Affidavit.

'(1) any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-

(a) within six weeks of the date that the award was served on the applicant

(2) a defect referred to in subsection (1) means-

(a) that the commissioner-

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

(b) that an award had been improperly obtained'.

Facts

[8] On 1 September 2011, my brother Van Niekerk J, issued the following order in matter D302/08, in respect of the substantiveness of the Applicant's dismissal:-

'1. The arbitration award issued under case number KNDB 11631-07 is reviewed, to the extent that it is declared that the second respondent committed a reviewable irregularity by failing to determine whether the applicant's dismissal was procedurally fair;

2. The matter is remitted to the second respondent. The second respondent is directed to determine whether the applicant's dismissal was procedurally fair;

3. In the event that the second respondent determines that the applicant's dismissal was procedurally unfair, the second respondent is directed to make an appropriate order for compensation;

4. The determination referred to in paragraphs 2 and 3 of this order must be made within 30 days of the date of this order;

5. The third respondent is to pay 50% of the costs of these proceedings such costs include the engagement of two counsel.'

[9] The Applicant was employed as an associate Professor and the Chief Financial Officer (CFO) at the Third Respondent. Applicant was a MCOM student at the Third Respondent, had successfully completed the course work, but not the mini dissertation. The Applicant completed the mini dissertation shortly before the April 2006 graduation and graduated during the April 2006 ceremony.

[10] The matter before this Court emanated from an anonymous email which the Third Respondent received on 31 July 2006. The subject matter of this anonymous email reads: "Concern regarding award of postgraduate degree to Professor Pillay". It states clearly that the email was sent by a group of concerned academics in the Faculty of Management studies[8], wherein the Applicant was an Associate Professor. Significant aspects of this email reads as follows:

> 'We are……deeply perturbed by the recent award of a Master's degree to a member of the University Executive, Professor Kanthan Pillay, when the decision was not supported by external examiners.
>
> …the award of postgraduate degrees, such as Master's or a Doctorate degrees, is subject to the approval of the external examiners…More specifically we would like to know why the Dean(Professor Msweli-Mbanga) and the Deputy Dean(Professor Tewari) connived to overrule the opinion of external examiners and awards the degree to Professor Pillay.
>
> Unfortunately, such is the atmosphere of distrust and victimisation in the Faculty that we have no option but to remain anonymous'

[11] On or about 10 August 2006, the Deputy Vice Chancellor, Professor Bawa, were tasked to respond to the anonymous email. He requested information from Professor Garach(School of Accounting), Professor Mitchell(School of Accounting), Professor Msweli-Mbanga(Dean- Faculty Management studies), Professor Tewari(Deputy Dean- Faculty Management studies) in respect of the MCOM degree which was awarded to the Applicant[9].This culminated in the Magid Tribunal, where the applicant was questioned on the amount money

[8] See: Internet Fundi "Concern regarding award of postgraduate degree to Professor Pillay", sent from Internet Fundi<internetfundi@yahoo.com>, date of email is 31-07-2006 11:47:16. Available in File 1 under case number D302/08, as "A" on page 123 under Case number D302/08, the prior application wherein the substantive fairness of the dismissal came under review.

[9] File 1 Pages 127-134.

advanced to Prof Msweli Mbanga and obtaining the MCOM degree. Prof Msweli-Mbanga was the promoter of this dissertation.

[12] A meeting ensued on 17 November 2006 with regard to the conferring of the MCOM degree to the Applicant. The Magid tribunal made a report, and found that the Applicant had lied under oath about his relationship Prof Msweli-Mbanga. On the other hand, he played no role in the evaluation of the mini dissertation for the MCOM degree. This Magid finding was put before the Senate for a resolution on the confirmation or rejection thereof. Professors Bawa, Makgoba and Tewari were involved in testifying before the Magid tribunal. Applicant submitted that Professors Bawa, Makgoba and Tewari should not have taken part in the rejection or acceptance of the Magid finding. Accordingly, Professors Bawa, Makgoba and Tewari should have recused themselves from the Council hearing as ethical and good governance principles preclude them from voting on the adoption of the Magid Report[10].

[13] Post the Magid report, a new investigation process ensued in the form of the Bawa Commission. The aim was to request the Applicant to answer to posed questions in respect of his MCOM degree[11]. This request was dated 6 November 2006 and it contained the following warning:

> 'It is necessary to stress to you that a refusal by you to answer these questions or a failure to answer them fully and accurately would be inconsistent with your obligations to your employer. This may then lead to disciplinary action being taken against you'.

[14] At a subsequent council meeting, the Council voted to dismiss the Applicant, following the Magid tribunal[12]. Subsequent to the Bawa commission on the conferment of the MCOM degree, the Council resolved to call the Applicant to a disciplinary enquiry. Adv. Pretorius SC was instructed to chair the disciplinary hearing. The charges proffered against the Applicant, are contained in File 2

[10] File 1 Page 207.
[11] File 1 pages 178-179.
[12] See File 3, Case number 320/08, D19; D23 item 19.

pages 401 and 402. On 1 February 2007, the Applicant received the notice to attend a disciplinary inquiry ("the Pretorius hearing") scheduled for 1 February 2007. The disciplinary enquiry ensued on 8 February 2007[13].

[15] The Pretorius report found the Applicant guilty of the stated charges. It recommended that the Applicant be dismissed from the position of CFO and as Professor at the University. It held that the trust relationship between the Applicant and the Third Respondent was severed[14]. The finding of the Pretorius report was placed before the Council of the University for authorization. Some of the persons who testified before the Magid Tribunal, the Bawa Inquiry and the Pretorius disciplinary inquiry, partook in this authorization of the decision to dismiss the Applicant. Dr Maphai(the Chairperson of the Senate), Prof Mazibuko(Acting Vice Chancellor) were witnesses before the Magid Tribunal[15]. The Applicant's submitted that as a result of their prior participation the dismissal was procedurally unfair. Accordingly, that the applicant's dismissal was not properly authorised and was substantially unfair.

[16] The Adv. Pretorius (SC) disciplinary enquiry did not hear or call for evidence in mitigation from the Applicant. It is clear that the Applicant was not given an opportunity to present evidence in mitigation[16].Item 4(5) of Schedule 8 of the Code of Good Practice requires the commissioner, before imposing the penalty, to give the employee the opportunity to submit mitigating circumstances, such as the length of service, previous disciplinary record, personal circumstances, the nature of the job and the circumstances of the infringement to the disciplinary committee[17].



[13] File 2 pages 399-402.
[14] Pretorius report Annexure "C" in case number D320/08 at paginated pages 26-83.
[15] See Case number D320/08 Volume 1 pages 272-274; Volume 1 pages 278-279; Magid Report File "D" pages 42 para 8.10 and 57 para 17.10. See also: Magid Tribunal pages 365-394; File 2 under case number D 320/08.
[16] See Annexure "C" to File 2 on pages 82-83.See also: *Sikhosana and Others v Sasol Synthetic Fuels* (2002) 21 *ILJ* 649 (LC).
[17] See *JD Group Ltd v De Beer* (1996) 17 *ILJ* 1103 (LAC); *Khoza v Gypsum Industries Ltd* [1997] 7 BLLR 857 (LAC); *Eddels SA (Pty) Ltd v* Sewcharan and Others (2000) 21 *ILJ* 1344(LC); *Nyembezi v NEHAWU* 1997 1 BLLR 94 (IC).

[17] The Pretoruis report records that the witnesses at the Magid Tribunal were not subjected to cross examination[18]. The Applicant had a legal representative present at the first day of the Magid hearing. The record reflects that Magid J stated that:-

> 'This is not the sort of case where one takes the 5th or pleads that he doesn't want to answer because it may incriminate him, because I can't imagine any question of incrimination arising.'[19]

[18] The Magid tribunal was not a disciplinary inquiry into the Applicant's conduct. It only dealt with Applicant's registration and studies for the MCOM degree[20].

[19] Mr Mia (Vice Chair of the Council) testified at the disciplinary enquiry held by Pretoruis(SC). Prof Makgoba (Vice Chancellor of UKZN) testified he had a conversation with the Applicant about the relationship with Prof Msweli-Mbanga and the amount advanced to Prof Msweli-Mbanga[21].

[20] Dr. TV Mamphai (Chair of the UKZN Council), Mr Mia and Prof Makgoba testified at the Pretorius disciplinary inquiry and Prof MW Makgoba partook in the Council process to oppose the Pretoruis findings[22].

[21] On 16 January 2007, after the results of the Magid Tribunal was communicated to Council, the Council comprising of Dr. Mamphai and Prof Mazibuko, decided to(resolve to) dismissing the Applicant[23]. This decision was taken mainly due to the Applicant's actions, his senior position, the impact of the lie and controversy surrounding the awarding of the MCOM degree.

<u>Submissions of the Parties</u>



[18] Para 19 paginated page 39 of the Pretoruis report- Exhibit "C" 'n Case number D320/08.
[19] Pretorius report para 22.
[20] Pretorius report paras 23, 25, 26 and 27.
[21] Pretorius report para 80 on paginated page 66 of the Pretorius report.
[22] Pages 84-85 of Annexure "C" to Case number D320/08.
[23] Transcript Volume 1, page 44 Lines 16-25; page 45 lines 1-7 to Case number D320/08.

[22] The Applicant submitted that a conflict of interest occurred in one or more of these inquiries, which necessitated the recusal of Mr Mia (Vice Chair of the Council), Prof Makgoba (Vice Chancellor of UKZN) and Dr TV Mamphai (Chair of the UKZN Council). Applicant referred this Court to Section 17[24] of the Statute of the University of Kwazulu-Natal[25], and stated that due to conflict of interest that these three persons should not have been allowed to vote during the Council meeting in this matter.

[23] The Applicant submitted that the Pretorius findings were biased. The gravamen of the Applicant's submission is that he was not called at the disciplinary enquiry to testify in mitigation. He submitted it was procedurally unfair not to call him to testify[26]. Applicant submitted that the holding the disciplinary enquiry was procedurally unfair as the double jeopardy rule applies. Grogan[27] opines on double jeopardy that:-

> 'An essential requirement of the double-jeopardy rule is that the charges against the employee in the second hearing are the same as they were in the first. This does not mean, however, that the employer can simply redraft the charges in different form. The true test is whether the charges relate to the same cause of action (i.e the same alleged misconduct).'[28]

[24] The Applicant submitted that the Pretorius finding, with the exception that the Applicant told a lie in respect of the R 80 000.00 loan to Prof Msweli-Mbanga should have been disregarded by the First Respondent. The Third Respondent's disciplinary code comprises of schedule 8 of the LRA and prescribes that an employee should be informed of the charges proffered against them and be given an opportunity to refute the decision taken. Clause 57 of the Standard Institutional Statute published as a Regulation to the Higher Education Act 101 of 1997, forms part of the terms and conditions of the Applicant's employment

[24] Pages 11 and 12 of File 1(under case number D302/08) dealing with the substantive fairness.
[25] Available in GG No 29032 GN 684, dated 14 July 2006.
[26] See Founding Affidavit paragraph 24 paginated pages 62-63.
[27] Workplace Law Page 202.
[28] See *Breugem v De Kock NO and Others* (2006) 27 *ILJ* 2352 (LC).

agreement. Non- compliance with clause 57 makes the dismissal procedurally unfair and unlawful[29]. The Applicant submitted that he was not given an opportunity to present mitigating factors to Pretorius, hence the biased outcome.

[25] The Applicant submitted that the persons who testified against him at the Pretorius disciplinary enquiry, is the same persons who authorized his dismissal. Hence his dismissal was unfair as these persons partook in two different capacities during the dismissal proceedings. Accordingly, the involvement of Dr Maphai, Mr Mia and Prof Makgoba should have been excluded in the determination process to accept or reject the Pretorius recommendations[30]. Manifestly, it was contended that the arbitrator failed to consider three aspects, being; the impact of the involvement of Dr Mamphai, Mr Mia and Prof Makgoba during the council meeting, the legal application of the legal framework and disciplinary codes of the Third Respondent.

[26] Applicant submits that he lodged an Appeal against the Pretorius finding. The Appeal was lodged one day out of time as he was hospitalized. The Third Respondent was not prepared to grant condonation for the late filing of the Appeal. Applicant submits this makes the dismissal unfair.

[27] Applicant submitted he was denied a fair hearing and the rules of natural justice during the Arbitration. This resulted in the First Respondent's failure to hear the Applicant on mitigation. A gross irregularity was thus committed by the arbitrator in the capacity as arbitrator[31]. The arbitrator allegedly also failed to hold the hearing *de novo* and determine the substantive charges proffered against the Applicant. The First Respondent found the Applicant guilty at the disciplinary enquiry without allowing the Applicant the opportunity to advance evidence in mitigation[32].



[29] See: *Denel (Pty) Ltd v Vorster* (2004) 25 *ILJ* 659 (SCA).
[30] See: Case No D320/08 Volume 3 Transcribed record page 57 Lines 18-22.
[31] See: *Toyota SA Motors (Pty) Ltd v Radebe and Others* (2000) 21 *ILJ* 340 (LAC) at para 51.
[32] See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 *ILJ* 2405 (CC) paras 266 and 267.

[28] The Applicant submitted that the parties agreed before the Commissioner that the documents used by the Third Respondent are what they purport to be. This was erroneously construed by the Second Respondent as an agreement by the parties to admit into evidence all the evidence lead at the disciplinary inquiry, including the Transcript. Applicant stated that the admission of the Transcript is submitted a gross procedural irregularity. The Applicant argued that the arbitration hearing was to be a *de novo* hearing and the prior findings and reports should not constitute evidence before the Second Respondent[33].

[29] Applicant submitted that the Second Respondent was only entitled to consider the evidence before her and the contents of documentation introduced through witnesses appearing arbitration hearing. The Applicant poses the following submissions justifying the setting aside of the award, pursuant the Court order of 1 September 2011 being:-

[29.1] The Council acted irregularly in dismissing the Applicant on 16 January 2007 without affording the Applicant the opportunity to respond to the allegations of misconduct;

[29.2] The Council failed to apply a fair process by not excluding Dr Maphai, Prof Makgoba and Mr Mia's attendance from the Council meeting. All three of these persons were witnesses at the Disciplinary Enquiry, but was present and voted in the Respondent's Council meeting of 31 August 2007, wherein Applicant was ultimately dismissed;

[29.3] The Third Respondent failed to comply with the Code of Good Practice in dismissing the Applicant;

[29.4] The failure to hear evidence from the Applicant in mitigation of the sanction, renders the Applicant's dismissal procedurally unfair;

[33] See Transcript under Case D320/2008 Volume 1 page 54 Lines 18-23; Page 55 Lines 3-9; Page 81 Lines 9-14 and Volume 2 Page 83 Lines 9-11.

[29.5] The Applicant's dismissal was procedurally unfair as the Third Applicant in the disciplinary enquiry and the Magid Committee was represented by a Senior Advocate and Senior Attorney, whilst the Applicant was refused similar representation;

[29.6] The refusal of the Third Respondent's to hear the Applicant's application to Appeal against the dismissal, was procedurally unfair;

[29.7] The hearing before Pretorius SC constitutes double jeopardy as all allegations against the Applicant had been investigated by the Magid Tribunal who made findings and recommendations.

[30] Applicant submitted that the Vice Chancellor was biased in disputing the recommendations of the Bawa Committee and subsequently moving the motion to dismiss the Applicant. The Vice Chancellor was a witness in the Applicant's Disciplinary enquiry, and also decided the ultimate sanction following the disciplinary enquiry, which makes it procedurally unfair.

[31] During the arbitration hearing, Mr. Mia admitted that he was under the mistaken impression that the Applicant's relationship with Prof Msweli-Mbanga was connected to the awarding of the MCOM degree to the Applicant[34].

[32] The Applicant stated that the Magid Tribunal recommended that Applicant be reprimanded. Applicant alleges all evidence was placed before the Magid Tribunal. No new or substantially different evidence emerged thereafter. Accordingly, the Respondent departed from the double jeopardy rule, by holding a further enquiry into the same misconduct of the Applicant. The Magid Tribunal made a finding, imposed a sanction. The subsequent Pretorius findings, renders the Applicant's dismissal procedurally unfair. The Vice Chancellor mooted that Applicant be dismissed. Third Respondent did not take an objective and unbiased decision as to the appropriate sanction.

[34] Arbitration Record Volume 1 page 65 Lines 1-7; page 66 Lines 13-17 and page 67 Lines 14-17.

[33] The Respondent submitted that in accordance with *SAMWU obo Mahlangu v SALGBC and Others*[35] a chairperson is mandated to recommend a sanction, but the employer steps into the chairperson's shoes to take the final decision and to implement the decision. The decision by the Third Respondent is accordingly correct and should be upheld.

[34] The Respondent submitted that the Council decided on the dismissal of the Applicant, which is the same sanction as recommended by Pretorius. No evidence of the Applicant is thus required as the same sanction was handed down. Furthermore, Prof Makgoba, Dr Mamphai and Mr Mia based their vote to dismiss the Applicant on the Pretorius findings and not the Bawa or Magid Tribunal. Manifestly, this contention conforms with the Award.[36]

[35] The Respondent submits that the participation of the Prof Makgoba, Dr Mamphai and Mr Mia in the decision making process, and voting as Council members on this issue does not constitute procedural unfairness. The gravamen of the Respondent's contention is that the process giving rise to the dismissal of the Applicant was procedurally fair. The Applicant was afforded the rules of natural justice and procedural fairness.

<u>Evaluation of the evidence</u>

[36] An anonymous email gave rise to the Bawa inquiry into the Applicant's MCOM degree and Bawa report. This anonymous email records that victimisation had occurred at the University (Third Respondent) hence the anonymity of the email complaint[37]. The Third Respondent took the decision to dismiss the Applicant on the basis of the Magid tribunal before the Disciplinary Enquiry[38].



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[3535] LC Case no JR2595/2009 date of judgment 21 June 2011.
[36] Paragraph 58 of the Award on paginated page 43.
[37] Case D320/08 File 1 page 123.
[38] See Magid Report File "D" page 42 at para 8.10 and page 57 para 17.10. See also: *Olivier v University of Venda* (2000) 5 LLD 395 (HC).

[37] The Council of the Third Respondent confirmed the finding of the Magid report on 31 August 2007. This report consisted of the testimony of Mr Mia, Dr Maphai and Prof Makgoba. This report examined if the Applicant obtained the MCOM degree fraudulently. These three persons also partook in the subsequent decision of the Council to adopt the recommendation of the Pretorius inquiry.

[38] The Third Respondent charged the Applicants with the following counts:-

> ‘(a) You gave evidence under oath before the Magid tribunal which that tribunal found to be untruthful.
>
> (b) the evidence that you gave before the Magid tribunal which has been transcribed supports the findings of the tribunal that such evidence was untruthful and it was in fact dishonest and untruthful in relation to:-
>
> (i) the nature of your relationship with Professor Msweli-Mbanga;
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> (ii) the amount of money that you paid to Professor Msweli-Mbanga;
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> (iii) what was said by you and Professor Msweli-Mbanga in meetings that you had together with Professor Mazibuko;
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> (iv) what was said by you in a meeting you had with the Vice-Chancellor;
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> (v) what was said by you to the Chairperson of Council; and
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> (vi) what was said to Richard Pemberton over a speakerphone in the presence of Brian Leslie.
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> (c) You were aware of the irregularities relating to your registration effected to enable you to graduate in 2006 when you had not been a registered student in 2004 and 2005 and your dishonesty allowed the registration to be backdated.
>
> (d) The Council of the University has resolved that in the light of findings of the Magid Tribunal that you should be dismissed with immediate effect on the basis that the employment relationship has broken down completely by reason of your conduct.’

[39] A procedural irregularity occurred when the Council resolved to adopt the Pretorius recommendations, and the failure to afford the Applicant an opportunity to make submissions on mitigations, subsequent to finding the Applicant guilty at the disciplinary enquiry. Applicant averred that the Third Respondent’s Council failed to give the Applicant an opportunity to make personal representations to

the Council prior to the council finding of 31 August 2007[39]. The Applicant stated that the rules of natural justice were not complied with as the Applicant was not afforded an opportunity to make submissions on mitigating factors during the disciplinary enquiry.

[40] Applicant submitted that the Minister of Higher Education ought to have set up a small sub-committee, alternatively, a nominee to deal with the involvement of the Council members in the dispute and their testimony at the arbitration[40]. This stems from the Council's alleged failure to consult with the Senate which is accountable for the University's academic staff, which should take place prior to the decision to dismiss the Applicant[41]. The head of the Third Respondent's Convocation, Young, testified that in his view the Third Respondent embarked on a series of processes designed to dismiss the Applicant[42].

[41] The Third Respondent placed the following evidence before the Second Respondent at the Arbitration hearing:-

(a) The Record of the Applicant's disciplinary enquiry is that what it purports to be;

(b) The transcript of the Applicant's disciplinary enquiry is an accurate reflection of what transpired in the disciplinary enquiry;

(c) The evidence of Mr Mia who merely confirmed that the Council decided to summarily dismiss the Applicant without affording the applicant the opportunity of addressing the council on the appropriate sanction after receipt of the Pretorius findings;



[39] Case no D320/08 Volume 3 page 49 Lines 16-25.
[40] Case D320 Transcribed Record Volume 2 page 98 Lines 23-25; Volume 3 page 99 Lines 1-9; Section 34(2) Higher Education Act 101 of 1997 read with Clause 8(1)(d) of the Standard Institution Statute.
[41] Clause 8(1)(d) of the Standard Institution Statute. See also: *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 *ILJ* 1051 (LAC).
[42] Case no D320/08 Transcribed Record Volume 3 page 12 Lines 3-4; page 14 Lines 5-6; Page 15 Lines 9-15; page 17 Line 11-15.

(d) The Third Respondent elected not to call the remaining witnesses who gave evidence at the Applicant's enquiry.

[42] The Second Respondent had to hand down the amended award within 30 days from 1 September 2011. The amended award was handed down on 18 October 2011, thus 17 days beyond the period. No condonation is sought by the Respondent for this delay[43].

[43] The Applicant stated in paragraph 12 of the Founding Affidavit that the arbitrator recorded the Applicant's challenges to procedural fairness in paragraphs 9.1 and 9.2 of the amended award. The procedural challenges raised by the Applicant, exceeds the grounds recorded by the arbitrator in paragraphs 9.1 and 9.2 of the amended award[44]. The Respondent responded[45] that the Applicant's procedural challenge is not clearly recorded in the Founding Affidavit. It added that it is impossible for the Third Respondent to address these challenges as the dismissal followed the recommendation the Magid finding to dismiss the Applicant. The Council did not consider or reconsider the matter on an unbiased manner. The Council unanimous dismissal of the Applicant following the Pretorius report is irregular as the no fair procedure was followed.

[44] The Applicant submitted in the Founding Affidavit[46] that the First Respondent had to determine the issues set out in paragraph 11(paragraph 4.2.1) as opposed to only applying her mind to the issues set out in paragraph 11, subparagraph 4.2.2. The First Respondent had to consider if the Council of the Third Respondent had an unbiased mind when resolving to dismiss the Applicant on 31 August 2007, subsequent to the council vote of 16 January 2007 to dismiss the Applicant.

[45] The Applicant submitted in the Founding Affidavit[47] that the First Respondent failed to deal with aspects of bias. The Arbitrator stated in the award that the

[43] See Replying affidavit para 29 page 85; Founding Affidavit para 11 page 57. See also: paragraph 11 of the Founding Affidavit page 57.
[4444] See Founding Affidavit para 12 pages 57-58.
[45] See Answering Affidavit para 30 page 85.
[46] See Founding Affidavit para 14 page 58
[47] See Founding Affidavit para 15 page 58.

Council meeting only considered and voted on the chairperson's findings and recommendations regarding the sanction and not the merits of the matter. Applicant submitted that the methodology applied by the Arbitrator is not consistent with the evidence before the Arbitrator. The Third Respondent responded that Council members bring out a vote which is amassed as a council resolution. There is no proof that these three individual votes articulated in the resolution[48]. Significantly, the Third Respondent submitted the Council does not have a procedure where Applicant could be invited to make further representations to the Council. Third Respondent stated that:

> '34. In addition there is no process for Applicant to give evidence or make further representations to the Council and it would be quite inappropriate a forum in which to do this. Applicant had his opportunity to present his case before Pretorius SC and, in this instance it was common cause that he was indeed guilty of gross dishonesty in the form of perjury before a University Tribunal.'[49]

[46] The Applicant stated that the Third Respondent did not comply with the Third Respondent's Code of Good practice or the Higher Education Act[50]. Third Respondent denied these allegations and stated the Applicant was given an opportunity to provide mitigating factors to the Pretorius inquiry during the evaluation of the merits stage of the dispute[51]. This statement is incorrect. It is clear that the Applicant was not granted the opportunity to advance mitigating factors following the guilty finding.

[47] The Applicant submitted[52] that on 16 January 2007 and, after the results of the Magid Report were communicated to the Council, the Council resolved to dismiss the Applicant. No notification was given to the Senate, to interject in this process. The Applicant submitted that the Senate should have been notified as the Applicant served as an Associate Professor at the Third Respondent. The

[48] See Answering Affidavit para 31 page 85.
[49] See Answering Affidavit para 34 page 86.
[50] See Founding Affidavit paras 18-19 pages 59-60.
[51] See Answering Affidavit para 38 pages 88-89.
[52] See Founding Affidavit para 21 pages 60-61.

Applicant submitted that the basis for requiring the intervention of the Senate in the dismissal were as follows:-

> ‘(i) severity of my actions
>
> (ii) my senior position
>
> (iii) the fact that I allegedly lied on many instances
>
> (iv) I was fully aware of what was transpiring in respect of my registration and other irregularities
>
> (v) in light of the aforegoing it was unacceptable for me to continue in his position in the University Executive, Chief Financial Officer of the Institution
>
> (vi) the controversy surrounding the awarding of the degree had caused serious damage to the University”[53]

[48] Applicant submitted that the Third Respondent dismissed him on the basis of the Magid Committee, which took place before the disciplinary enquiry. The Magid Committee recommended that the Applicant be reprimanded and not dismissed[54]. The Third Respondent’s disciplinary code comprises Schedule 8 of the LRA, which prescribes that an employee must be informed of the charges proffered against him, and be given an opportunity to refute same, before the decision affecting the employee is made. Clause 57 of the Standard Institutional Statute[55] forms part of the terms and conditions of the Applicant’s employment agreement. According to the Applicant, the Third Respondent violated Schedule 8 and the Standard Institutional Statute.

[49] The Third Respondent conceded that some Council members testified before the Magid Tribunal[56]. The Council resolution[57] in Annexure “PF1” recommended that the Applicant be dismissed. Dr T V Maphai was the chairperson of this Council meeting. Mr. Mia was present at this meeting and Prof MW Makgoba was absent from this meeting. Subsequent to this Council meeting, charges were formulated

[53] Case D320/08 Transcribed Record Volume 1 page 44 Lines 16-25 to Page 45 Lines 1-7.
[54] See Founding Affidavit para 22 page 61.
[55] See Founding Affidavit para 23 page 62.The Standard Institutional Statute was published as a Regulation to the Higher Education Act 101 of 1997.
[56] See paragraphs 21, 22 and 23 of the Applicants Founding Affidavit and paragraph 39 of the Third Respondents Answering Affidavit at pages 89-90.
[57] See Page 395- 396 File 1 under D320/2008.

with which the Applicant was charged at the Pretorius Disciplinary Enquiry. Mr Mia, Dr Maphai and Prof Makgoba participated in the council's decision of 31 August 2007 to dismiss the Applicant[58]. Manifestly, the Third Respondent alleged that Mr Mia, Dr Maphai and Prof Makgoba[59] had to participate in the Council decision as they are Council members and the full Council participated in these meetings, including Mr Mia, Dr Maphai and Prof Makgoba. Mr Mia, Dr Maphai and Prof Makgoba formed a preconceived view of the Applicant's guilt on 16 January 2007[60] based on the alleged irregular award of the Applicant's MCOM degree and the Code of Good Conduct as incorporated in the Third Respondent's disciplinary code[61]. Applicant submitted that the involvement of Dr Maphai, Mia and Prof Makgoba made the Applicant's dismissal procedurally unfair[62]. Mia testified before First Respondent that he was unaware that Prof Makgoba was informed by Applicant of facts pertaining to the loan to Prof Msweli-Mbanga. First Respondent found that the Council by virtue of the reports serving before it, was fully aware of the history of this matter[63]. Mia testified before the First Respondent that if he knew Makgoba was aware of the truth, he would have changed his view on this matter[64].

[50] The Council failed to apply due process prior to adopting the resolution to dismiss the Applicant. The Council ratified the Pretorius finding, without considering the rules of natural justice and fair process. Council indeed decided on 16 January 2007 to dismiss the Applicant, subsequent to the BAWA Commission[65]. The Third Respondent replied that Council does not have a mechanism to hear disciplinary inquiries[66]. It was procedurally unfair that the Pretorius disciplinary enquiry failed to give Applicant the opportunity to produce

[58] See Answering Affidavit para 44 pages 90-91 in response to Founding Affidavit paras 24, 25, 33,34,35 and 36. See also: Annexure "PF5" attached to the Answering Affidavit pages 108-109.
[59] See Founding Affidavit paragraph 24 pages 62-63.
[60] See paragraph 33 of the Founding Affidavit on paginated page 6.
[61] Volume 3 Transcribed Record page 57 Lines 18-22; paragraph 33 of Founding Affidavit page 68.
[62] Paragraph 34 of the Founding Affidavit paginated pages 68-69.
[63] See paragraph 35 Founding Affidavit paginated page 69.
[64] See paragraph 36 Founding Affidavit paginated page 69. See also: Case number D 320/08 Volume 1 transcribed record page 77 Lines 1-14.
[65] See Founding Affidavit para 27 paginated page 64.
[66] See Answering Affidavit para 51 paginated page 93.

evidence or arguments in mitigation[67]. In juxtaposition, the Third Respondent submitted there was no need to submit character evidence before the Pretorius commission as the Magid tribunal and Bawa commission, heard character evidence pertaining to the Applicant. The papers before the Court reflect that the Applicant was highly regarded by the University[68]. The Third Respondent stated that Pretorius believed that it was unnecessary to request mitigating factors or evidence from the applicant pertaining to mitigation[69]. Third Respondent accordingly submits mitigating evidence was not required and the contention was correctly dismissed[70]. The Third Respondent's submission is untenable. At all times character evidence must have been called for.

[51] On behalf of the Applicant, Young stated that Third Respondent embarked on a series of processes to dismiss the Applicant[71], whilst the Third Respondent stated that Young gave no evidence confirming a procedural unfairness[72]. The gravamen of the Applicant's argument is that the evidence before the First Respondent was based on the circumstances of the lie as opposed to the fact of the lie itself. Third Respondent contended that the evidence in respect of the loan to Prof Msweli-Mbanga was material and destroyed the trust relationship vis-à-vis the Third Respondent and the Applicant. Young's evidence was that neither Applicant nor Msweli-Mbanga had any control over the appointment of external examiners for the MCOM degree[73]. Third Respondent left the Young submission unchallenged[74]. The Applicant testified that he was victimised at work. Pretorius



[67] Para 26 of the Founding Affidavit paginated page 63.
[68] See Answering Affidavit para 48 paginated page 92.
[69] See Answering Affidavit para 49 paginated page 92.
[70] See Answering Affidavit para 50 paginated page 93.
[71] See Founding Affidavit para 32 paginated page 67. See also Case number D 320/08 Transcribed record Volume 3 Lines 3-4; Page 12 Lines 13-17; p14 Lines 5-6; page 15 Lines 9-15; Page 17 Lines 11-15; page 49 Lines 24-25; Page 50 Lines 1-5 and Page 51 Lines 9-22.
[72] See Answering Affidavit para 55 paginated page 94-95.
[73] See Section 29 of the Founding Affidavit paginated page 65-66; Transcribed Record Volume 3 page 49 Lines 16-25; page 51 Lines 1-22; Page 50 Lines 2-4, 14-18, 21-25; page 51 Lines 1-2. Volume 1 page 64 Lines 20-28; Volume 1 page 68 Lines 18-21; Volume 1 page 69 lines 1-4; page 72 lines 19-27; page 73 lines 1-10; page 74 lines 1-22; page 76 lines 5-8.
[74] See paragraph 52 of the Answering Affidavit paginated page 93.

rejected this statement, yet the anonymous email which caused this matter to unfold, spoke of victimization in the faculty[75].

[52] Applicant contended that the Third Respondent should have created a sub-committee to address the involvement of council members in this dispute. Third Respondent in the Answering Affidavit submitted that the Minister's failure to put up a sub-committee does not affect the procedural fairness of the dismissal[76]. Applicant submitted that it was procedurally defective that the Third Respondent failed to include the Senate in this dispute, as the Senate appointed the Applicant as CFO[77]. Third Respondent's submitted that the Senate had no role in this matter as the Applicant was untrustworthy[78].

[53] The failure to invite the Applicant to address the Pretorius Committee on mitigation makes the dismissal procedurally unfair. The Respondent responded that there is no procedure where the Applicant could be allowed to make further representations to the Council[79]. Applicant should have been given an opportunity to place mitigating factors before the Third Respondent[80]. The Applicant averred that the Second Respondent should have founded in paragraph 11 of the award, that the dismissal was procedurally unfair[81], whilst the Third Respondent submitted that the dismissal was procedurally fair[82].

[54] Applicant submitted that he was dismissed resulting from the alleged fraudulently obtaining the MCOM degree. It is procedurally unfair as the Applicant was not charged with fraudulently obtaining the MCOM degree[83]. Applicant furthermore submitted that it is inappropriate of the Council to ratify the decision to dismiss

[75] Applicant was suspended in 2003 from University of Durban Westville (UDW) for whistleblowing. Exhibit "A" page 183.
[76] See Answering Affidavit para 53 paginated page 94.
[77] See Founding Affidavit para 31 paginated page 66.Section 34(2) Higher Education Act 101 of 1997 read with Clause 8(1) of the Standard Institution Statute; *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 1051 LAC.
[78]See Answering Affidavit para 54 page 94.
[79] See Answering Affidavit para 56 paginated page95.
[80] See Founding Affidavit para 38 paginated page 70.
[81] See Founding Affidavit para 39 paginated page 70.
[82] See Answering Affidavit para 57 paginated page 95.
[83] See Replying Affidavit para 7.8 paginated page 115.

the Applicant as this decision extended beyond the charges and the recommendation of Pretorius SC[84]. Mr Mia testified that Applicant was guilty of fraudulently obtaining a MCOM degree. Mia testified that he did not know if Prof Makgoba was aware of the extent of the loan prior to the Magid tribunal[85]. Mr Mia, Dr Maphai and Prof Makgoba's participation in the Council process precluded other council members from taking a different view to Pretorius's recommendations [86]. The Third Respondent submitted that some Council members testified before the Magid Committee [87]. The subsequent Council resolution[88] ruled that the Applicant be dismissed. This meeting was held on 16 January 2007 under the chairmanship of Dr T V Maphai, which is procedurally unfair.

[55] It is trite law that the employee must be afforded the right of appeal and the opportunity to Appeal against the dismissal, as stipulated in the notice to appear at the disciplinary inquiry. The Applicant indeed noted an Appeal against the dismissal. It was four days to late.The Applicant should have been given the opportunity to explain the grounds of appeal at the Appeal hearing[89]. The Third Respondent ruled that as the Appeal was noted four days late, the Third Respondent ruled it could not hear the application for Appeal. The employer could have informed the Applicant of his right to approach the CCMA. Item 4(3) of Schedule 8 Code of Good Practice: Dismissal, requires of the employer to remind the employee that he is entitled to appeal against the decision and may refer the dispute to the CCMA or a bargaining council for resolution. It reads as follows:

> '(3) if the employer is dismissed, the employee should be given the reason for the dismissal and reminded of any rights to refer the matter to a council with jurisdiction or to the Commission or to any dispute resolution procedures established in terms of a collective agreement'.

[84] See Replying Affidavit para 19.4 paginated page 121.
[85] See Replying Affidavit para 20.1 paginated page 122.
[86] See Replying Affidavit para 27.1 paginated page 125.
[87] See Answering Affidavit para 39 pages 89-90.
[88] Case D 320/08 Annexure "PF1" File 3 pages 395-396.
[89] Minewo*rkers Union v Consolidated Modderfontein Mines 1979 Ltd* 1987 ILJ 709 (IC); *Henn v Eskom* 1996 6 BLLR 747 (IC); *DIMES v Durban City Council* 1988 ILJ 1085 (IC).

[56] It is a fundamental requirement for a fair hearing that an employee against whom charges is proffered at a disciplinary inquiry, must be permitted to call witnesses in defence or in mitigation and to cross examine witnesses called by the employer. Proffering charges following the letter of an irate customer was held in *Magic Company v CCMA and Others*[90] to be unfair. In the present case the Third Respondent relied on an anonymous email, complaining about the awarding of a MCOM degree to the Applicant. Applying this email as the basis of the preliminary inquiry vitiates that proceeding and the subsequent proceedings[91].

The award

[57] The Commissioner's amplified award her award of 3 April 2008 under KNDB11631/07 as follows:-

> '80. I accordingly issue the following amplified award relating to the question whether the applicant's dismissal was procedurally unfair or not:
>
> 80.1. The applicant's dismissal was not procedurally unfair.
>
> 80.2 No order is made as to costs'.

Evaluation of the award

[58] The Second Respondent found that there was no conclusive evidence before her, reflecting that Mr Mia was biased, or that as the matter has served before the council, the council had full knowledge of the history of this matter[92].The Third Respondent submitted[93] that the Applicant did not explain his contention for stating that Mr Mia was biased as Mr Mia only expressed an opinion before the Magid Commission that he expects a Chief Financial Officer (CFO) to be honest.

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[90] (2005) 26 *ILJ* 271 (LC).
[91] See also: *Afrox Ltd v National Bargaining Council for the Chemical Industry and Others* (2006) 27 *ILJ* 1111(LC) where it was held that the non- calling of the complainant vitiates the proceedings.
[92] See Founding Affidavit para 16 page 59.
[93] See Answering Affidavit para 36 pages 87-88.

Third Respondent states there could be no evidence of bias when Mr Mia's vote is disregarded. The rest of the Council member's still voted unanimously to dismiss the Applicant.

[59] The Applicant submitted[94] that the Arbitrator on the date of hearing for the amended award, failed to have regard to the full prior arbitration transcript in Case Number 320/08. Second Respondent used her handwritten notes for reference. Applicant accordingly submits that the Arbitrator failed to apply her mind to the Applicant's heads of argument. Applicant states it is a procedural unfairness which led to a gross irregularity. The Third Respondent response was that[95]

> 'The handwritten notes are consistent with the transcript of the evidence. There is no evidence that the First Respondent did not have regards to the transcript….'

[60] The Third Respondent's response to the Second Respondent not referring to the arbitration record is nonsensical. Applicant stated that the Second Respondent made findings which were at odds with the evidence, including that Mr Mia was not biased[96] and that the Second Respondent did not consult the transcript[97] in to make the determination to dismiss the Applicant. These actions Applicant argues were procedurally unfair[98]. In reply the Third Respondent submitted that the Second Respondent was correct when finding that the dismissal was procedurally fair as:

> 'The handwritten notes are consistent with the transcript of the evidence.'[99]

[61] The Third Respondent did not offer any explanation why the same persons who testified against the Applicant, auhorised his dismissal at the Council meeting. It is clear that the Third Respondent had no evidence contradicting the submission that Mr Mia, Prof Makgoba and Ramphai was biased.

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[94] See Founding Affidavit para 17 page 59.
[95] See Answering Affidavit para 38 page 88.
[96] See Founding Affidavit para 40 paginated page 70.
[97] See Founding Affidavit para 41 paginated page 71.
[98] See Founding Affidavit para 42 paginated page 71.
[99] See Answering Affidavit para 37 paginated page 88.

[62] The *crux* of the Applicant's grounds of review is thus that the Commissioner acted irregularly by not allowing the Applicants the opportunity to address the Commissioner in mitigation. This was argued resulted in an unfair trial and non-compliance with their fundamental rights and rules of natural justice.

Relevant requirements pertaining to procedural fairness

[63] Van Jaarsveld and Van Eck opines[100] that ten golden rules must be applied to determine procedural fairness of the disciplinary hearing. These rules are:-

> '(i) The employee must be fully informed about the charges brought against him prior to the hearing;
>
> (ii) he must be informed about the charges timeously and also when and where the hearing will take place;
>
> (iii) the hearing must be held within a reasonable time;
>
> (iv) the hearing must be conducted in the employee's presence;
>
> (v) the employee is entitled to be represented at the hearing by a co-employee, or a trade union official or a lawyer;
>
> (vi) the employee must be afforded a fair opportunity to state his case to a disciplinary committee after the employer has presented his case. In other words he is entitled:
>
> (aa) to full discovery of and access to all evidence(including documents) to be used against him;
>
> (bb) to cross-examine the persons testifying against him
>
> (cc) to give evidence and put forward his defence;
>
> (dd) to call witnesses to substantiate his defence;
>
> (ee) to make representations to the committee;

[100] Van Jaarsveld and Van Eck, Principles of Labour Law, Third edition, Page 159-160.

(vii) the chairman and his disciplinary committee must be unbiased and must consider all relevant circumstances and facts to the charges objectively with a just and open mind;

(viii) after a finding of guilty but before the imposition of a penalty, the employee must be afforded the opportunity to adduce evidence in mitigation of sentence[101];

(ix) the decision and the reasons for the decision must be made known to the employee; and

(x) the employee must be reminded that he is entitled to appeal the decision and may also render the dispute to the CCMA or a bargaining council for resolution.'

[64] It is clear the (vii), (viii) and (x) above were not complied with *in casu.* In *CUSA v Tao Ying Metal Industries and Others*[102] it was held:-

'…..the LRA permits commissioners to "conduct the arbitration in a manner that the commissioner considers appropriate". But, in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.'

[65] In *Davis v Tip NO and Others*[103] it was held that:-

'Civil proceedings invariably create the potential for information damaging to the accused to disclosed by the accused himself, not least so because it will often serve his interest in the civil proceedings to do so. The exposure of an accused person to those inevitable choices has never been considered in this country to conflict with his right to remain silent during criminal trial proceedings.'…

On page 1158 G, the Court held:-

'In the present case the applicant may well be required to choose between incriminating himself or losing his employment…….In my view his right to silence does not shield him from making that choice.'

[101] See: item 3(5) of Schedule 8 of the LRA; *JD Group v De Beer* 1996 *ILJ* 1108(LAC); *Nyembezi v NEHAWU* 1997 1 BLLR 94 (LC); *Khoza v Gypsum Industries* Ltd [1997] 7 BLLR 857(LAC); *Eddels SA (Pty) Ltd v Sewcharan* 2000 *ILJ* 1344(LC).
[102] 2009(2) SA 204 (CC) paras 6.5.
[103] 1996(1) SA 1152 (WLD) at 1157 E-F.

[66] The arbitrator did not deal with the non-compliance with fair administrative procedure, in that Mia, Prof Makgoba, and Maphai testified at the Bawa inquiry, Pretorius committee and also partook in the administrative decision of the Council when this matter was tabled on 31 August 2007. Applicant submitted that this conduct was unfair. This Court was referred to *Murray v Minister of Defence*[104] stating that:-

> '…the common law of employment must be held to impose on all employers a duty of fair dealing at all times with their employees-even those the LRA does not cover.'[105]

[67] The Applicant submitted that in *SA Breweries Ltd v Shoprite Holdings Ltd*, it was held that :-

> '...all issues submitted must be resolved in a manner which achieves finality and certainty.'

[68] The Applicant submitted that the Third Respondent failed to appreciate a number of procedural challenges during the various stages, being:-

(1) The Third Respondent's council predetermined the matter without affording the Applicant an opportunity to address the Council;

(2) The resolution of 16 January 2007 to dismiss the Applicant was taken by the Third Respondent before the Disciplinary Inquiry took place before Pretorius SC. The decision to dismiss was based on the finding reached by the Magid Tribunal.

(3) The ratification of the resolution of 16 January 2007 to dismiss the Applicant is based on part on the Pretorius recommendations pursuant to the disciplinary enquiry. This follows after the University had reinstated the Applicant pursuant to the Applicant charges of alleged misconduct at the Magid Tribunal[106].

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[104] 2009(3) SA 130 (SCA) at para 5.
[105] See also: *Mohlakoana v Commission for Conciliation, Mediation and Arbitration and* Another (2010) 31 *ILJ* 2688(LC).
[106] See: *Olivier v University of Venda* (2000) 5 LLD 395 (HC).

(4) The failure by the Pretorius disciplinary enquiry to afford the Applicant an opportunity to make representations to Pretorius SC or the Third Respondent's Council prior to the Council adopting the Pretorius recommendations to dismiss the Applicant.

[69] The Statute of the University of KwaZulu Natal ("UKZN") states in clause 17[107] that conflicts of interests between council members must be addressed at Council level. Clauses 17 were not complied with in this matter. Clause 17 reads as follows:-

'17. Conflict of interest of council members

(1) A member of the council who has a direct or indirect financial, personal or other interest in any matter to be discussed at a meeting which entails or may entail a conflict of interest must, before or during such meeting, declare the interest;
(2) Any person may, in writing, inform the chairperson of a meeting, before a meeting, of a conflict or possible conflict of interest of a council member of which such person may be aware;
(3) No member of the council must vote upon or take part in the discussion of any matter in which he or she has a conflict, or a possible conflict of interest and the member concerned must recuse him or herself from the meeting of the council for the duration of such discussion and voting unless the council decides otherwise'.

[70] The Applicant submitted that the hearing should have occurred *de novo* before the Pretorius Commission. Grogan[108] states that :-

> 'Arbitration hearings are not merely reviews of the employer's decision to dismiss employees, or of the property of procedures followed by the employer. They constitute a full rehearing on the merits plus an investigation of the fairness of the procedure followed by the employer. This means that all relevant evidence must be placed before the Commissioner in proper form, even if it has been fully canvassed at the employee's disciplinary and Appeal hearings'.

[107] GG 29032 No 684 of 14 July 2006.
[108] Dismissal, Discrimination and Unfair Labour Practices 563.

[71] In *Anglo American Farm trading as Boschendal Restaurant v Konjwayo*[109] the approach to be followed in respect of decisions affecting the future of an employee is stated as follows:-

> 'The principle seem to be this: while allowance will be made for the unavoidable practicalities of prior conduct, personal impression and mutual reaction in the employment relationship, any further feature which precludes the person hearing the complaint from bringing an objective fair judgment to bear on the issues involved such as bias or presumed bias stemming from a closed or prejudiced mind or from a family or other relationship, will render the procedure unfair. The importance of an appearance in this area must not be left out account and it is submitted that where an employee has reasonable suspicion for believing that something more than merely the traces unavoidably left by prior contact in the employment relationship is present and this precludes a fair hearing, a complaint on the grounds of bias should be upheld.'

Relevant requirements pertaining to dismissals

[72] In accordance with Section 192(1) of the LRA[110] the Applicant bears the onus to prove on a balance of probabilities that a dismissal occurred. Once it has been proven, the onus shifts to the employer to prove that the dismissal was fair. The Applicant was dismissed after being found guilty at the arbitration hearing of the charge that the trust relationship completely broke down between the Applicant and the Third Respondent. The Pretorius inquiry found that the Applicant had told various lies to the Third Respondent, which caused the breakdown of the relationship.

[73] Grogan[111] in dealing with the Code of Good Practice: Dismissals, states that consistency should be applied when dismissing employees, specifically,



[109] 1992(13) *ILJ* 573 LAC.
[110] Section 192 of the LRA reads as follows:
'192. Onus in dismissal disputes
(1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.
(2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair'.
[111] Grogan Workplace Law 9th edition Schedule 8, Code of Good Practice: Dismissal, Page 461 at 463.

employees participating in the same set of conduct. Paragraph 6 of the Code of good Practices reads as follows:-

> '(6) The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently, as between two or more employees who participate in the misconduct under consideration'

[74] It is trite law the disciplinary hearings must be procedurally and substantially fair. Procedural fairness requires compliance with natural justice, the *audi et alteram partem* rule[112] and company policies and procedures[113].

[75] Adverse evidence available to the disciplinary officer must be disclosed to the employee and/or his representative for challenge[114]. The representative must be enabled to challenge the evidence impacting on the aspects in the case. These aspects includes the decision to dismiss the Applicant, the records pertaining to the MCOM degree, the author of the anonymous email, the Council's authorization of the dismissal and the predetermined outcome of the Applicant's future and the right of fair proceedings before the arbitrator.

[76] It is trite law that fair reasons must exist to terminate the employment contract legitimately. Reasons for the termination must exist such as: the conduct of the employer, the capacity of the employee and, operational requirements of the employer's business. The Act prescribes that a dismissal is automatically unfair if the reason for the dismissal amounted to an infringement of the fundamental rights of the employees and trade unions, or if the reason is one of the listed grounds in Section 187 of the Labour Relations Act. Section 187 reads as follows:

> 'Section 187. Automatically unfair dismissals
>
> (1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is-

[112] See *Mahlangu v CIM Deltak; Gallant v CIM Deltak*(1986)7 *ILJ* 346(LC).
[113] See *NUM & Others v Zinc Corporation of South Africa Ltd*(unreported LAC case No 11/2/11462). See also *Sibiya v NUM* [1996] 6 BLLR 794 (LC) at 801.
[114] See *Yichiho Plastics (Pty) Ltd v Muller* (1994) 15 *ILJ* 593 (LAC).

(a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV;

(b) that the employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;

(c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee;

(d) that the employee took action, or indicated an intention to take action, against the employer by-

(i) exercising any right conferred by this Act; or

(ii) participating in any proceedings in terms of this Act.'

[77] Section 188 of the Labour Relations Act reads as follows:-

'188. Other unfair dismissals

(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-

(a) that the reason for dismissal is a fair reason-

(i) related to the employee's conduct or capacity; or

(ii) based on the employer's operational requirements; and

(b) that the dismissal was effected in accordance with a fair procedure.

(2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act[115]'.

[78] In cases where a dismissal is not automatically unfair, the employer must show that the reasons for dismissal related to the employee's conduct or capacity or is based on the operational requirements of the business. Where the employer fails

[115] See Schedule 8, the Code of Good Practice: Dismissal.

to do that or fails to prove that the dismissal was effected in accordance with fair procedure, the dismissal is unfair[116].

[79] The disciplinary hearing must be fair. Grogan[117] opines that five guidelines determine the fairness of a dismissal for misconduct, being:-

> 'Any person who is determining whether a dismissal for misconduct is unfair should consider-
>
> (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to the workplace, and
>
> (b) if a rule or standard was contravened, whether or not-
>
> (i) the rule was a valid or reasonable rule or standard;
>
> (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard
>
> (iii) the rule or standard has been consistently applied by the employer, and
>
> (iv) dismissal was an appropriate sanction for the contravention of the rule or standard'.



Relevant principles pertaining to employees during proceedings

[80] It was held in *OTK Operating Company Ltd v Mahlangu*[118] that the employee should be allowed in his defence or in mitigation to call a witness or to cross examine the employer's witnesses. Similarly, the employer has the right to cross-examine the employee's witnesses[119].

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[116] See Grogan at 462.
[117] See page 464.
[118] [1998] 6 BLLR 556(LAC).
[119] *Hartlief Continental Meat Products (Pty) Ltd v Mutotua and Others* (2000) 21 *ILJ* 1421 (LCN). See also *Magic Company v CCMA and Others* (2005) 26 *ILJ* 1271 (LC).

[81] It was held in *Leonard Dingler (Pty) Ltd v Mgwenya*[120] that the consequence of procedural unfairness in accordance with Section 193 of the LRA is to grant reinstatement, where the dismissal is proved unfair and the employee so desires, except in so far as a Court found the dismissal was substantive fair. Grogan[121] opines where the employer merely failed to comply with fair procedure, compensation should be awarded, except in case of a trifling procedural irregularity where the Courts may exercise their discretion not to award compensation.

[82] In *Jabhari v Telkom SA (Pty) Ltd*[122] an employee was dismissed after the chairperson on the disciplinary inquiry found that the employment relationship had irretrievably broken down as the employee was incompatible with the "corporate culture". The employee claimed he was unfairly dismissed due to the initiated grievance and legal proceedings against management. The Court found that the employee was victimised and that the dismissal was automatically unfair[123].

<u>Test for Review</u>

[84] The Applicant stated in the Founding Affidavit that the motive to implicate him falsely and to victimize him, were ignored by the First and Second Respondents. This resulted in the Applicants not having a fair trial.



[120] (1999) 20 *ILJ* 2531 (LAC).
[121] Workplace Law 208.
[122] (2006) 27 *ILJ* 1854 (LC).
[123] In *NUMSA obo Joseph v Hill Side Aluminium* (2004) 25 *ILJ* 2264 (BCA) it was held that the making of frivolous allegations is automatically unfair as the dismissal prejudiced the finding of the Court in the pending matter.

[85] In *Carephone (Pty) Ltd v Marcus NO and Others*[124], which was decided before the advent of PAJA, the Court enunciated the test for Section 145 of the Labour Court reviews as:

> '...is there a rational objective basis for justifying the connection made by the administrative decision maker between the material property available to him and the conclusion he or she eventually arrived at?'

[86] In *Nampak Corrugated Wadeville v Khoza*[125], the Labour Appeal Court held that:-

> '....this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable'.

[87] In *Rustenburg Platinum Mines Ltd (Rustenburg section) v Commissioner for Conciliation, Mediation & Arbitration and Others*[126] the Labour Appeal Court stated that Section 33 of the Constitution extended the scope of review and introduced a requirement of rationality in the outcome of decisions. Section 33 of the Constitution states that:-

> '(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair'.

[88] An objective inquiry must take place during the arbitration proceedings and must be reflected in the Arbitrator's award[127]. The award must be rationally connected to the information before the arbitrator and the reasons entered on the record. It must be established if the arbitrator properly exercised the powers given to him in compliance with Section 3 of the Labour Relations Act and the Constitution. The rational objective test set out in *Carephone infra*, must thus be applied.



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[124] 1999(3) SA 304 LAC; (1998)19 *ILJ* 1425 LAC; 1998 11 BLLR 1093 (LAC).
[125] 1999 20 *ILJ* 578(LAC); 1999 2 BLLR 108 LAC at para 33.
[126] (2007) 28 *ILJ* 1107 (LC).
[127] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687(CC) at para 25.

[89] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[128],Navsa AJ held that a Commissioner conducting a CCMA arbitration performs an administrative function and that the Promotion of Administrative Justice Act does not apply to arbitration matters in terms of the Labour Relations Act.

[90] In *Herholdt v Nedbank Ltd*[129], the Court found that the test applicable to Section 145 LRA reviews recognises that dialectical and substantive reasonableness is intrinsically interlinked and that latent process irregularities carry the inherent risk of causing a possible unreasonable outcome. The Court must scrutinize the Commissioner's reasons to determine whether a latent irregularity occurred, being an irregularity in the mind of the Commissioner, which is only ascertainable from the Commissioner's reasons. On page 1802 Murphy AJA in paragraph 39 states:-

> 'There is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of the inquiry. The threshold for interference is lower than that; it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different'.

[91] The Applicant argued before the Court, that the Commissioner in making the award overlooked the procedural unfairness of his dismissal. It is trite law that a disciplinary hearing must be fair. Points of non-compliance with natural justice, substantial unfairness were raised by the Applicants in the Founding Affidavit[130]. As a result of points raised of substantial unfairness during the arbitration, the Applicants brought this review.[131]

[92] In *Klaasen v CCMA and Others*[132], Murphy AJ, in the context of an employee not testifying in a misconduct case, held as follows:-

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[128] 2008 (2) SA 24 (CC); 2007 28 *ILJ* 2405 (CC).
[129] (2012) 33 *ILJ* 1789 (LAC).
[130] See *Hotellica and Another v Armed Responses* [1997] 1 BLLR 80 (LC).
[131] See *Nasionale Parkeraad v Terblanche* (1999) 20 *ILJ* 1520 LAC; See also: Grogan Workplace Law 205.
[132] [2005] 10 BLLR 964 (LC) at para [26]- [28].

> '[27] Commissioners acting under the auspices of the CCMA in terms of the LRA are expected to act inquisitorially or investigatively. Section 138(1) of the LRA provides that a commissioner may conduct the arbitration in a manner that he or she considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with a minimum of legal formalities. This includes stepping into the arena to direct the proceedings in the interests of justice'.

[93] The Record does not reflect that Applicant was given the opportunity to provide explanations on issues in dispute[133]. It is clear that not all issues were ventilated and that the required warnings were not given by the Commissioner to the parties. In President of the *Republic v SA Rugby Football Union*[134] , the following was said with regard to the cross-examination process:

> 'It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, or to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed'.

[94] This Court perused the Review application, Files 1, 2, 3, the Court File under Case Number D302/08, which resulted in 2158 pages of reading. It is clear to this Court procedural fairness did not take place. Accordingly, it is the Court's finding that an irregularity occurred due to the error not to invite the Applicant to address the Commissioner on mitigation. No warnings were given to the Applicants of adverse inferences to be drawn. Following from the judgment of Van Niekerk J on the substantial fairness, there is no possibility of remitting the matter back for a re-hearing or re-employment. Accordingly, this Court is placed in a position to award compensation to the Applicant. The Applicant requested a period of three months of compensation. Due to amongst other factors, the acrimony of this matter, the failure to comply with natural justice rules, the reliance on the anonymous email, the victimization of the Applicant, fairness demands compensation for a period of ten months.



[133] See: *ABSA Brokers (Pty) Ltd v Moshoana NO and Others* [2005] 10 BLLR 939 LAC.
[134] 2000 1 SA 1 CC.

[95] Both parties asked the Court to award costs in their favour. As a result of the irregularities pointed out above, the Applicant should be entitled to costs and loss of income.

Order

[96] For these reasons, my order is as follows:-

i) the Applicant's application for Review is upheld;

ii) the Third Respondent is ordered to pay the Applicant;

a. the monthly salary as at date before dismissal for the period of ten months to the Applicant;
b. this amount shall be paid within 30 days from the date of this Court order;

iii) the Applicant is awarded costs on a party and party scale, which shall be taxed within 30 days hereof.

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Fouché AJ

Acting Judge of the Labour Court
of South Africa

APPEARANCES:

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For the Third Respondent : Cox Attorneys