


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 54720/2020

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE	YES / NO
(2) OF INTEREST TO OTHER JUDGES	YES / NO
(3) REVISED	
10 May 2023	
_____ DATE	_____ SIGNATURE

In the matter between:

AMARENTIEA JOHANNA ELIZABETH PIENAAR N.O.

Applicant

and

THE MINISTER OF STATE SECURITY

1st Respondent

**THE CHAIRPERSON OF THE DISCIPLINARY
COMMITTEE OF THE STATE SECURITY AGENCY**

2nd Respondent

**THE DIRECTOR GENERAL: STATE SECURITY
AGENCY**

3rd Respondent

**DESIGNATED PROSECUTOR IN THE DISCIPLINARY
HEARING OF JR BESTER**4th Respondent

Summary: Review in terms of Uniform Rule 53
Administrative Law

ORDER

1. The decision to subject the applicant to a disciplinary hearing is reviewed and set aside.
 2. The guilty finding of the applicant by the second respondent in the disciplinary hearing, the recommendation to dismiss as well as the actual dismissal of the applicant is reviewed and set aside.
 3. The first respondent's dismissal of the Appeal against the applicant's conviction and dismissal is reviewed and set aside.
 4. The aforesaid decisions are referred back the first and/or second respondents respectively for reconsideration.
 5. The first respondent should pay the costs of this application.
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JUDGMENT

VAN HEERDEN AJ

6. INTRODUCTION

7. This is a review application in terms of which the first applicant seeks to set aside the second respondent's dismissal of the second applicant. The first applicant is the duly appointed *curator bonis* of the second applicant, Jacobus Rudolph Bester ("Bester").
8. This application essentially is about the second applicant as an employee (Bester) who had apparently been treated unreasonably and unfairly, both substantively and procedurally during the process both preceding the decision to subject him to a disciplinary process and thereafter.
9. It is common cause between the parties that Bester had been employed by the State Security Agency and that his employment had been terminated subsequent to a disciplinary hearing at which Bester had been found guilty of fraudulently altering a medical certificate booking him off work. It is moreover common cause that Bester had indeed altered the medical certificate to extend the date from 14 April 2014 to 19 April 2014.
10. The provisions of the Labour Relations Act, 66 of 1995 ("the LRA") do not apply as the State Security Agency is exempt from such provisions by virtue of Section 2(b) thereof. As such, the actions fall within the ambit of administrative law and are subject to review by this Court.
11. The application relates to both alleged substantive and procedural unfair and unreasonable actions on the part of the first to fourth respondents in the workplace. The application focuses on two distinct stages of the process: the

first deals with Bester's medical condition prior to the decision to institute disciplinary proceedings and the second deals with the disciplinary proceedings itself and the processes that followed.

12. The Applicant relied on the following:

12.1 Everyone has the right to administrative action that is lawful, reasonable, and procedurally fair.¹

12.2 Section 9(3) of the Constitution which states that: The state may not unfairly discriminate directly or indirectly against any one on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.²

12.3 Section 9(4) of the Constitution which states that: No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

12.4 Section 9(5) of the Constitution which states that: Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

12.5 Everyone has the right to fair labour practices.³

¹ Section 33(1)
² Section 9(3) to 9(5)
³ Section 23(1)

13. In relation to Section 145 of the LRA the Constitutional Court expressed itself as follows:⁴ *“The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action, which is lawful, reasonable and procedurally fair.”*
14. This Court is, in considering the fairness and the reasonableness of the respondents’ action in this matter, not limited to the issue of Bester’s disciplinary hearing, but to the entire process.⁵
15. The respondents’ duty to act reasonably and fairly and not to unfairly discriminate against anybody, including an employee is part of the constitutional imperative that the respondents need to comply with.
16. Reliance in this regard was placed on the case of ***Jansen v Legal Aid South Africa***⁶ in which it was found that a dismissal of an employee who suffers from a mental condition, of which the employer is aware, for misconduct in circumstances where the acts of misconduct are inextricably intertwined with the employee’s conduct, constitutes an automatically unfair dismissal and unfair discrimination.
17. The applicant further submitted that:

⁴ ***Sidumo and Another v Rustenburg Platinum Mines and Others*** [2007] 12 BLLR 1097 CC per Navsa AJ at para [110]

⁵ ***Sidumo (supra)*** at para’s [18] and [59]

⁶ ***Labour Court of South Africa, Cape Town case*** C678/14 dated 16 May 2018

- 17.1 Bester suffered from a pre-existing medical condition that severely impacted on his mental capacity;
 - 17.2 Such condition was at all relevant times known to the respondents;
 - 17.3 It was known that Bester's actions of which he was charged was inextricably intertwined with his pre-existing condition;
 - 17.4 The respondents knew Bester's condition was one that was deteriorating and also one for which there was no cure;
 - 17.5 The respondents, in electing to proceed with disciplinary charges despite such knowledge, acted unfairly and unreasonably;
 - 17.6 The respondents should have availed themselves of the procedure that presented itself under section XX of its Regulations;
 - 17.7 In not doing so, the respondents had in fact unfairly discriminated against Bester on the basis of his disability or condition;
 - 17.8 The respondents were in fact *mala fide* in that they perceived the disciplinary process as an easy way to dismiss Bester;
 - 17.9 Despite the possible ostensible fairness of the disciplinary procedure, the decision to follow the procedure as well as the procedure itself was deeply and incurably flawed.
18. The Respondents submitted that:

- 18.1 The Court Order declaring Bester as incapable of managing his own financial affairs and appointing a *curator bonis* for him, was *stricto sensu* irrelevant for the purposes of the disciplinary proceedings. It could not be used on its own as a decisive factor to the question whether Bester could validly participate in the disciplinary proceedings, in that:
- 18.2 the Court Order did not declare Bester of unsound mind or a lunatic nor was the first applicant appointed as the curator to his person;
- 18.3 crucially, there is no causal link between the mental state of Bester and the dismissal. The dismissal was caused purely by his misconduct and not his mental condition. The circumstances of this case reveal that the proximate reason for disciplining Bester and for his dismissal was his misconduct and not his mental condition;
- 18.4 the decision of the Labour Appeal Court in ***Legal Aid south Africa v Ockert Jansen***⁷ is on point in this regard. In that case, the LAC dealt with a case where the employee had suffered from severe depression over an extended period of time. It had been alleged that his dismissal was automatically unfair in terms of section 187(1)(f) of the LRA as he had been unfairly been discriminated on the grounds of disability. Settling aside the decision of the Labour Court, the LAC concluded as follows:

⁷ 2001 (1) SA 245 (LAC) or (2020) 41 2580 (LAC)

- 18.4.1 That the proximate reason for disciplining the employee was his misconduct and not the fact that he was depressed.⁸ *In casu*, the nature of the misconduct (altering dates on the sick note) is illustrative of misconduct consciously and appreciatively committed;
- 18.4.2 That the employee failed to adduce cogent evidence, whether medical or otherwise, to establish that his act of misconduct was caused by his depression or that he was dismissed for being depressed.⁹ *In casu*, the misconduct barres no connection at all to Bester's alleged mental disability;
- 18.4.3 That the employer had a legitimate basis for imposing discipline, the employee's depression notwithstanding.¹⁰ *In casu*, the Agency clearly had a legitimate basis for imposing discipline, unconnected to Bester's alleged mental disability; and
- 18.4.4 That even if it may be said that the employee might not have committed the misconduct had he not been depressed, he still failed to present credible possibility that the dominant or proximate cause of the dismissal was his depression. The mere fact that his depression was a contributing factual cause is not sufficient ground upon

⁸ *Ockert Jansen matter (supra)* at para 47

⁹ *Ockert Jansen matter (supra)* at para 45

¹⁰ *Ockert Jansen matter (supra)* at para 47

which to find that there was an adequate causal link between his depression and his dismissal as to conclude that depression was the reason for it. There was therefore neither factual nor legal causation.¹¹ *In casu*, it can hardly be said that Bester's alleged mental disability was a contributing or subsidiary causative factor to the charges and his dismissal not even to mention being the dominant, proximate, decisive or substantial cause thereof.

18.5 In any event, even where a person is declared insane (which was not the case with Bester), it does not necessarily mean that he cannot at all perform legal acts. **Cronjé and Heaton**¹² state that the mere fact that a person has been declared mentally ill and that a curator has been appointed to administer his or her estate does not mean that such person loses all capacity to act.

18.6 As early as 1930, in **Pienaar v Pienaar's Curator**,¹³ De Villiers JP held as follows:

"The mere fact that such a person has been declared insane or incapable of managing his affairs, and that a curator is appointed to such person, does not deprive him of the right of administering his own property and entering into contracts and other legal dispositions to the extent of which he may de facto be capable, mentally and physically, of so doing. Such mental or physical

¹¹ **Ockert Jansen matter (supra)** at para 48

¹² Cronjé & Heaton, The South African Law of Persons, 113

¹³ 1930 OPD 171 at 174-175

capacity may vary from day to day, but at all times it remains a question of fact. The object of appointing a curator is merely to assist the person in question in performing legal acts to the extent of which such assistance is from day to day, in varying degrees, necessary. Thus, even a person who has been declared insane and to whose estate a curator has been appointed can dispose of his property and enter into contract whenever he is mentally capable of doing so.”

- 18.7 The contention on behalf of Bester that he was mentally disabled to such an extent that he could not distinguish wrong from right or appreciate the consequences of his actions, is without any factual, scientific or legal basis, in that:
- 18.8 The very misconduct with which he was charged and convicted reflects a calculated fraudulent act which could only have been committed by a person who understands his actions. Actually, the fraudulent alteration of the medical certificate, which was done by Bester without any assistance, was an act performed with a view to shield himself from the misconduct of absence without leave. This clearly removes the misconduct from being associated with his alleged disability;
- 18.9 Added to that, the reaction of Bester of initially denying to his supervisor that he had committed fraud and/or changed the dates and later admitting it also reflects an appreciation of wrong from right;

- 18.10 The admission in an affidavit by the employee of the misconduct of fraud and denying the other charges and providing a persuasive explanation for such denial also supports the finding that he could appreciate and understand the impropriety of his conduct and its consequences as well as the disciplinary charges against him and the consequences flowing therefrom;
- 18.11 The subsequent admission of guilt by the employee after hearing the insurmountable testimony of Dr de Beer is also normal conduct of a person in Bester's position;
- 18.12 The reference in Mr Bester's CV to dyslexia could not be equated to an indication of lack of capacity to appreciate the consequences of his conduct or being *doli incapax*. Dyslexia relates to a mere reading disability. Had it meant that Bester was incapable of distinguishing right from wrong as alleged, then Bester would not have been appointed by the Agency;
- 18.13 In any event, even if it were to be said that the presumption of *doli incapax* applied to Bester, it would have been effectively rebutted by the fashion in which he methodically planned and committed the misconduct and the logical manner in which he conducted his defence.
- 18.14 The private psychologist report utilised by Bester was also irrelevant as its purpose was to initiate and/or support an application to declare Bester incapable of conducting his own financial affairs and not to

declare him of unsound mind or a lunatic. The internal psychologist's report on the other hand was directly relevant and answered affirmatively the question whether Bester could take part in the disciplinary proceedings. The chairperson's acceptance of the internal psychologist's report and his ruling that the disciplinary proceedings should proceed with Bester in attendance, was therefore rational.

- 18.15 Bester was competently represented by Adv Triegaardt and all that his legal representative ought to have done was to call the *curator bonis* or the private psychologist or any other relevant witness in order to support Bester's plea that he was incapable of understanding the disciplinary proceedings against him and/or that he could not distinguish between wrong and right and/or that he could not give appropriate instructions or alternatively that a less severe sanction should be imposed.
- 18.16 The finding of guilt of Bester upon the presentation of the overwhelming documentary and oral evidence at the disciplinary hearing is beyond reproach, particularly when regard is to the water-tight evidence of Dr De Beer.
- 18.17 The sanction of dismissal is also appropriate in view of the evidence led through two witnesses of the Agency in aggravation. The utter dishonesty with which the misconduct was committed was of egregious nature and rendered it a dismissible offence exacerbated

by Bester's employment record which was not without blemish. The impact of the fraud was that Bester literally gave himself three paid leave days, for which he did not even tender a refund.

18.18 The challenge of the appeal and the appeal process is also unfounded. The Minister correctly confirmed the finding of guilt and the appropriateness of the penalty of dismissal in view of the concrete evidence placed before the chairperson of the disciplinary hearing.

18.19 Further, the complaint that the Minister should have appointed an appeals board has no foundation as Regulation 15(3) read with Regulation 16 clearly granted the Minister the sole discretion to decide whether to deal with the appeal herself or to appoint a panel to constitute an appeals board.

18.20 The issue raised about the provision of documentation is also baseless in that the official representative of the employee did not complain after being furnished with documentation. The complaint emanates from a non-party, being the *curator bonis*.

18.21 Bester was subjected to a properly constituted disciplinary hearing and afforded all his constitutional and labour related rights including the right to legal representation and to adduce evidence in support of his case or rebut evidence against him. It was submitted that the chairperson applied his mind to the evidence presented before him

during the hearing including the evidence relating to Bester's alleged mental disability.

18.22 The charging and the subsequent dismissal of Bester on the basis of misconduct of fraudulently altering the medical certificate was rational notwithstanding his alleged mental infirmity. Similarly, the sanction of dismissal was appropriate, rational and befitting in view of the serious nature of the misconduct.

19. **HISTORY PRECEDING THE DECISION**

20. Bester suffers from obsessive compulsive disorder and has done so at all times. The respondents deny that they were aware of the existence of this condition at the time of Bester's appointment. They however do not dispute that Bester indeed suffers from this condition.

21. The respondents did not deny that the particulars of Bester's condition were not only known but had been investigated at their behest *before* the decision was made to bring disciplinary charges against him.

22. The respondents themselves commissioned a psychological report from Dr Anne-Maria Joubert ("*Dr Joubert*") on 10 January 2014. The purpose of the report was commissioned specifically because Bester had assaulted a member of the State Security Agency.

23. A full report was issued by Dr Joubert, dated 19 February 2014. After thorough investigation of Bester's condition, she was of the view:

- 23.1 that Bester was severely intellectually disabled and had at all relevant times been so;
- 23.2 that the prognosis of recovery was very poor;
- 23.3 that there appeared to be a deterioration of his social profile.
24. The deterioration of Bester's condition is evidenced by a number of warnings that he received early in 2014 for his conduct, on 7 February 2014, 25 February 2014 and 10 March 2014.
25. It is clear from the record that there was not only reason for concern because of Bester's behaviour, but that Dr Joubert's report had been commissioned in order to understand and manage his behaviour. For this reason, it was *inter alia* decided to re-deploy Bester.
26. At the mandatory investigation stage preceding the decision to institute a disciplinary hearing¹⁴ it was well known that Bester's case was problematic:
- 26.1 Ms Yako reported that in a meeting called by Ms Tokwe in February 2014 it was noted that Bester was managed as a special needs person and also that Ms Tokwe had noted that Bester's behaviour appeared to have deteriorated;
- 26.2 There was the report of Dr De Beer dated 26 June 2014, where he noted that Bester was managed as a special-needs-person and also that his behaviour seemed to have deteriorated. In his report he

¹⁴ Chapter XVIII of the Regulations

refers to a report of a psychologist, Ms Joubert from which it appeared that Bester suffered from mental retardation and could not operate in an adult world. In Dr De Beer's own view Bester lacked insight into the consequences of his actions.

27. **THE DECISION**

28. Charges in terms of the disciplinary enquiry were proffered against Bester by virtue of a charge sheet dated August 2014 and served on Bester on 6 October 2014. The disciplinary hearing against Bester commenced on 11 November 2014, after the respondents had been informed of the applicant's appointment.

29. At the time, the details of Bester's condition had not only been discussed by his superiors and were they fully aware that his condition appeared to deteriorate, the report from Dr Joubert had been commissioned and received by the Agency confirming his condition and the poor prognosis for recovery.

30. The decision to proceed with disciplinary steps was moreover preceded by an investigation into the alleged misconduct in terms of the provisions of Chapter XVIII of the Regulations with a view to obtaining not only evidence but also relevant information. Once the report has been completed the manager has to submit the report together with his or her recommendations to the Director General. The Director General. The Director General on his or her part needs to consider the report and confirm or set aside the recommendation.

31. The requisite investigation report dated 22 July 2014 consists of the following:
 - 31.1 A summary by Mr M Mabela detailing the evidence as regards Bester's falsifying of the medical certificate and his absenteeism;
 - 31.2 An email from Dr De Beer merely confirming the consultation and the fact he had issued a medical certificate;
 - 31.3 The medical certificate itself;
 - 31.4 A statement by Bester in which he confesses to changing the dates on the certificate.

32. These facts were all available at the time that Mr Mabela's investigation report was drafted on 22 July 2014. No mention whatsoever is however made in the report to:
 - 32.1 Ms Yako's statement of 24 June 2014;
 - 32.2 Dr De Beer's statement of 26 June 2014; or
 - 32.3 Dr Joubert's report, which the agency themselves commissioned in January 2014 and to which pertinent reference was made in Dr De Beer's statement.

33. The recommendation to proceed with disciplinary proceedings was merely done on the basis of the facts dealing with the transgression and Bester's confession to the effect that he had indeed changed the medical certificate.
34. Omitting these facts, relevant and material facts with regards to the decision on whether to proceed or not were ignored and did not form part of the decision despite the injunction by the Regulations to secure relevant information and evidence.
35. This information indeed constituted relevant information with relation to reach the decision to proceed with disciplinary proceedings or not. Despite this relevant information having been secured before the report, but for reasons that are wholly unexplained, these reasons had been excluded from the report.
36. In this regard relevant facts had been ignored in arriving at the decision to institute disciplinary proceedings. The only reasonable conclusion is that the respondents perceived disciplinary proceedings as an easy way to terminate Bester's employment, more so given Bester's admission that he had in fact changed the particulars on the medical certificate. Given his history of transgressions it must have been clear that he faced the real possibility of dismissal if found guilty.
37. The remark by the prosecutor to the applicant, at the time of the meeting at the Master's office, that as far as he was concerned, Bester had in any event been irregularly appointed, that he was an "*embarrassment*" to the agency

and that he could have him dismissed on the basis of his mental condition,¹⁵ is startling.

38. It must be that, in ignoring these facts, the respondents, in taking the decision to proceed with disciplinary proceedings, had acted unreasonably and unfairly towards Bester.

39. The respondent's Regulations moreover provide for a situation such as Bester's. The provisions of Chapter XX of the Respondents' Regulations¹⁶ the following is pertinent:

“6.1 When it comes to the attention of the supervisor that a member under his supervision is not performing in accordance with the job that the member has been employed to do as a result of medical unfitness or injury, the supervisor must investigate the extent of the medical unfitness or injury. He or she must make a written submission to his or her general manager in a manner determined by the Director General in which he or she must state the grounds for the alleged medical unfitness of the member and attach relevant documentation in support or explain the submission.

6.2 ...

¹⁵ Despite this allegation being denied in broad terms by the Respondents no supporting affidavit of Mr Matlale had been attached. As such the denial is a bald denial and devoid of any substance.

¹⁶ First Respondent's record, CaseLines E27 and further

6.3 *If the general manager concerned is of the opinion, on receiving the member's submission or where applicable the supervisor's submission, there is reason to suspect that a member is medically unfit to perform his duties satisfactorily, he or she **must** request the Head: Medical Services for his or her medical opinion. The general manager must provide the Head: Medical Services with all relevant information."*

40. Despite the injunction in Chapter XX that the supervisor investigates the medical unfitness and to fully report thereon, and despite clear evidence at the disposal of the Respondents that indeed such condition existed and that this severely affected Bester's ability to perform within the workplace, this did not happen. There was simply no procedure followed as envisaged by Chapter XX save for the fact that a report had been commissioned and evidence had been obtained which was simply ignored.
41. The decision to bring charges late in 2014 must be seen as flawed and should be reviewed and set aside.
42. The apparent reason why the relevant considerations pertaining to Bester's conditions were ignored was that the alternative posed a much more expensive termination of Bester's employment, if he were to be medically boarded it would be with retention of his pension and medical aid benefits.
43. The purpose of disciplinary regulations is not to discipline and get rid of someone who because of a medical problem cannot regulate his conduct in an appropriate manner. The purpose of disciplinary regulations is to

discipline people who otherwise are well able to function in an accepted and proper manner. To use disciplinary regulations otherwise amounts to an unlawful use of those regulations.¹⁷

44. Apart from the decision to institute disciplinary proceedings, the disciplinary proceedings itself were fatally flawed.
45. It is however common cause that the applicant was appointed as Bester's *curator bonis* on 3 June 2014 and that the respondents had been informed of this fact on 7 November 2014. Although the decision to proceed with the disciplinary proceedings had been taken by the time that the respondents were informed of the applicant's appointment as Bester's *curator*, the disciplinary proceedings had not yet commenced. That only happened on 11 November 2014.
46. *Curator bonis* are appointed only when a Court "*is absolutely satisfied that the patient has to be protected against loss which would be caused because the patient is unable to manage his affairs*".¹⁸ "*The purpose of the provisions is to ensure that no person, even a duly appointed curator bonis, may perform any act which would place at risk the property or interests of the de cuius.*"¹⁹
47. Having regard to the report of 1 April 2015 it was clear that the respondents had been alerted to the fact that Bester was unable to take care of his

¹⁷ See eg. *Van Dyk NO & Van Rensburg NO v Elna Stores* 1974 (2) SA 984 (A); *Rikhoto v East Rand Administration Board* 1983 (4) SA 278 (W) confirmed on appeal 1983 (3) SA 595 (A)

¹⁸ *Ex Parte Klopper: in re Klopper* 1961 (3) SA 803 (T) at 805

¹⁹ In relation to Section 71 of the Administration of Estates Act, 66 of 1965 *De Wet v Barkhuizen and Others* 2022 (4) SA 197 (ECG) relying on *Bouwer N.O. v Saambou Bank Bpk* 1993 (4) SA 492 (T) at 497

financial affairs. In fact, application had been made in this regard by his representative at the disciplinary hearing, Adv Triegaardt. A new assessment was made of Bester and ultimately the application was dismissed.

48. Despite the respondents' knowledge of the applicant's appointment, and despite the application by Adv Triegaardt, no steps were taken to join the applicant to the proceedings.
49. It is clear that the disciplinary proceedings could have a deleterious effect on Bester's financial affairs. He clearly ran the risk of dismissal which of necessity implied the loss of all benefits flowing from his employment. As such it posed a clear threat to Bester's rights against his employer and could materially impact thereon. This issue was pertinently raised by the applicant in a letter to the SSA dated 13 July 2013.
50. This state of affairs flowed from the fact of the Court Order dated 3 June 2014. From that date, whether a curator had been appointed or not, no person could perform any act that would place at risk Bester's property, at least not without having fully appraised the Master of the duly appointed curator thereof and joined them to the proceedings in order to take such steps that may have been necessary to safeguard Bester's property rights.
51. It is true that *ex post facto* the commencement of the disciplinary proceedings, the respondents afforded the applicant the opportunity to join the proceedings but that she declined to do so. As such, she had chosen not to participate and did so at her own peril.

52. If one has regard to the provisions Chapter XVIII of the Regulations and particularly sub-regulations 11(3) to 11(7) thereof it is clear that there are certain pre-trial procedures at the disposal of the member (and in this case the applicant, his curator) which the applicant had been denied.
53. It was clear that at the time that when the invitation was extended to the applicant to join the proceedings the respondents had no intention of starting *de novo* with the proceedings.
54. Joining the procedure would not have cured the fact that the applicant had been denied the opportunity at the time when the charges were brought to rely on the provisions of Chapter XX and to request that the respondents do not proceed with a disciplinary enquiry but first fully investigate and consider Bester's medical condition and the alternatives presented in Chapter XX of the Regulations.
55. The respondents' invitation to the first respondent was an effort to give legitimacy to a process which was already fatally flawed. Once the disciplinary proceedings commenced after the Director General had made the decision to bring charges, the procedure in terms of Chapter XX was no longer available, at least within the practice of the respondents.
56. On 6 July 2015 Adv Triegaardt, who represented Bester during the initial phases of the trial, after commencement of the trial, made representations to the Director General with regard to Bester's medical condition. The respondents did not consider these representations and no formal response is to be found. The reason for that appears to be that the last opportunity for

making such representation was at the time when a member is charged. This had come and gone.

57. During the course of the trial, Adv Triegaardt who initially represented Bester raised the issue of Bester's competency to stand trial. This was investigated by Ms V Sivhaba who arrived at the conclusion that Bester was able to participate in a disciplinary hearing *"but it is important that he takes his medication as prescribed by his psychiatrist"*.

58. **PROCEDURE AT THE DISCIPLINARY HEARING**

59. A comprehensive record of the disciplinary proceedings has been included in the respondents' record. At the time of his sentencing Bester was unrepresented. If one bears in mind the abundant evidence of Bester's intellectual and mental incapacity this in itself raises serious concerns as far as the process is concerned.

60. From a proper perusal of the record it appears that Bester had never been given the opportunity to present evidence in mitigation. It appears that he had not been appraised of the effect of his failure to present evidence in mitigation.

61. The psychologist, Ms Joubert's evidence which was available to the respondents, should have been presented.

62. Even if the statements of Dr De Beer and Ms Yako were handed in at the proceedings and to some extent dealt with Bester's disability, no reference at

all was made during consideration of Bester's sentencing to these considerations and it appears that these considerations played no role in arriving at the conclusion that Bester should be dismissed.

63. The facts of Bester's mental condition should have been considered in mitigation of his sentence. On Dr De Beer's (and also Ms Joubert's) clear evidence there is a direct link between Bester's actions (for which he had been disciplined and found guilty of) and his disability. This was not considered.
64. The procedure followed by the respondents were procedurally and substantively unfair in dismissing Bester.
65. The decision to institute disciplinary proceedings and/or the conviction and refusal of appeal and/or the decision to dismiss him should be reviewed and set aside.
66. I find the alternative relief in paragraph 5 of the Notice of Motion, prudent, suggesting that the decisions should be referred back to the first and/or second respondents for reconsideration.
67. There is no reason why costs should not follow the result.
68. **ORDER**
69. Accordingly, I make the following order:

- 69.1 The decision to subject the applicant to a disciplinary hearing is reviewed and set aside;
- 69.2 The guilty finding of the applicant by the second respondent in the disciplinary hearing, the recommendation to dismiss as well as the actual dismissal of the applicant is reviewed and set aside;
- 69.3 The first respondent's dismissal of the Appeal against the applicant's conviction and dismissal is reviewed and set aside;
- 69.4 The aforesaid decisions are referred back the first and/or second respondents for reconsideration;
- 69.5 The first respondent should pay the costs of this application.



DJ VAN HEERDEN
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 16 November 2022

Date of judgment: 9 May 2023

APPEARANCES

For the applicant:
Adv J Moller
Instructed by:
Moller & Pienaar Attorneys

For the respondents:
Adv DT Skosana SC
Instructed by:
The State Attorney, Pretoria