REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 3063/2023

In the matter between:

THEUNS DU TOIT	Applicant
and	
S HUMAN N.O.	1st Respondent
NH MAENETJE N.O.	2nd Respondent
STELLENBOSCH UNIVERSITY	3rd Respondent
THE RECTOR AND VICE-CHANCELLOR OF STELLENBOSCH UNIVERSITY	4th Respondent

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JUDGMENT: DELIVERED ELECTRONICALLY ON NOVEMBER 2023

ALLIE, J (CLOETE J in a separate concurring judgment)

1. This is an application for the review and setting aside of the decisions of the Central Disciplinary Committee ("CDC") and the Disciplinary Appeal Committee ("DAC") of the University of Stellenbosch, made against the Applicant.

2. Applicant's counsel submitted that although ordinarily in reviews the Court is not expected to delve into the factual findings of the tribunal and to substitute its findings for that of the tribunal, where irrationality on the part of the tribunal is a ground for review, the Court must consider the facts that served before the tribunals for the purpose of determining whether the tribunals acted rationally.

The Relief sought

3. During oral submissions made on behalf of Applicant, counsel agreed that the relief Applicant seeks is not as wide as is reflected in the Notice of Motion and that it should be limited to the following.

4. Applicant seeks the setting aside of the findings of the CDC that the Applicant is guilty of trespassing (charge 1), urination on the property of a fellow student and resident (charge 2) and of making a statement that is racist (charge 3), as contained in paragraphs 1,2 and 3 of the findings section of the CDC's judgment.

5. Applicant seeks further, the setting aside of the CDC's sanction order that the Applicant be expelled as set out in paragraph 1 of the Order.

6. Applicant seeks the setting aside of the Order of the DAC in its entirety.

7. Applicant seeks further that this Court substitutes its decision for that of the CDC and the DAC and finds the Applicant not guilty of having committed any violation of the University's Code and its Residence's rules by reason of the Applicants severely intoxicated state.

8. Applicant deposed to a founding affidavit. Applicant's attorney Mr Van Niekerk deposed to a supporting affidavit, a supplementary affidavit and Applicant deposed to a replying affidavit, while Mr Van Niekerk deposed to a further supplementary affidavit that this Court did not allow.

9. The Third Respondent alone opposes this application for review before us and the remaining Respondents abide the decision of this Court.

10. The First and Second Respondents as chairpersons of the respective committees, the evidence leader and two members of the DAC, deposed to brief affidavits, however.

11. The Applicant elected not to make use of the procedure provided by Uniform Rule 53 in these proceedings

Applicant's Grounds for Review

12. The Applicant relies on the following grounds as set out in The Promotion of Administrative Justice Act 3 of 2000 ("PAJA") in respect of both decisions, namely that the decision makers:

12.1. were biased or can reasonably be suspected of bias (section 6(2) (a) (iii));

12.2. acted procedurally unfairly (section 6(2) (c));

12.3. committed errors of law which materially influenced the outcome (section 6(2) (d));

12.4. acted for ulterior purpose and motives (section 6(2) (e) (ii));

12.5. took irrelevant considerations into account (section 6(2) (e) (iii));

12.6. acted consistently with the unauthorised and unwarranted dictates of another person or body, namely the Rector (section 6(2) (e) (iv);

12.7. acted in bad faith, arbitrarily and capriciously (section 6(2) (v) and (vi));

12.8. took action not rationally connected to the purpose for which it was taken, the purpose of the Code, the information before it and the reasons given (section 6(2) (f) (ii)); and

12.9. performed their functions so unreasonably that not reasonable person could have done so (section 6(2) (h) ;

Facts concerning the incident complained of

13. The facts giving rise to the convening of a disciplinary enquiry, the findings of guilt, the imposition of sanction and the findings by the disciplinary appeal committee in this case, are the following.

14. The Applicant, a first year LLB student at the University of Stellenbosch and a resident at the University's Residence known as "Huis Marais" where his room was on the second floor, allegedly entered the residence's room in which a fellow first year student, Babalo Ndwayana resided on the first floor at approximately 04h00 on the morning of Sunday, 15 May 2022.

15. Mr Ndwayana was asleep at the time but was awoken by the noise of Applicant moving around in his room.

16. Mr Ndwayana allegedly stood up, walked to the light switch and switched it on.

17. He allegedly observed Applicant reach for his desk and urinate on Mr Ndwayana's desk and belongings on the desk. The urine also ended up on the floor near the desk.

18. Another student arrived, allegedly stood in the door of the room and suggested that Mr Ndwayana video record what the Applicant was doing, which is what Mr Ndwayana did.

19. Mr Ndwayana allegedly asked the Applicant what he was doing and the Applicant replied that he was: *"waiting for someone, boy."*

20. Thereafter Mr Ndwayana allegedly asked the Applicant why he was urinating on his things, whereupon Applicant allegedly said: *"It's a white boy thing."*

21. At the time of the last reply from the Applicant, Mr Ndwayana had allegedly switched off the video.

22. The Applicant allegedly left the room after he finished urinating.

The Victim's conduct in lodging a complaint

23. At 04h39 on the morning of 15 May 2022, literally minutes after the incident, Mr Ndwayana sent a Whatsapp message to one, Ricky. That message formed

part of the initial investigative record that served before the CDC. The message reads as follows:

> "*Sorry Ricky to text you at this time, but someone just came into my room and pee also insulting me."*

24. At 09h30 on the same morning, namely 15 May 2022, Mr Ndwayana sent one Jaco Joubert, a Whatsapp message that reads as follows:

> "*Hello, I am Babalo staying in room 1032 someone came into my room around 4am and pee in my desk and insulted me."*

25. On the same day, 15 May 2022, at 12h13 Mr Ndwayana sent an email to the SRC notifying it of the incident. In that email, he states, *inter alia*:

> "*Then I realized that the (sic) was this white guy who came to my room and reached for my study table and decided to pee on it… When I asked this guy what he was doing he said "This is what we white boys do."…. This I consider as a violation of my right to dignity and very dehumanizing….*
> *The Stellenbosch residences are currently undergoing a review of the alcohol policy in student residences which (sic) in which the use of alcohol is currently banned so now if people are going to get drunk in their respective environments or social gatherings and come to res to violate us in this manner, then certain measures have to really be put in place to deal with them for their ill misconduct…*"

26. At approximately 11am that same morning, the Applicant came to Mr Ndwayana's room again and apologised but Mr Ndwayana's held the view that an apology was insufficient to address the trauma and impairment of dignity he had suffered.

27. At approximately 12 noon, one Bongani Langa, who later testified before the CDC, went to the room of Mr Ndwayana where he observed the Applicant attempting to clean up the urine.

28. Mr Langa saw three other male students who asked Mr Ndwayana what did the Applicant do or say and Mr Ndwayana said that the Applicant said " *it's what we do (sic) black boys*" . The three males then laughed.

29. In his testimony, the Applicant confirmed that he was present in the room of Mr Ndwayana with the three male students who were his friends, Mr Ndwayana, and a friend of Mr Ndwayana. That was when the Applicant heard Mr Ndwayana allege that Applicant had said something about white boy.

30. Mr Simeon Boshoff, a student, also testified that he was trying to console Mr Ndwayana at approximately 19h30 on 15 May 2022 and told him that the incident is not right, when Mr Ndwayana on his own, told him that the Applicant had said: "*it's a white boys thing*."

31. Mr Boshoff said that Mr Ndwayana definitely did not allege that Applicant said: "*This is what we do to black boys*."

32. Mr Ndwayana spoke to the Equality Unit of the University on 16 May 2022, that being the day after the incident. He went back to sign a statement at the Equality Unit on 17 May 2022. He signed a further statement there, on 19 May 2022.

33. In the first statement Mr Ndwayana said that;

33.1. although his room door was unlocked, he didn't give anyone permission to enter at the time when Applicant entered;

33.2. his roommate was away for the weekend;;

33.3. he saw Applicant reach for his desk and urinate on it;

33.4. Mr X came past his room and told him to take a video;

33.5. He asked Applicant what he was doing and he said: "*waiting for someone, boy*";

33.6. He then asked Applicant why he was urinating on Mr Ndwayana's belonging and the Applicant said: *"It's a white boy thing"*;

33.7. After the urination, the Applicant left his room;

33.8. He reported the traumatic incident immediately to his mentor, Blake Govender and the Vice Prim of Huis Marais via Whatsapp;

33.9. He had taken a video of the incident and would make it available;

33.10. He did not accept the later apology by the Applicant as sincere nor could it justify urinating on his belongings nor the words the Applicant uttered;

33.11. The whole incident affected his mental well-being and impaired and diminished his dignity as a black person.

34. In Mr Ndwayana's statement of 19 May 2022, he added a more relevant aspect, namely that he ended the video of the incident, the Applicant walked out and then he allegedly uttered the words" *it's a white boy thing*."

35. According to Mr Ndwayana, the following items were damaged; a laptop lent to him by the University; his textbook and 3 notebooks.

36. The Head of the Equality Unit recommended that the matter be referred to the Office of Student Discipline in order for a Disciplinary Matter to be proceeded with.

The Disciplinary Code

37. It is common cause that the Code applies in the same manner to both the CDC and the DAC. Clause 2.3. of the Code describes what will inform sanctions imposed in terms of the Code. As follows:

> "*Therefore sanctions imposed in terms of this code will take cognisance of the efforts made to restore relationships and will, in addition to the established aims of punishment and deterrence, serve to rehabilitate and educate offenders and where persons found guilty of misconduct and where appropriate, sanctions will contribute to the restoration and healing of the University Community as a whole, the relationships amongst its Student Communities and individual members of the Student Community*."

38. Clause 3.1. sets out the University's values and allows for the variation in values adopted by the University to apply to students. To that extent it is not an immutable set of values. The clause provides as follows:

> "*Stellenbosch University operates on a set of basic values which every Student is expected to respect and promote, and which informs the application of this disciplinary code. The values are: Excellence, Accountability, Mutual Respect and Compassion. In addition hereto, current values adopted by Stellenbosch University and any variation thereof, shall be applicable to the application of this disciplinary code*."

39. Clause 7.7 provides:

> '' *An initial investigation is conducted to collect evidence relevant to the suspected Disciplinary Misconduct. The initial investigation forms the basis of the University's case, which may be supplemented at various points throughout the disciplinary process."*

40. Clause 7.11. provides:

> "*Where a matter is referred to the RDC or the CDC that does not mean that the enquiry should necessarily mimic a criminal trial. Evidence can be presented either through oral testimony or witness statements (sworn or otherwise). Cross-examination may, or may not be appropriate. The University's case is presented to the disciplinary committees by an Evidence Leader (as provided for in clause 29). A Student who is affected by the suspected misconduct, will always be allowed to address the relevant committee at the enquiry*."

41. Clause 7.13 vests the DAC with wide powers as well as the power to consider additional evidence.

42. Clause 7.14 gives all disciplinary committees the wide discretion to impose an appropriate sanction.

43. Clause 9.1 provides as follows:

> " *No Student shall, without good and lawful reason, wilfully engage in any conduct which adversely affects the University, any member of the University Community, or any person who is present on the University*

Campus at the invitation of the University." [Charge 2 – the "urination charge"].

44. Clause 9.3 provides as follows:

"*A Student shall not act in a manner that is racist, unfairly discriminatory, violent, grossly insulting, abusive or intimidating against any other person. This prohibition extends but is not limited to conduct which causes either mental or physical harm, is intended to cause humiliation, or which assails the dignity of any other person*." [Charges 2 and 3 – the "urination" and the "statement charge"].

45. Clause 13.1 provides:

"*A student shall not make use of, occupy or enter any University Premises without permission to do so.*" [Charge 1 – the "trespassing charge"].

46. Clause 18.3. sets out how a functionary may exercise disciplinary powers:

"*Any Functionary exercising disciplinary powers may, prior to exercising such powers:*

18.3.1. Request and receive the assistance of the Student Disciplinary Investigator to obtain such additional evidence as the disciplinary Functionary considers necessary to properly consider the issue at hand; and

18.3.2. May seek and receive information and advice from any other Functionary mentioned in this disciplinary (sic) may not abdicate the decision for which the Functionary is responsible."

47. Clause 19 provides, *inter alia,* that: "*the Rector or a delegate of the Rector may temporarily Suspend a Student from the University if, on the facts available at that time, the Rector reasonably fears that the continued attendance of the Student poses an imminent threat to the order and discipline at the University or the mental or physical well-being of fellow Students*."

48. Clause 34 grants any staff member of employee or person with authority over a Student, a power to investigate and gather and if needs be, confiscate evidence

of Disciplinary Misconduct. The results of that initial investigation must be presented in writing, to the student suspected of the misconduct.

49. Clause 34.6. provides that the results of an investigation by the Equality Unit shall form part of the preliminary record before the CDC.

50. Clause 37 provides that the Chairperson of the CDC may ask for further investigation to be conducted. A Student affected by the suspected misconduct may indicate if he/she wishes to take part in the proceedings and may make written submissions. Members of the University community may be invited, in appropriate cases, to make written or oral submissions before the CDC. The CDC must issue a directive indicating whether it is necessary for witnesses to be called or whether it requires evidence to be submitted by way of sworn statements in whole or in part.

51. Clause 37.10 provides that the CDC's finding on guilt must be established on a balance of probabilities.

52. Clause 37.11 lists the possible sanctions available to the CDC.

53. Clause 37.12. lists the relevant considerations and allows for the determination of further relevant considerations in deciding on an appropriate sanction. Those considerations are:

" *37.12.1.* *Proportionality between misconduct and the sanction imposed;*

37.12.2. *Mitigating circumstances, if any, which may include the Student's co-operation with the disciplinary process;*

37.12.3. *Conversely, lack of co-operation with the disciplinary process may be regarded as an aggravating circumstance;*

37.12.4. *The interest of members of the University Community affected by the misconduct and the University as a whole;*

37.12.5. *The CDC has a discretion to defer the effective date for the sanction pending the outcome of an appeal….;*

37.12.6. *The CDC may Suspend whole or part, of the sanction subject to the fulfilment of any condition which it considers appropriate…;*

37.12.6 [applies to groups of students found guilty of misconduct] "

Discussion on the meaning and structure of the Disciplinary Code

54. The Code envisages that the CDC is not to conduct proceedings as a Court of Law.

55. Although the Code states that the proceedings are not to be identical to a Criminal Trial, it also imposes a Civil Law standard of proof, namely, a balance of probabilities test.

56. The Code uses some terminology identical to what one finds in Criminal/Civil Procedure and in the Law of Evidence.

57. However, despite the Code referring to evidence being presented before the CDC and the DAC it, does not provide that information placed before those committees must be in the form of sworn testimony exclusively.

58. Therefore, in the context of the Code, “evidence” is not what Courts ordinarily are bound to receive, namely, allegations made in the form of sworn statements, whether orally or in writing.

59. The Law of Evidence applicable to courts law, such as, the prohibition against hearsay evidence unless it is found to be admissible in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988, is not applicable to the CDC. The Chairperson of the CDC in the exercise of his/her discretion, may permit hearsay evidence.

60. Accordingly, the word “evidence,” used in this case in relation to the proceedings of the CDC and DAC have a *sui generis* meaning.

61. The proceedings of the CDC and DAC are also *sui generis* in nature, in that the Chairperson is vested with the power to allow or refuse cross examination whereas in a court of law, cross examination is a fundamental principle of natural justice.

62. The use of the word “cross-examination” itself, in proceedings before the CDC and the DAC are not to be confused with cross-examination in a court of law, where certain rules need to be abided by.

63. According to the Code, the evidence leader in the committees represent the interests of the University, not the victim. Clause 7.12 of the Code provides that a student may choose to be legally represented in disciplinary proceedings but it is not a right and it may be applied for.

64. Clauses 7.11 and 7.12 read together, makes clear that the Evidence Leader does not represent a student.

The Process and Notices preceding the CDC hearing

65. The CDC’s hearing was preceded by the following.

66. A letter in the form of a Notice, from Head of Student Discipline one, Van Rooi dated 20/05/2022, was addressed to Applicant. In that Notice applicant was informed of allegations that arose from the preliminary investigation.

67. In the notice letter, applicant’s attention was drawn to the provisions of the Disciplinary Code, namely, clauses 3.1; 9.1; 9.3; 9.6; 13.2 as well as to amended Residence Rule 7.2.2 which he was alleged to have breached and which reads as follows:

> *“Students and residences should at all times act in such a manner that no discomfort or disturbance of peace is caused to the occupants or other residences in the area”.*

68. Applicant was invited to admit or deny the alleged misconduct and make a short written statement setting out all relevant facts or he could decline to make a statement.

69. Applicant was informed that further proceedings could take three possible forms.

70. Applicant was invited to indicate if he will admit or deny the conduct and he was required to do so within 72 hours.

71. On 24 May 2022, Applicant was sent a ‘Notice of Allegations and outcome of Preliminary Investigation’. The notice is signed by the Chairperson of the CDC.

72. Once again applicant’s attention was drawn to the alleged breach of the clauses of the Disciplinary Code stated in the notice dated 20 May 2022.

73. Applicant was told in that notice, that the bundle of evidence collected during the preliminary investigation, which was attached, was considered.

74. Applicant was informed that for the reason that the allegations are serious, it was considered to be in the interest of the broader University Community that Applicant answer the allegations before a CDC hearing. He was also advised that, it was in the interest of the victim, that the evidence obtained during the initial investigation and the representations / statements from the Equality Unit and the victim, would form part of the evidence. He was informed that the chairperson exercised her discretion to refer the matter to the CDC for a full hearing.

75. Applicant was informed that the "*nature of the enquiry will include oral testimony and a submission of sworn statements, if applied for by the parties*." That is clearly, in accordance with clause 7.11 of the Code set out earlier.

76. It bears mention, that the word "*include*" has been defined by the Constitutional Court as not exhaustive but a term of extension[1] depending on the context in which it is used.

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[1] Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amicus Curiae) (New Clicks) 2006 (2) SA 311 (CC); at [455]; New Nation Movement NPC v President of the Republic of South Africa 2020 (6) SA 257 (CC) at [23]; King N.O. & Others v De Jager and Others, (2021 (4) SA 1 (CC) at [36].

77. On 27 May 2022, F van Rooi, the Head of Student Discipline, sent Applicant a letter headed Directive CDC in which he was invited to attend the CDC enquiry. His attention was drawn to the provision of clause 37.4 of the Code as follows:

77.1. Clause 37.4.1 requires that in setting the date and time for the hearing, the chairperson must consider the circumstances of the applicant and complainant.

77.2. Clause 37.4.2 provides that the CDC consider an application made for legal representation but no such application was received.

77.3. Clause 37.4.3, it was recorded, is applicable, where further investigation had raised new factual issues or expanded the range of suspected misconduct, the directive must in that event, provide a summary of new material but in this instance, there was no additional material.

77.4. Clause 37.4.4 provides that the CDC must state whether the CDC considers it necessary for witnesses to be called, or whether it requires evidence to be submitted by way of sworn statements in whole or part and where it calls for sworn statements, it must set out a timeline for its submission. It was recorded that no sworn statements were envisaged but should that change, the parties would be informed.

78. The Administrative Officer at Legal Services of the University caused an email to be sent to the Applicant to notify him that a Disciplinary Enquiry would be held on 22 June 2022.

79. At that stage the Applicant was legally represented by Mr Fullard.

The CDC hearing

80. When the University's CDC convened to conduct the enquiry, it was established that the legal representatives of Mr Ndwayana had indicated that in the light of both his legal representatives not being allowed to observe proceedings, he would not be testifying at the enquiry.

81. The following students provided written statements as well. They are the student who peered into the room at the time when the incident occurred and who allegedly advised Mr Ndwayana to make a video of the incident; the student who shared a dorm room with Applicant, the student who attended school with Applicant, the student who went out that night and morning with the Applicant, namely Mr Y, the student that Applicant and Mr Y had visited and whose bed they jumped on, namely Mr Z, the residence Mentor, a student, Mr L who had gone to the room of Mr Ndwayana later that morning and a Mr B, to who Mr Ndwayana had reported the allegation of the last utterance attributed to the Applicant.

82. The student, Mr Y, who went out the night before the incident with Applicant made a statement to the effect that on their return to “Huis Marais,” they stopped at a BP petrol station where they bought food. From there, they walked to “Huis Marais” and arrived at approximately, 3 am. They went to a friend’s room for approximately 10 minutes, to tease him. Mr Y then decided to go to his room and his bed. The room of the friend where they spent about 10 minutes was to the left of Mr Ndwayana’s room.

83. The friend whose room they visited, Mr Z, made a statement that both Applicant and his friend were intoxicated to the point of having slurred, incoherent speech when they came to visit him.

84. According to Mr Z, after the companion of Applicant left, Applicant could not contact another friend on his cellular phone and fell asleep. The friend whose room Applicant had visited also fell asleep and when he awoke, Applicant was not there.

85. The student who attended school with Applicant described him as not being aggressive nor racist.

86. The friend that shared a dorm room with Applicant, Chad, said he was brown and did not experience the Applicant as racist.

The CDC's Judgment

87. In a written judgment, the CDC stated the following:

87.1. It is an internal body established in terms of the Disciplinary Code for Students 2021;

87.2. It is inquisitorial in nature;

87.3. It is mandated to embark on a fact finding mission, to ask questions in clarification to any party appearing before it;

87.4. It performs an administrative judicial function;

87.5. It must establish guilt on a balance of probabilities;

87.6. It is not a court of law;

87.7. The case hinges on the following issues, namely, the urination; abuse of alcohol; residence culture; racism and the future interests of the University.

87.8. As a consequence of the wide publicity accorded to the incident and its nature, it is deemed prudent to produce a written judgment with clear reasons;

87.9. The Applicant and another student, Mr Y consumed alcohol in the University's residence, namely half a bottle of brandy;

87.10. Thereafter they visited two establishments after 22h00 where the Applicant consumed eight double brandy and mix drinks which means in total he consumed one and half bottles of brandy between approximately 7pm and 3am;

87.11. Applicant alleged that he blanked out periodically and he could not remember the time he spent at the two establishments;

87.12. At about 3am Applicant and Mr Y went to the room of Mr Z to fool around but Mr Y left after 10 minutes and Applicant unsuccessfully tried to call another friend but then fell asleep on Mr Z's bed.

87.13. Applicant allegedly woke at 6am and went to his own room and at about 10am he was informed of the incident where he had urinated on Mr Ndwayana's desk and possessions at about 4h30 am.

87.14. While Applicant was urinating on the desk, Mr X came past, heard the noise as Mr Ndwayana was clearly annoyed and attempted to de-escalate the situation by suggesting that the Applicant be recorded;

87.15. The video footage provides undisputed evidence as to what occurred;

87.16. It shows Applicant urinating on Mr Ndwayana's possessions. When Mr Ndwayana asked the Applicant what he is doing, the latter replies: *"waiting for someone"*;

87.17. Mr Ndwayana asked Applicant again what he was doing and the Applicant replied: *"waiting for roommate"*;

87.18. Applicant alleged that he returned to Mr Z's room to sleep;

87.19. Mr Ndwayana's legal representatives applied to be allowed to observe the proceedings of the CDC as a source of comfort and support to him. After refusing the application, the CDC granted one legal representative and not both the right to observe proceedings but the legal representatives

informed the CDC that Mr Ndwayana decided not to testify as a witness because he believed that the CDC was biased and unfair;

87.20. The CDC found that Mr Ndwayana's allegations of bias and unfairness was premature and unfounded;

87.21. The CDC found that it was in the interests of the student body as a whole, the alumni and the national interests for Mr Ndwayana's version to be heard;

87.22. On behalf of the Applicant, it was argued that expulsion would be too harsh punishment and that an appropriate punishment should include an element of rehabilitation because the Applicant made a drunken mistake and did not act deliberately;

87.23. The CDC found on the trespassing charge, that when the Applicant entered the room without the permission of Mr Ndwayana or his roommate, he contravened clause 13.1 of the Disciplinary Code, namely occupying University premises without permission;

87.24. Applicant argued that because he visited the room in question previously as a friend of Mr Ndwayana's roommate, who was absent on the relevant day, he had tacit consent to enter, there was an open door policy but he was also too drunk to remember if Mr Ndwayana gave him consent to enter;

87.25. The CDC found that because Mr Ndwayana and the Applicant were not friends, tacit consent could not have been granted;

87.26. Applicant accepted that he was the individual that urinated on Mr Ndwayana's desk and possessions;

87.27. Applicant alleged that he did not act unlawfully or intentionally because he was heavily intoxicated and did not know what he was doing;

87.28. According to Applicant, it is not in his nature to intentionally destroy the property of someone nor to be racist;

87.29. The CDC found that the urination incident falls foul of clauses 13.2 and 3.1 of the Disciplinary Code in that it prohibits destruction of property belonging to the University or the University Community and compels students to operate on the basis of the University's values that include, *inter alia*, mutual respect and compassion;

87.30. Applicant was also found to have contravened clause 7.2.2 of the Amended Residence Rules by trespassing and thereby causing a disturbance of peace to the occupant of the room;

87.31. Applicant was found to have not contravened clause 9.6. of the Disciplinary Code in that it was the publication of the video of the incident and other allegations of discrimination that caused disruption of order at the University;

87.32. In addressing the other incidents that led to the disruption of order at the University, the CDC addressed the alleged failure of leadership and the prevailing culture at " Huis Marais";

87.33. In so doing, the CDC found that the Applicant was made a scapegoat in that he testified that a culture of drinking and relying on alcohol to fit in at the University, existed and that he partook in that culture;

87.34. The CDC found that according to the testimony of Dr Groenewald, the Prim of 'Huis Marais,' its residents and students were allegedly notorious for being involved in disciplinary matters, much of their misconduct was in secrecy and with racist intentions;

87.35. The CDC found that the University needed to deal with unhealthy cultures in its residences;

87.36. The CDC found that the Applicant's conduct of urinating on the possessions of Mr Ndwayana is not good nor lawful and no good and lawful reason could be found to justify Applicant's conduct;

87.37. Turning to whether Applicant's excessive consumption of alcohol on the relevant night and early morning was wilful, the CDC found it was wilful engagement in conduct that adversely affects the University as contemplated by clause 9.1 of the Code. The CDC found that the residences and the University had not developed a comprehensive policy and process to stem the tide of alcohol abuse and therefore the Code ought to be interpreted in a manner that does not permit self-inflicted abuse of alcohol to be used as a defence to escape the consequences of a student's actions. Therefore it found that prior deliberate consumption of alcohol satisfies the criteria in clause 9.1 of the Code, namely, wilful conduct;

87.38. In support of that conclusion of wilful conduct, the CDC relied on the following: the Applicant testified that he had an issue with alcohol abuse; he was prone to blank out when he abused alcohol; he took no constructive steps to prevent his state of blanking out from recurring; he had control of his bodily functions in sufficient measure to enable him to walk normally into “Huis Marais”, to walk into Mr Ndwayana’s room; speak with Mr Ndwayana by responding to his questions, finally walk out of the room, therefore, his conduct was wilful as he had control over his bodily functions.

87.39. The CDC found that all of Applicant’s conduct cannot be nullified by excessive consumption of alcohol and his conduct must be seen as wilful. On that basis, he was found guilty of contravening clause 9.1 of the Code;

87.40. Relying on Mr Ndwayana’s statements and the Applicant’s agreement that his conduct assailed the dignity of Mr Ndwayana, the CDC found that Applicant contravened clause 9.3. of the Code in that his conduct was unfairly discriminatory , insulting and caused mental harm and humiliation to Mr Ndwayana;

87.41. The CDC went on to state that it hoped to set a precedent on the prohibited conduct provided for in clause 9.3.;

87.42. Despite stating in the beginning of the judgment that the video does not reveal whether the Applicant used the word “boy” at the end of his first reply to Mr Ndwayana, the CDC found that Applicant’s testimony that he said “ooi” and not “boy” is not favoured by the probabilities. This leads one

to conclude that a word sounding similar to either word must have been heard on the video. The CDC took account of Mr Ndwayana's statement that after the video was switched off, the Applicant said: *"it is a white boy thing"*;

87.43. The CDC applied a subjective test to the use of the word "boy" in the context in which it was used and concluded that although the word was used in a condescending manner, in the light of Applicant's peers not finding the word to be racist, it could not conclude that the Applicant knew that it had racist connotations and therefore found that he was not guilty of having made the racist statement shown on the video recording;

87.44. In regard to the alleged utterance made off camera, the CDC said that in the context of the Applicant urinating on Mr Ndwayana's possession and the fact that Mr Ndwayana had alleged that Applicant used the words: *"it's a white boy thing"*, which he reported contemporaneously, the nature of Mr Ndwayana's complaint to his mentor and Vice Prim shortly after the incident, all showed consistency with his allegation that the Applicant made the said utterance. The CDC found that the words used by Applicant are racist in that it assumes dominion over a person of colour and implies that a white boy can use a person of colour's possessions as a toilet and therefore it is humiliating and demeaning to Mr Ndwayana.

87.45. The mitigating factors that the CDC took account of, are that Applicant is a first offender who showed remorse and was co-operative;

87.46. However due to the degrading nature of the misconduct and the impact it had on Mr Ndwayana and the University community, the CDC found that the mitigating factors could not displace the aggravating consequences of the misconduct.

87.47. The Applicant was found guilty of having contravened clauses 3.1; 9.1; 9.3; 13.1 and 13.2 of the Disciplinary Code and clause 7.2.2 of the Amended Residence Rules, including acting in a racist manner in saying "*it's a white boy thing*". He was found not guilty of contravening clause 9.6 of the Code;

87.48. The CDC therefore expelled the Applicant immediately from the University based on the urination charge and the statement charge;

87.49. The CDC ordered that the judgment be made available to the Khampepe Commission of Inquiry and it made certain recommendations and suggestions with regard to the residence and University's leadership on its alcohol related policy and related transgressions.

88. The Applicant appealed the decision of the CDC to the DAC in respect of charge 3 and the sanction imposed only.

The DAC hearing

89. The DAC issued a directive in terms of clause 40.5. of the Code to the effect that:

89.1. Legal representation before the DAC is permitted;

89.2. No new factual issues arising from further investigations had arisen and would be heard;

89.3. It was not necessary for further evidence to be led except from the victim who didn't testify before the CDC and was granted another opportunity to testify but who declined ;

89.4. The appellant, namely the Applicant before us, was invited to give further evidence but also declined to do so; and

89.5. All documents that served before the CDC that were relevant, would form part of the record before the DAC, including the live video footage or recordings of the incident as well as the Disciplinary Code.

90. The Chairperson of the DAC was at pains to obtain an indication from Mr Fullard, the attorney of Applicant about what aspects of the CDC's findings and order he was appealing against.

91. Mr Fullard said before the DAC that Applicant was not appealing the finding by the CDC that applicant's use of the word "boy" when he uttered the words; "*waiting for someone, boy*," was not racist.

92. When Mr Fullard then went on to address the main ground of appeal before the DAC as the CDC's finding that the Applicant uttered the words: *"it's a white boy thing."* He explained that the CDC relied on the written statements of the victim who had not testified before it and the CDC said that it could not find that the

victim was lying because that would insult him and add to his injury, Mr Keva, a DAC member asked the following: "*But just again I mean the three documents we referred to are not the only ones where that statement was confirmed, for example the video footage is also a source of the complainant speaking about the phrase*."

93. Clearly Mr Keva was referring to the statement of the Applicant that was video recorded and not the alleged statement that came after that, which was not recorded. However what that comment from Mr Keva makes clear, is that both the CDC and the DAC had regard to the video of the incident.

94. Mr Fullard then said that the direct written statements of the victim are not the only information that was considered on the issue of the alleged unrecorded statement of Applicant because Dr Groenewald also testified that the victim had given him those statements.

95. Mr Fullard submitted that the CDC incorrectly placed weight on the written statements that were in fact hearsay evidence.

96. The DAC's chairperson then asks Mr Fullard whether he was saying that the evidence that the victim had shortly after the incident sent messages to his mentor and the residence leadership stating that not only did the urination in his room occur, but that he was also insulted, ought not to have carried any weight.

97. Mr Fullard agreed that he is challenging the weight that the CDC attached to the written statements of the victim, the testimony of Dr Groenewald on those statements, the written proof of messages that the victim sent to people shortly after the incident expressing that he was insulted and the way the CDC treated the evidence of Mr X when he said that he heard a conversation between the victim and the Applicant but he didn't hear what the Applicant said.

98. Mr Fullard told the DAC he wanted to address the evidence of Mr X but then proceeded to refer to the written statement of the victim, that he complained was hearsay evidence. At that point, the Chairperson asked him why he was referring to the victim's written statement when he was addressing the evidence of Mr X. Mr Fullard responded by saying he would like to proceed if he was allowed to and the Chairperson said he was allowed to proceed but then interrupted him again and asked Mr Fullard how the DAC could have regard to the victim's statement because it places Mr X's evidence in context, but not have regard to it for any other purpose if it is objectionable hearsay. The Chairperson then said that the whole case before the CDC was argued on the understanding that all documents could be considered. The Chairperson put it to Mr Fullard that he was raising objection to the acceptability of the documents for the first time before the DAC and did not do so before the CDC. The Chairperson pointed out further that it was Mr Fullard who added additional footage in order to analyse the discrepancies between the video interviews given by the victim and his written

statements, in order to show that the last statement allegedly made by the Applicant was never made.

99. Mr Fullard responded by saying that he had to jump around in his heads of argument in order to answer the chairperson.

100. The chairperson responds by saying that the purpose of oral argument is to elucidate the arguments advanced on behalf of the Applicant and not to merely follow the written heads of argument which the DAC can read on its own.

101. Mr Fullard responded by saying that he got the impression that he was not being afforded an opportunity to argue.

102. The Chairperson said that there was no point in Mr Fullard addressing the DAC and proceedings end thereafter, if he cannot engage with Mr Fullard orally.

103. Mr Fullard said that he would like to present his heads of argument orally and then invite questions from the DAC members after that.

104. The Chairperson said that Mr Fullard could not invite questions and that he was present to answer questions from members of the DAC so that its members could understand his argument. The Chairperson went on to say: "*Now, I'm giving you the opportunity for you to do that and then I'll read to you what I read*

of Mr X's evidence and then I'll also ask you a question, that's how argument goes."

105. Mr Fullard then said that he wished to place on record that it feels that the Chairperson was not affording him the opportunity.

106. The Chairperson replied that he was inviting Mr Fullard to please answer the question, namely, what part of Mr X's evidence did the CDC ignore and which part of that evidence supports the conclusion that they should have found that the statement was not uttered by the Applicant.

107. Mr Fullard proceeded to state again that he was just placing on record that it feels like he was not being given an opportunity to make his submissions.

108. The Chairperson replied that he can place everything, anything on record, but he was asking Mr Fullard because he needs to understand what the argument is that he was dealing with and pointed out that the quoted evidence of Mr X in the heads of argument are not accompanied by a footnote to where that evidence can be found in the record, hence he asked Mr Fullard to take the DAC to that evidence in the record.

109. The evidence Mr Fullard referred to includes testimony of Mr X as follows: " … *and then after that I didn't hear the communication, the conversation between the two. … I actually heard Babalo speaking but then I didn't hear Theuns speaking*

and then after that, after some while Theuns was done peeing and then he went out of the room."

110. I point out here, that the evidence of Mr X does not state that the Applicant spoke as he was leaving the room and while passing or being near to Mr X, as advanced in argument on Applicant's behalf before us.

111. Mr Fullard then referred to the portion of the record where he asked Mr X what did Theuns say when he walked towards him and Mr X said that Theuns said nothing. Mr Fullard sought to rely on that evidence to show that the Applicant said nothing.

112. However if one reads the earlier portion of Mr X's evidence what he said was, that while the Applicant was urinating and before he left the room, he and the victim had a conversation.

113. Additionally in his evidence in chief, before the CDC, Mr X was questioned not only on having observed a conversation at the time when the urination had not yet ended, and not hearing the response from the Applicant, he was also questioned on whether he heard the Applicant say, as he was walking out: "*it's a white boy thing*" to which Mr X replied that he saw that there was a conversation between the victim and the Applicant at that stage as well, but he couldn't hear what the Applicant was saying.

114. Mr Fullard again objected to the Chairperson thereafter for posing a question to him as to whether his understanding of Mr X's evidence is a fair understanding by alleging that it feels like a question is put to him and he has to answer but he is not given an opportunity to give reasons for his answer. The Chairperson informed Mr Fullard that he was not precluded from giving reasons and he was in fact busy giving reasons.

115. It is apparent that Mr Fullard did not understand that the questions were not meant to stymie his presentation but to elucidate it.

116. The Chairperson responded by saying: "*No, no I said carry on. I asked only whether I understand the evidence correctly that Mr X is saying is he could see they were in conversation, he hear Babalo but he couldn't hear Theuns….. Confirmed, then you carry on showing other pieces of evidence you're free to do that, I'm not stopping you.*"

117. Mr Fullard then submits to the DAC that Mr X said that he didn't perceive the incident to be racially motivated and he would have the Applicant back in the residence because Mr X forgives everyone, therefore the only conclusion that the CDC could draw is that the incident was not racially motivated.

118. However, from the record it is clear that Mr X in fact said he is uncertain as to whether he considers the incident to be racially motivated as sometimes he thinks it is and other times he thinks it isn't. Therefore Mr Fullard's characterisation of that evidence by Mr X is incorrect.

119. A lengthy exchange ensued between the Chairperson and Mr Fullard on whether the latter had objected to the written statements being admitted before the CDC as he had submitted before the DAC those statements must be ignored.

120. Mr Fullard eventually said that he had reserved his right to argue that little or no weight should be placed on those statements but he did not object to their admission before the CDC. The exchange between Mr Fullard and the Chairperson on that issue is as follows:

> "*Mr Fullard: Yes correct, so in those exact words no I didn't object. But does is it mean that as my, into (sic) my failure to specific in those sentence that they must now come to an incorrect conclusion.*
>
> *Chairperson: No*
>
> *Mr Fullard: the possibility is still for them to have a look consider everything and then to make their own determination.*
>
> *Chairperson: They made their determination on the base (sic) that all parties approach the matter on the basis that they can have regard to everything in the record and reach a conclusion. You can disagree with their conclusion, but not that they were not allowed to look at everything*.
>
> *Mr Fullard*: *I only had an opportunity then to argue regarding the weight. Because the determination was made there and then. … To proceed with the matter.*
>
> *Chairperson: If witness (sic) doesn't come you are entitled to proceed because the rules allow you.*

Mr Fullard: Correct

Chairperson: It may have implications either way. Maybe that you're allowed to carry on with it because it's a law point, or you're not allowed because it will prejudice the other party. If they knew that the whole of those things must be excluded at that time, they might have tried to do it, present the documents differently. They might have if they knew you objected."

121. The Chairperson put it thereafter to Mr Fullard that maybe the University would have applied for a postponement if it knew he objected to the admissibility of the victim's written statements being before the CDC, which Mr Fullard then agreed could have happened.

122. Mr Fullard argued that no regard ought to have been had to the victim's email to the SRC on the day of the incident because at the end of the email he spells his first name incorrectly and its authenticity is disputed but he agreed that he did not dispute its authenticity or admissibility before the CDC.

123. The Chairperson put it to Mr Fullard that what he found problematic is that the Applicant could recollect going to Mr Z's room and jumping on his bed, falling asleep there, but not remember what he did in Mr Ndwayana's room which was later. Applicant also went past the other bed and desk in the room of the victim and went straight for the desk of Mr Ndwayana and he continued to urinate after

the light was switched on. It leaves a lot of doubt and question marks on why the Applicant was there and why that is the only chunk in time that he can't remember, yet the Applicant could remember he awoke at 6am.The Chairperson said that the Applicant was still drunk when he jumped on the bed of Mr Z, yet he remembers that.

124. Mr Fullard said that the only person that can answer why the Applicant could not remember is a psychiatrist or medical expert.

125. The Chairperson asked how could the DAC excuse the misconduct when there was no expert evidence presented of how much alcohol the Applicant had consumed and how that impacted on his ability to do things.

126. Mr Fullard said that if the DAC found that the Applicant did utter the words: "*It's a white boy thing*" that would have been insulting to the victim.

127. Mr Fullard pointed out that the victim's initial reports that the Applicant not only urinated on his possessions but also insulted him could mean that the urination is the insult and not that offensive words were used because those offensive words are only alleged in the email that the victim sent to the SRC.

128. The DAC put it to Mr Fullard that since he is not challenging on appeal the CDC's finding on charges 1 and 2, the wilfulness found by the CDC in regard to the urination charge stands even though the Applicant was intoxicated.

129. It was put to Mr Fullard that the evidence leader argued before the CDC that the urination charge alone warrants expulsion.

130. It was put to Mr Fullard that although the CDC didn't find the urination to be racist, it found that the offensive statement viewed in the context of the urination, was racist because it assumed dominion over the victim. Therefore, although the DAC did not need to re-consider the urination charge, in considering the impact of the offensive statement, objectively, it could take into account the facts concerning the urination charge which places the offensive statement in context.

131. Mr Fullard responded by saying the perception of a statement being racist is a subjective matter not connected to the context. He said that he had no submissions to make on whether the statement is racist.

132. On the inability to cross examine the victim because he did not give evidence, the Chairperson asked Mr Fullard to assume that the victim did testify, and pointed out in that event, if it was put to the victim that Mr X said he didn't hear what the Applicant said while walking out, the victim's answer as to why Mr X did

not hear would be pure speculation because only Mr X could answer why he didn't hear.

133. Mr Fullard agreed with the Chairperson that the Applicant could apply to study at other Universities but he argued that expulsion affects the Applicant adversely because he was a law student.

134. Mr Keva, a member of the DAC put it to Mr Fullard that the evidence of the Applicant, when faced with the question of whether he accepts responsibility for his actions, either relied on his intoxication or said that the media had blown it out of proportion and had given it political coverage and it could have been dealt with as a minor issue within the residence. That, it was alleged, was not the answers of a person who appreciated the seriousness of the misconduct and the impact it had on the victim and the University Community.

135. Mr Fullard said that in the plea explanation, it was accepted as serious misconduct and it was not argued as a minor infringement.

136. Mr Hess, the evidence leader, representing the University, submitted at the DAC, that there was no objection before the CDC to the admissibility of the written statements of the victim who didn't testify, the legal representatives argued what weight had to be attached to the statements and it only impacted on charge 3 before the DAC.

137. The members of the DAC questioned Mr Hess on why he applied to have the written statements admitted under clause 30.7 of the Code that provides that a student may apply to have written statements entered into evidence, if he also submitted that the statements in any event had the status of evidence because it formed part of the preliminary investigation record that the CDC was entitled to have regard to in terms of clause 37.5 of the Code. He replied that he was just following the clauses in the Code.

138. Clearly Mr Hess incorrectly applied clause 30.7.

The DAC's judgment

139. The DAC delivered a written judgment on appeal which contains the following:

140. The DAC invited the Applicant to present further oral evidence but he declined to do so.

141. Applicant's legal representative submitted written argument before the DAC, which narrowed the issues on appeal as compared to the grounds of appeal initially submitted.

142. Applicant's legal representative also made oral submissions.

143. Applicant's legal representative confirmed that applicant did not challenge the guilt finding in respect of charges 1 and 2 but did challenge the order of expulsion

to the extent that it is based on charges 1 and 2 and he also challenged the finding on the merits in respect of count 3, namely racism in the form of a racist statement.

144. Applicant's grounds for appeal on count 3 are twofold, namely;

144.1. that the CDC ought not to have admitted and had regard to the written statements of Mr Ndwayana because he failed to testify nor make sworn statements and little or no evidential weight ought to have been placed on those written statements; and

144.2. the CDC erred and misdirected themselves in the way it treated the evidence of Mr X.

145. Applicant's legal representative argued that the CDC was not empowered to admit the written statements of Mr Ndwayana through the grant of an application in terms of clause 30.7 of the Code because that clause provides for a situation where a student who intends to testify orally, applies to have his/her written statement admitted whereas, in this instance, Mr Ndwayana didn't testify orally nor did he apply to have his statements admitted.

146. Applicant's legal representative further submitted that in any event, the admission of the statement was contrary to the CDC's own directive of 27 May 2022 that witnesses will be called to testify orally and therefore, evidence through unsworn written statements were not envisaged.

147. On Applicant's behalf, it was submitted that should it be found that the written statements could be admitted, then no weight ought to be attached to it, because the Applicant was precluded from cross- examining Mr Ndwayana on its content nor could Applicant obtain valuable information from him or clarify the inconsistencies between his statements, emails and video footage.

148. It was further submitted that it was not possible to put to Mr Ndwayana, the evidence of Mr X that he didn't hear the words: "*it's a white boy thing*" being spoken by Applicant because Mr Ndwayana didn't testify.

149. It was also submitted that the CDC ought to have drawn a negative inference from Mr Ndwayana's failure to testify at the enquiry and from the inconsistencies mentioned above.

150. It was argued that the CDC failed to place sufficient weight on the evidence of Mr X that he didn't hear the words that constitute the basis of charge 3 and it should have concluded that it is therefore, highly improbable that Applicant uttered those words.

151. It was submitted that the CDC failed to have regard to Mr X's perception that the Applicant was either drunk or sleepwalking.

152. It was argued that the CDC failed to consider different sanctions provided for by clause 37.11 of the Code and the considerations provided for in clause 37.12 of the Code.

153. It was submitted that the CDC failed to take account of the purpose of the Code as provided for in clause 2, namely, to consider the personal circumstances of the Applicant, to place sufficient weight on the true remorse shown by the Applicant and the CDC over-emphasized the seriousness of the offence.

154. It was argued that the CDC failed to take account of the principles of Ubuntu and to show mercy nor did it consider reformative justice when imposing the sanction.

155. The Applicant could neither confirm nor deny that he uttered the words that form the basis of charge 3 because he was allegedly very intoxicated.

156. The DAC summarised the findings of the CDC with regard to charge 3 as follows.

157. Mr X said that he did hear a conversation between Mr Ndwayana and the Applicant after the video was switched off and before the Applicant left the room but he couldn't hear what the Applicant said, although he could hear what Mr Ndwayana said.

158. The CDC placed reliance on the written statements made by Mr Ndwayana because they were made shortly after the incident occurred. It was clearly made

at a time when the events were still fresh in the mind of Mr Ndwayana, before he had given media interviews and before other students made public statements and a petition was started in support of him.

159. The DAC said that the CDC considered the written statements by Mr Ndwayana as more reliable than subsequent media interviews by Mr Ndwayana because at the stage when he made the written statements, he had not yet been influenced by media and other publicity.

160. The DAC said that the CDC also found his written statements to be clear and consistent.

161. The DAC said that the CDC found on the probabilities, Mr Ndwayana's early, consistent recall of what Applicant uttered before he left the room, favoured Mr Ndwayana's version.

162. The DAC pointed out that the CDC relied on the case of **Rustenburg Platinum Mine v SAEWA (obo) Bester**,[2] for the finding that a reasonable, objective and informed person, on hearing the words, would perceive them to be racist in the context of the conduct of the Applicant that preceded the uttering of the words.

[2] 2018(5) SA 78 (CC) at [24].

163. The DAC said that CDC's sanction was preceded by a consideration of mitigating factors, the impact the incident had on the University community and on Mr Ndwayana.

164. The DAC relied on the answer given by Mr X when he was questioned about whether he saw the Applicant answer Mr Ndwayana's question which is, what the Applicant was doing after the video recording was stopped. Mr X answer was that for sure, he heard them having a conversation but he didn't hear what Applicant said as the latter was walking back out of the room. The DAC therefore formed the view that that evidence supports the statement of Mr Ndwayana that the Applicant gave him a reply before walking out and that reply was: *"it's a white boy thing*."

165. The DAC found that Mr X's question to Mr Ndwayana as to whether the Applicant was sleepwalking or drunk didn't express a view and was no more than a query.

166. The DAC accepted that clause 30.7 of the Code only applies to a situation where a student wishes to present evidence by way of a written statement and ought not to have been used before CDC to admit the evidence of the victim's written statements.

167. The DAC found that the CDC had a discretion to consider written documents that form part of the preliminary investigation and to consider the evidence presented

by witnesses before the CDC that referred to information that was relevant to the content of the written statements of Mr Ndwayana. In fact, it found that the legal representative of the Applicant questioned witnesses on the content of the said written statements without any reservation on admissibility and without raising any objection to its admissibility during the CDC's proceedings.

168. The DAC referred to clause 7.11 of the Code that provides that the CDC is not a court and its inquiry does not mimic a criminal trial. That clause also provides that the CDC has a wide discretion regarding the admission of evidence.

169. The DAC referred to clauses 37.5 and 37.10 of the Code where it provides that the preliminary record of results of further investigation and additional relevant material must be circulated among members before the inquiry.

170. The Code allegedly provides further that a fact-finding enquiry must be embarked on and questions should be asked of anyone appearing before the CDC.

171. The clauses also provide that cross examination of witnesses will only be allowed with permission of the Chairperson of the CDC.

172. No objection was raised by the Applicant's legal representative to witnesses who received emails from Mr Ndwayana or emails that he had written, testifying about

it and in fact those witnesses were questioned on that evidence by Applicant's legal representative.

173. The DAC found that the CDC's assessment of the reliability of the documentary evidence in the light of the video footage of media interviews given by Mr Ndwayana, was correct in that his written statements were more reliable and given soon after the incident but before he was subjected to any external influence and pressure.

174. The DAC declined to draw a negative inference from Mr Ndwayana's refusal to testify because his refusal arose from the CDC's conduct in refusing to allow him to have all the persons he wanted present as observers.

175. The DAC found that there was no right to cross- examine Mr Ndwayana and the fact that the Applicant had been denied an opportunity to cross examination the victim, was a discretionary decision by the Chairperson of the CDC. The DAC found that the nature of cross examination would be limited by the fact that Applicant had no recollection of what occurred and could not challenge its veracity nor could Mr X's testimony that he could not hear what Applicant said lastly before walking out of the room, have led to a challenge as to the veracity of what Mr Ndwayana said Applicant had uttered.

176. Before the DAC, the Applicant's legal representative accepted that if the Applicant was found to have uttered the words; "*it's a white boy thing*" it would be a racist statement.

177. The DAC found that there was no basis on which to interfere with the CDC's decision to admit and place reliance on the written statements, messages and emails of Mr Ndwayana.

178. The DAC found that the CDC's error in admitting the written documents of Mr Ndwayana on the basis of clause 30.7 was superfluous and immaterial.

179. The DAC found that the CDC's finding on the probabilities, when regard is had to the evidence of Mr X, was not open to interference by it.

180. Turning to the sanction imposed, the DAC, found that the CDC had considered not only the nature and impact that the incident had on the individual, but also the University community as well as mitigating factors relevant to the Applicant.

181. The DAC considered clause 9.3 of the Code that recognises a right to dignity that is the intrinsic worth of human beings and the decision in **S v Makwanyane & Another** [3] that found that: " *Respect for the dignity of human beings is particularly important in South Africa. For apartheid was a denial of a common*

[3] 1995 (3) SA 391 (CC) at [329] and [225].

humanity. Black people were refused respect and dignity and thereby dignity of all South Africans was diminished. The new constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new constitution."

182. The DAC held that, a proper appreciation of values and dignity, means that Ubuntu should not be used as a shield from accountability for conduct that assails the dignity of another.

183. The DAC affirmed the University's right to its institutional values that derive their thrust from its vision of where it wants to go and what it wants to be.

184. The DAC found that the urination charge alone is sufficient for expulsion because it is deeply humiliating, degrading to Mr Ndwayana and also destructive of Mr Ndwayana's property.

185. The DAC found that even if it is wrong on the outcome of charge 3, namely, the alleged racist utterance by Applicant after the video is switched off, expulsion is the appropriate sanction in terms of clauses 2, 37.11 and 37.12 of the Code.

Applicant's attorney, Mr Van Niekerk's supporting affidavit and an evaluation thereof

186. In a supporting affidavit, the Applicant's attorney of record makes the following allegations: "*The incident involving Theuns du Toit triggered a national outcry of condemnation fuelled by exaggerated reports and the involvement of politicised and political organisations, all of which presented it as an instance of racism. Even President Ramaphosa lamented the prevalence of racism in South Africa.*"

187. The said attorney goes on to refer to a public statement made by the Rector of the University, Prof Wim de Villiers in which he, *inter alia*, explained that the suspension of the applicant would remain, that an investigation was underway, that governance procedures and rules will be followed and the full extent of the law would be used. He also said that *"permanent expulsion and/or criminal charges are possible outcomes based on the investigations."*

188. The attorney alleges that the above-mentioned public statement demonstrates that Applicant was prejudged by the Rector, as well as employees of the University including the CDC and DAC.

189. The attorney alleges that the public statement of the rector constitute a prejudging of Applicant's disciplinary enquiry and unwarranted dictating to employees of the University that served on the CDC and the DAC.

190. That is an astounding allegation that presumes that employees of the University are incapable of bringing their independent minds to bear on a disciplinary process.

191. It also assumes that the employees of the University who are academics, have no academic freedom.

192. The attorney states further in the affidavit that the Rector's statement branded the Applicant as a racist and cemented that narrative firmly. The attorney goes on to conclude in the affidavit, that the CDC sought to make an example of the Applicant to establish a precedent based on fundamentally flawed perceptions of the culture prevailing at "Huis Marais".

193. The attorney states that he deposed to the affidavit in order to provide a perspective on the matter.

194. The attorney's allegations, therefore, are intended to provide a particular perspective.

195. It is indeed an elucidating perspective provided by an officer of this Court.

196. The affidavit fails to provide facts that demonstrate impropriety by the CDC where it makes the factually un-challenged recordal, that it considered the media

interviews and public statements made by Mr Ndwayana but found them to be factually different and less reliable than Mr Ndwayana's initial written statements made shortly after the incident as well as his written communication to Residence and University staff or assistants, shortly after the incident.

197. There are many instances of misconduct, whether criminal or not, that are widely reported in the media in this country and that evoke public outrage and condemnation.

198. Regrettably, some of those incidents involve allegations of racism.

199. Nonetheless, it does not behove an alleged perpetrator of misconduct to lament a disciplinary or adjudicatory process as being biased or unduly influenced purely because of public outcry and condemnation.

200. More is required of someone who alleges that the process was tainted by bias and prejudice, namely, a tangible link between the conduct of the tribunal or court and the public outcry and a displacement of the dual presumption of impartiality in favour of the adjudicator.

201. It was always known to anyone who took the time to read clauses 37.11 and 37.12 of the Code, that expulsion is one of the possible outcomes and sanction that the University could impose on anyone who is found guilty of contravening

the Code in a material way that impacts on the University and the University community in a deleterious way.

202. The rector's statement to that effect, could not have been news to the CDC nor the DAC who would have had regard to the content of the Code.

203. The attorney appears to conflate the case he attempts to make out on behalf of his client, the Applicant, whose interests he is duty bound to represent in this case, with his personal involvement in signing an agreement between the elected leadership of Huis Marais and representatives of the alumni in 2020 as well as with the patently obvious grievances the attorney has with the way the University has conducted a process to transform the residence in 2020.

204. The attorney states in the affidavit that: "*Bully tactics were the order of the day and on a number of occasions officials distorted or concealed the true facts to present Huis Marais in the worst possible light to SU's Council and other decision-makers.*"

205. The attorney appears to be presenting new evidence or information not considered by the CDC or DAC concerning the history of the operation, leadership and negotiations concerning Huis Marais and its culture which have clearly not been considered by the CDC nor the DAC and do not from part of

what this court is required to consider in this review. The decision to put those allegations in an affidavit in support of this application is ill-advised.

206. As a result of the new evidence contained in the attorney's supporting affidavit, the papers have become unduly prolixed.

207. In the same affidavit, the Applicant's attorney alleges that the petition and demand by students that applicant be expelled because he allegedly said that this is what we do to black boys, which is an incorrect reflection of what the Applicant is alleged to have said, was placed before the CDC and it had a profound influence on the decision of the CDC because it did not refuse to accept the petition and letter and its findings accord with the demand in the letter.

208. Nowhere does the attorney allege any overt manner in which the CDC relied on the said petition letter in arriving at its decision.

209. The allegation is based on conjecture and presupposition, as are the allegations of prejudice, bias, ulterior purpose and acting in accordance with the dictates of the letter.

210. The attorney went on to allege that the real reason why Mr Ndwayana refused to testify, is because his subsequent oral statements and interviews differed vastly

from his initial written statements and he didn't want to be questioned on those discrepancies.

211. Even if Mr Ndwayana's reasons for not testifying indeed include that which is alleged by the Applicant's attorney, it doesn't detract from the fact that the CDC didn't rely on the public interviews made by Mr Ndwayana to arrive at its decision because it found the initial statements and messages of Mr Ndwayana to be more reliable.

212. It is evident that the CDC as well as the Applicant viewed Mr Ndwayana's video recording of the incident and considered it to be aligned with Mr Ndwayana's two initial statements, insofar as it applies to charges 1 and 2. The CDC also found it to be consistent with the part of charge 3 that relates to the Applicant allegedly having said: "*waiting for someone, boy*."

213. In the light of the allegations made by the Applicant's attorney that the members of the CDC and the DAC did not bring their independent minds to bear on the issues before them and were actuated by prejudice, bias, ulterior motive, public outcry, public condemnations and a call for the expulsion of the Applicant, the notion of independence in an inquisitorial or even in a purely adversarial process requires some consideration.

214. In **Basson v Hugo & Others**,[4] the SCA held, with regard to allegations of bias on the part of a tribunal:

> *"[26] The rule against bias is thus firmly anchored to public confidence in the legal system, and* ***extends to non-judicial decision-makers such as tribunals.*** *And the rule reflects the fundamental principle of our Constitution that courts and tribunals must not only be independent and impartial, but must be seen to be such; and the requirement of impartiality is also implicit, if not explicit in s 34 of the Constitution (Bernert v ABSA Bank Ltd 2011 (3) SA 92 (CC) paras 28 and 31).*" (emphasis added)

215. In the pre-1994 era, in South Africa, there existed a system of Parliamentary supremacy where judges were expected to make decisions that were executive-minded in order to uphold that supremacy of Parliament. The procedure for the appointment of judges was as follows: the Judge President of a court assessed the needs of the Division, identified a candidate with appropriate qualities, and made a recommendation to the Minister of Justice and if the Minister agreed, the recommendation was forwarded to the State President for approval and appointment.[5] Judges were primarily drawn from the ranks of those who supported the *status quo* at the time. [6] That method of appointment of Judges did not advance institutional judicial independence. Judicial impartiality was described as judges having to hold no private views on issues and as requiring them to isolate and insulate themselves from any public views on issues that they may be required to adjudicate. In short, a fiction was created that judges were independent because they were not exposed to political views and therefore,

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4 2018 (3) SA 46 (SCA) at [26].

5 Van De Vijver Judicial Institution 122.

6 S Kentridge Telling the Truth About Law (1982) 99 SALJ 652.

held no views. Judges were expected to merely interpret statutes in a manner that established the intention of the legislature and not to depart therefrom.[7]

216. The reality, at the time, did not accord with that notion of judicial independence at all. Judges were drawn from *inter alia*, the ranks of the Attorney-General's office, an office that represented the interests of the State and was not apolitical nor independent, in a dispensation where the daily and mundane conduct of people were politicised by legislation. Conduct such as: where they could live, which schools or Universities they could attend, where they could eat, where they could be on a beach, which public benches they could sit on and which entrance at the Post Office they could enter through, were all legislated and enforced by laws that the Attorney-General and his/her staff were duty bound to uphold.

217. The Constitutionally democratic definition of judicial independence expressed in sections 165 and 174 of the Constitution encompasses an understanding and an acceptance, that judges, like all other members of society, are exposed to various public views and expressions of outrage and condemnation and may privately hold certain views, but they must and ought to disabuse their minds of those views and exposure and bring an independent and judicious mind to bear on the issues before them.

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[7] Chief Justice Steyn quoted in H Corder Judges at Work the Role and Attitudes of the South African Appellate Judiciary 1910-50 (1984) 12.

218. Similarly, members of a tribunal must be found, based on objective facts, to have conducted themselves in a biased and prejudicial manner during proceedings before it can be imputed to them purely because they, like every member of society, were exposed to public outrage and condemnation on issues that serve before them.

219. It is that prevailing understanding of impartiality that informs the double presumption of impartiality that a party seeking to challenge an outcome on the grounds of bias must surmount.

220. The Applicant's attorney goes on to allege that the CDC incorrectly relied on the fact that the attorney of Applicant had introduced evidence of video footage into the enquiry and therefore applicant could not object to its admissibility. That finding is allegedly incorrect because the videos were not introduced to show the truthfulness of its content but the fact of its existence.

221. Mr Fullard, the applicant's legal representative before the CDC and the DAC, did not state the purpose for which he introduced the video footage during the enquiry. However, in light of the CDC and the DAC placing no reliance on the video footage and regarding it as less reliable than the initial written statements of Mr Ndwayana, those interviews had no effect on the outcome nor should it have had any effect because at least on one video, the interviewer states words that were allegedly uttered by the Applicant lastly after the incident which

Mr Ndwayana had not attributed to the Applicant nor can his failure to correct the interviewer be indicative of his credibility when he was inundated with media attention and his credibility was not directly placed in issue before the CDC because Mr Fullard wanted the enquiry to proceed without his oral testimony. It would in any event, be a stretch in reasoning to attribute the interviewer's words to Mr Ndwayana.

222. The deponent to the supplementary affidavit alleges that the Second Respondent harassed Mr Fullard, and did not granted him an opportunity to argue his client's case at the DAC.

223. The attorney alleged in the affidavit that even if the Applicant said: "*it is a white boy thing*," that remark is disparaging of white people and is not racist.

224. Clearly, that allegation places the words allegedly uttered, in a silo, separate from the conduct that preceded it and out of context.

225. In his affidavit, the attorney takes issue with the Second Respondent's reasoning that the Applicant appears to have a selective recollection of what happened in that approximate hour before the incident.

226. The Applicant remembers jumping on the bed of Mr Z and falling asleep there. The loo was just across the corridor from Mr Z's room, it being common cause, was nearer to Mr Z's room than to Mr Ndwayana's room. The Applicant went further down the corridor to the room of Mr Ndwayana and he allegedly had no recollection of what he did an hour and some minutes later inside the room of Mr Ndwayana.

227. The attorney also takes issue with the Second Respondent's reasoning that the Applicant was familiar with the room of Mr Ndwayana, having visited the latter's roommate there previously, yet in his alleged severely intoxicated state, he walks past the bed and desk of the roommate and specifically goes to urinate on the desk of Mr Ndwayana.

228. The attorney then alleges that the entire reasoning is pure conjecture and the probabilities allegedly show that the Applicant passed out.

Respondent's Answering Affidavit

229. In its answering affidavit, the Third Respondent alleges the following.

230. The CDC is a panel whose members are selected by the Senior Director: Legal Services from members of the University community comprising University academic staff, a Students Representative Council representative, and members of the University's administrative staff nominated by the rector's management team.

231. The DAC appeal structure comprises one academic staff member, a student member and a chairperson who must be the Dean or a professor or an attorney or advocate approved by the Rector.

232. The DAC has wide appeal powers and may re-hear any disciplinary matter on the merits if necessary.

233. At the CDC the University's case is presented by an Evidence Leader who may challenge evidence presented by any person..

234. Cross- examination may or may not be permitted by the CDC.

235. The CDC is expected to conduct a fact finding enquiry and to ask questions in clarification.

236. The CDC's finding of guilt has to be established on a balance of probabilities.

237. Mr Ndwayana made two statements to the Equality Unit of the University, one on 17 May 2022 and another on 19 May 2022. Those statements do not contradict one another and the later statement simply amplifies the first one.

238. The CDC convened proceedings on the understanding that Mr Ndwayana would testify.

239. At the beginning of proceedings, the CDC was informed by Mr Ndwayana's legal representative that he would not be testifying.

240. The Applicant did not challenge on appeal before the DAC the guilty conviction on charges 1 and 2 but only the sanction relating thereto and the guilty conviction on charge 3, therefore Third Respondent alleges, it is not open to Applicant to seek to review and set aside the guilty conviction on charges 1 and 2.

241. The DAC found that the conviction of the Applicant on the admitted charge 2 alone, warrants expulsion.

242. Third Respondent avers that the decision of the DAC with regard to charge 2 was a competent and reasonable conclusion.

243. Third Respondent alleged that the correctness of the decisions do not fall to be reviewed.

244. Evidence was presented by Applicant and his friends on how consumption of alcohol impacts on him but no expert evidence was presented on this aspect.

245. Third Respondent alleged that is noteworthy that Applicant stated that he had no memory of what occurred during the incident but he remembers going to the room of Mr Z.

246. The CDC made no order against Huis Marais but did make recommendations, requests and suggestions to the University concerning Huis Marais.

247. Third Respondent alleged that the evidence leader was not aware of certain facts concerning Huis Marais, therefore he did not bring to the attention of the CDC.

248. It was open to Applicant to have brought those facts to the attention of the CDC but he failed to do so.

249. Third respondent averred that even without Applicant's consent and in accordance with the Code, the CDC was entitled to have regard to the written statements of Mr Ndwayana that formed part of the preliminary investigation by the University's Equality Unit.

250. The Third Respondent denied the allegation of patent bias by the CDC merely because its findings on Huis Marais and its student leadership are unfavourable to Applicant.

251. Third Respondent averred that it is not necessary to find direct intent for a finding of racism.

252. Third Respondent alleged that the chronology of the appointment of the Commission of Inquiry into racism at the University and its findings do not support the conclusion sought to be drawn by Applicant that the CDC's findings were designed to pre-determine the outcome of the Commission's enquiry.

253. Third Respondent alleged that Mr X's evidence that he did not hear what Applicant said, does not rule out that Applicant could have said the words complained of.

254. Third Respondent alleges that the way in which the CDC and the DAC evaluated Mr X's evidence are not legitimate grounds for review.

255. Third Respondent alleges that the CDC's consideration of the culture prevailing at Huis Marais and its leadership was necessary to establish if there were grounds on which to treat the applicant leniently.

256. The urination charge was admitted by Applicant, therefore it is open to the CDC to make observations on the impact that the urination had on Mr Ndwayana and the University community and how it was objectively perceived.

257. Third Respondent denies that the CDC's decision evinces bias and averred that the CDC was critical of the University.

258. Third Respondent averred that because the Applicant admitted charges 1 and 2 the DAC, correctly limited its inquiry to charge 3 and the sanction imposed.

259. Third Respondent denied Applicant's allegation that Mr X's evidence shows that Applicant was standing right next to him when Applicant made his last remark.

260. Third Respondent alleged further that this Court is not required to make a fine analysis of the evidence and a mistaken conclusion of fact in reasoning is not a ground for review because it is a review and not an appeal.

261. Third Respondent alleged that the reasons for Mr Ndwayana's failure to testify are irrelevant considerations.

262. Third Respondent alleged that the attorney of Applicant, in his affidavit belittles the transformation agenda of the University with regard to Huis Marais.

263. Third Respondent denied the claim made by Applicant's attorney that the public outcry was "*fuelled by exaggerated reports and the involvement of politicised and political organisations all of which presented it as an instance of racism*."

264. Third Respondent denied the attorney's allegation that Mr Ndwayana changed his tune later to allege that the issue was racist. Third Respondent pointed out that in the initial complaint of Mr Ndwayana on 17 May 2022, to the Equality Unit, he is recorded as having alleged that he was unfairly discriminated against based on his race.

265. Third Respondent denies that the Rector had branded the Applicant as a racist long before the facts of the matter had been established because at the stage when the Rector made his public statement of condemnation, the salient facts of the incident were well known as the video had already been circulated. The Rector stated that the Applicant's guilt or innocence would be considered in accordance with the University's established procedures.

266. Third Respondent denied that the Rector prescribed to the CDC and the DAC, because it alleges that those committees are independent structures that did not hesitate to criticise the University and the Residence's pace of transformation.

267. Third Respondent denied that the CDC made an example of the Applicant and sought to establish a precedent. Third Respondent pointed out that the CDC's

reasons for finding the Applicant guilty are based on his own conduct and not on the omissions of the Residence or the University.

268. Third Respondent alleged that the CDC's judgment contains the words: "*Mr du Toit has been scapegoated, thereby conveniently ignoring the culture which has been bred in Huis Marais*," is irrelevant to this review.

269. Clearly, the comment stated above must be read in the context of the judgment as a whole. In so doing, the conclusion is inescapable, that the CDC, after having heard evidence and obtained facts in its fact-finding exercise, found that the Residence, Huis Marais, and by extension the University, cannot abdicate its responsibility to transform the prevailing culture in Huis Marais by treating the misconduct of Applicant as an isolated incident because it was certainly not the only incident of discrimination and alcohol abuse at the residence and therefore the CDC made recommendations concerning the structure of the leadership of Huis Marais and the need to alter the culture there.

270. Third Respondent addressed the applicant's attorney's allegations of the University being dismissive of previous attempts to change the culture at Huis Marais by stating that the attorney's description of the University's transformation requirements as so-called, is *per se*, belittling and dismissive.

271. Third Respondent alleged that the applicant's attorney alleged that he formed a certain impression of the applicant and appears to want this Court to re-hear the character evidence already adduced at the CDC proceedings.

272. Third Respondent alleged that the evidence leader at the CDC put it to Mr B, a student, that the petition handed to the CDC contained words attributed to Mr Ndwayana who was alleged to have said that applicant said to him: *"This is what we do to black boys"* and the evidence leader told Mr B that Mr Ndwayana had not made the allegation nor attributed those words to Applicant, therefore the fact that the petition was before the CDC was known to the Applicant and his legal representative who was at liberty to question students who testified on the meaning and import of the petition. The Applicant's legal representative did in fact refer to the petition. Accordingly the petition was not secretly placed before the CDC.

273. Third Respondent alleged that the CDC's questioning of Mr B demonstrated that the CDC was well aware that the petition elicited signatures based on incorrect allegations and on an incorrect basis.

274. Third Respondent denied that the DAC was not fair and impartial and did not afford applicant's legal representative an opportunity to make the case for the Applicant. Third Respondent points out that the legal representative did not record an apprehension of bias at the DAC.

275. Third Respondent alleged that the DAC in fact contributed to the fairness of the proceedings by frankly putting to Applicant's legal representative the difficulties it had with the submissions and treatment of the evidence by the legal representative.

276. Third Respondent alleged that the Applicant failed to lead evidence that would have enabled the CDC to consider whether his intoxication reduced his responsibility.

277. First Respondent, in her affidavit denied the allegations contained in the affidavits of Applicant's attorney to the effect that the CDC's judgment "*evidences patent bias,"* that the CDC " *was biased or can reasonably be suspected of bias*", "*acted procedurally unfairly*", "*committed errors of law which materially influenced the outcome*"," *acted consistently with the unauthorised and unwarranted dictates of another person or body*", "*acted in bad faith, arbitrarily and capriciously*", "*took action not rationally connected to the purpose for which it was taken, the purpose of the Code, the information before it and the reasons given*" and "*performed its functions so unreasonably that no reasonable person could have done so*."

278. Second Respondent deposed to an affidavit in which he said that: he denied the allegations made by applicant's attorney that he and the DAC were prejudiced against the applicant, extremely biased, that he pre-determined the outcome of

the matter, that he harassed Mr Fullard, the attorney of Applicant during the hearing, repeatedly and frequently interrupted him, that he devalued the attorney's arguments and did not give him an opportunity to develop them and that Mr Fullard was accordingly intimidated, brow-beaten and not given a fair opportunity to state his client's case.

279. Second Respondent went on to state that he took exception to the allegations that he was prejudiced and biased and did not grant Mr Fullard a fair hearing, because those allegations are wrong and reckless.

280. Prof Kraak, a member of the DAC, also deposed to an affidavit and supports the allegations in the answering affidavit and the affidavit of Second Respondent insofar as they refer to him.

281. Mr Hess, a practising attorney, who was the evidence leader, deposed to an affidavit in which he states that he had amplified the transcription where possible where it had been left blank. He also alleges that he was not aware of the history between Dr Groenewald, the erstwhile head of Huis Marais and Huis Marais and therefore could not bring information in that regard to the attention of the CDC nor does he consider that history to be relevant. He states that the Applicant was at liberty to have brought evidence of that history to the attention of the CDC if he considered it relevant.

282. A confirmatory affidavit was filed by Mr Keva, the student member of the DAC.

Replying Affidavit

283. In the replying affidavit, Applicant states as follows.

284. The public video-recorded statement by the rector and the condemnation of the incident by Judge Cameron shortly after Applicant was suspended, precluded justice from being seen to be done.

285. He states that Applicant's sentence was shockingly inappropriate.

286. The Applicant refers to an allegation concerning the rector in a subsequent matter, that he regarded as unfair. That allegation is considered later because it is the subject of an application to strike it out.

287. Applicant alleges through his attorney's affidavit that the public statement of the rector had the effect of causing public outrage and that outrage caused the CDC and the DAC to be prejudiced and biased, yet Applicant refers this Court to public condemnation and outrage against the Rector and the University in subsequent matters and seeks to sway this Court with reference to media publications and comments thereof. Those allegations that refer to media outrage in subsequent matters are also the subject of a striking out application and is considered later.

288. Applicant denies that he uttered the words: "*it's a white boy thing*" whereas before CDC he said that he could not deny that he uttered those words because he had no recollection of the incident at all.

289. The Applicant, places new matter in reply, in the allegation that he recently bumped into Mr Ndwayana at a rugby game, where he again apologised and Mr Ndwayana allegedly said that all was forgiven.

290. The Applicant alleges that the DAC's finding that the second charge alone justifies expulsion indicates its bias.

291. The Applicant alleges that the degree of his intoxication should have been considered in determining his guilt.

292. It is clear that the chairperson of the DAC in fact considered the likelihood of the Applicant being intoxicated to the extent that he had no recollection and effectively didn't know what he was doing, by having regard to the fact that Applicant remembers going to the room of Mr Z and falling asleep there. Despite that consideration being challenged on applicant's behalf as bias and a consideration of facts not before the DAC, Applicant now calls for a reconsideration of his level of intoxication, which was clearly considered with reference to the consequential nature of his actions.

293. Applicant denies that the words "*it's a white boy thing*" is a racist remark.

294. Applicant clearly does not address the context in which the words are alleged to have been uttered.

295. Applicant's attorney filed a further supplementary affidavit in which it is alleged that on 28 September 2023 two reports of disciplinary proceedings at the University was brought to his attention. This affidavit was not admitted after an Application was made from the Bar for its admission, which application was opposed. The reasons for the decision follows.

Applicant's Argument

296. Applicant's counsel's argument largely repeatedly the allegations contained in Applicant's papers.

297. Applicant's counsel submitted that the CDC and the DAC did not act fairly and to that extent they disregarded the principle of legality.

298. It was also submitted that a further ground for challenging the decisions are the errors of law made that also fall foul of the principle of legality.

299. The submission was made that the CDC disregarded principles of law of evidence be accepting the written statements of the victim that were not made under oath and where the victim did not testify.

300. It was also submitted that the CDC erred in accepting into evidence, the written recordal of correspondence from the victim in the form of emails and messages as well as the evidence of witnesses who made hearsay allegations of what the victim reported to them.

301. It was submitted that the CDC made a further error in accepting the allegation made in the statement of the victim that the Applicant had made an utterance to the effect that: "*this is what white boys do*", based on an acceptance that to find that the Applicant had not made that utterance would amount to finding that the victim had lied about it and that would be humiliating to the victim.

302. It was submitted that the CDC erred in finding that the conduct of urination was humiliating to the victim and the DAC erred in finding it is racist conduct because it is alleged that it was accepted that the Applicant did not act with intent because he was so intoxicated that he did not know what he was doing and accordingly, also could not have the intention to say anything racist.

303. It was submitted that Mr X's evidence was incorrectly found to include an allegation that the Applicant spoke lastly as he was leaving the room but Mr X

didn't hear. What should have been found, is that Mr X's evidence that he did not hear what Applicant said at a time when he was close to Applicant, supports the view that the Applicant said nothing at that stage.

304. It was submitted that the First Respondent's directive to the Applicant does not disclose that unsworn written statements will be admitted into evidence because it only refers to oral evidence and sworn written statements.

305. It was submitted that not only did the CDC err in admitting the documents pertaining to the victim's allegations under clause 30.7 of the Code, that was not applicable, but the DAC erred in finding that the documents could be had regard to by the CDC although not in terms of clause 30.7 because they form part of the preliminary investigation. It was argued that the documents ought not to have been had regard to, because they were hearsay evidence.

306. It was submitted that there was no reason for the evidence leader to ask the chairperson of the CDC whether he could introduce the statements of the victim into evidence if there was already a provision in the Code that allowed its admission.

307. It was submitted that the CDC's finding that the victim refused to testify because both his legal representatives were not accorded the right to observe proceedings is incorrect and it should have been found that he did not want to testify after Mr Beresford, for the Applicant informed the victim that he would be

questioned on the discrepancies in his recount of the incident and the victim did not therefore want to be held accountable for those discrepancies.

308. It was submitted that the CDC and the DAC ought to have compelled the victim to testify because without his testimony the Applicant was denied the right to cross examine him.

309. It was argued that the CDC and the DAC ought to have drawn a negative inference from the victim's failure to testify.

310. It was submitted that the Rector and other members of the University staff had unfairly branded the conduct of the Applicant as racist long before the CDC had made its determination and therefore, it was unduly influenced by those remarks.

311. It was submitted that the CDC made irrelevant findings and suggestions unrelated to its purpose, namely those concerning the policies and practices of the University and the Residence concerned.

312. It was submitted that it was unfair to the Applicant, for the CDC to make its judgment available to the Khampepe Commission of Inquiry and to make it public.

313. The DAC unfairly interrupted Mr Fullard, the attorney of Applicant and intimidated him, thereby not granting him a full opportunity to make his submissions.

314. The CDC and the DAC sought to make an example of the Applicant by imposing the highest sanction on him, namely expulsion.

Respondent's Argument

315. Third Respondent's counsel's heads of argument refer to **R v Somerset County Council, Ex Parte Fewings & Others**[8] which was cited with approval in **Bo-Kaap Ratepayers Association v City of Cape Town** [9] where the role of the Court in review proceedings are describes as not being an exercise in determining the correctness of the decision under review.

316. On Third Respondent's behalf, the argument was advanced that for this Court to re-evaluate contentious facts lawfully entrusted to the CDC and the DAC and to substitute its decision for that of those decision makers, is impermissible.

317. Third Respondent's counsel argued that bias may only be inferred from a mistake where the mistake is so unreasonable on the record that only bias can explain it.

318. On Third Respondent's behalf it was submitted that the decision of the CDC is critical of the University and exonerated the Applicant on one alleged contravention of the Disciplinary Code, therefore no bias can reasonably be apprehended.

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8 [1995] All ER 513 (QB) at 515 d-g.
9 [2020] All SA 330 (SCA) at [72].

319. Third Respondent's counsel argued that the bias alleged on Applicant's behalf is inferred bias not supported by the record.

320. Third Respondent's counsel argued that the Applicant has failed to show that the public condemnation by the Rector led to the CDC and the DAC irrevocably deciding against Applicant.

321. Third Respondent's counsel pointed out that in his plea Applicant, admitted that he urinated on Mr Ndwayana's laptop, textbook and three notebooks but that he did not remember doing so, however he accepted from the video taken by Mr Ndwayana, that he had done so. He denied that he said that it is a white boy thing.

322. Third Respondent's counsel summarized the following evidence and findings:

323. In giving evidence before the CDC, the Applicant said that he could not remember anything that transpired when he was in Mr Ndwayana's room. Mr Boshoff, a member of the Huis Marais house committee said that use of alcohol at Huis Marais and on campus was a problem. He also said when he spoke to Mr Ndwayana on the night of 15 May 2022, the latter had told him of his own volition that applicant had told him that it is a white boy thing.

324. Mr X who had come across the incident and stood at the door of the room said that he heard Mr Ndwayana ask Applicant a question but he didn't hear the answer of the Applicant but the Applicant spoke, for sure.

325. Mr Z whose room the Applicant and his friend came to after their night out testified that Applicant and his friend were very intoxicated.

326. Another student, one Bongani, testified that when he went to the room of Mr Ndwayana, the Applicant was trying to clean up the urine and three other students were there and they asked Mr Ndwayana what Applicant had said and Mr Ndwayana said that Applicant had said: "*it's what like, you know, white boys do or it's what we do to black boys, like something along those lines, but I might be incorrect* ". Then the other students that were present, laughed.

327. Bongani said that Mr Ndwayana's roommate was a friend of the Applicant so the latter should know where Mr Ndwayana's desk was.

328. Dr Groenewald the erstwhile head of Huis Marais testified about how the incident came to his attention and about the alcohol abuse at Huis Marais.

329. Applicant's first witness was one, Chad, who was a person of colour and a best friend of Applicant who had not experienced racism from the Applicant.

330. Another friend of the Applicant also testified that he did not perceive the Applicant to be racist but the Applicant became confused when drunk and did not know what was going on around him when he was drunk.

331. The CDC viewed video footage of interviews given by Mr Ndwayana in which he failed to correct a reporter who attributed to the applicant the words: *"this is what we do to black boys"*, as well as footage where Mr Ndwayana said he was willing to forgive the Applicant and that the incident was not racially motivated.

332. The Applicant testified that he had consumed half a bottle of brandy and had some of 16 shots of brandy. He recalled going to the room of Mr Z and falling asleep there but he does not recall going to the room of Mr Ndwayana.

333. The evidence leader, during argument suggested that if it was found that there was a culture of drinking at Huis Marais, it might be a mitigating factor. He also argued that the CDC should recommend an investigation of alcohol abuse on campus and at Huis Marais, if the Applicant was not expelled.

334. Mr Fullard, on behalf of Applicant argued that all of the written documents before the CDC must be considered in its totality. He said that alcohol abuse was not unique to the Applicant and Dr Groenewald also testified about it.

335. The CDC found that on the evidence, there was no support for the contention in the petition, that the Applicant used the words : *“this is what we do to black boys.”*

336. The CDC commented that to a large extent the Applicant had been scapegoated by the University, thereby conveniently ignoring the culture which has been bred in Huis Marais and, by extension, the University.

337. The CDC discussed whether the Applicant’s intoxication could diminish his responsibility and found that it did not.

338. The CDC found that it was not racist for the Applicant to have used the word, boy after having heard testimony from Applicant’s peers who didn’t consider it to be racist while older people did consider it to be racist.

339. The CDC found that while the University’s policies were against racism, its culture was not.

340. The CDC exonerated the Applicant on a contravention of clause 9.6. of the Code, namely, it found that he did not act in a manner so as to disrupt, or potentially disrupt , the maintenance of order and discipline at the University.

341. The DAC found that the CDC did not need to have relied on clause 30.7 of the Code to admit the written statements of Mr Ndwayana.

342. The DAC found that Mr Fullard had referred to the written statements of Mr Ndwayana in questioning witnesses without any reservation and did not object to the statements being referred to.

343. The DAC also found that Mr Fullard did not object to the hearsay evidence of witnesses which referred to the statements or allegations made by Mr Ndwayana.

344. The DAC found that Mr Ndwayana's refusal to testify, rightly or wrongly, was based on the CDC's refusal to allow both his legal representatives to observe the proceedings and therefore he felt he would not have a fair hearing.

345. Concerning the alleged lost opportunity to cross-examine Mr Ndwayana, the DAC found that the right to cross-examine was limited in the discretion of the CDC.

346. The DAC found that there was no version of what Mr Ndwayana alleged the Applicant said lastly before leaving the room that the Applicant himself could dispute since he had no memory of the incident and what Mr X testified does not amount to a denial of the alleged words having been uttered.

347. The DAC took account of the nature of the incident and the effect it had on Mr Ndwayana in agreeing with the sanction imposed by the CDC.

348. Third Respondent brought an application to strike out new matter in the replying affidavit and in the further supplementary affidavit.

349. Third Respondent's counsel argued that the analysis of Mr X's evidence and the decision of whether or not to have regard to the written statement of Mr Ndwayana, are matters of judgment for the jurisdiction of the CDC and the DAC and it is not for this Court to substitute its view for those findings.

350. Third Respondent's counsel referred to **Dumani v Nair**[10] for the argument that the Court will not revisit a disciplinary tribunal's evaluation of evidence even where there has been an error. The SCA said that a court will only revisit uncontentious and objectively verifiable facts.

351. It was submitted that this court should be concerned with whether there has been a fair hearing within the permissible procedures.

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[10] 2013 (2) SA 274 (SCA) at [31] to [32] & 284D to 286E.

352. Third Respondent's counsel argued that Third Respondent pleads that Applicant, through Mr Fullard, waived his right to object to the written statements of Mr Ndwayana being admitted.

353. On Third Respondent's behalf, it was submitted that the weight that ought to be attached to those statements were fully ventilated at the CDC and the DAC.

354. It was submitted that based on applicant's evidence that he knew that he was prone to blanking-out when he consumed alcohol, he nonetheless proceeded to consume alcohol excessively,therefore, the CDC found that his conduct in so consuming alcohol was wilful.

355. On behalf of Third Respondent, it was submitted that Applicant, who bears the *onus*,[11] has failed to prove bias on the part of the CDC and the DAC, as being the only plausible, acceptable, credible, suitable[12] and appropriate inference to be drawn from the proven facts.[13]

356. It was submitted that the Applicant has to prove that both he and the apprehension of bias that he holds, must be reasonable.[14]

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[11] *De Lacy v South African Post Office* 2011 JDR 0504 (CC) at [35] and [67].
[12] Ocean Accident and Guarantee Corporation Ltd v Koch 1963(4) SA 147 (A) AT 159C – D.
[13] Cooper v Merchant Finance Ltd 2000(3) SA 1009 (SCA) at [7].
[14] Bernert v ABSA Bank Ltd 2011 (3) SA 92 (CC) at [34].

357. Turning to the allegation that the DAC chairperson intimidated and did not grant Mr Fullard an opportunity to argue the case, Third Respondent's counsel referred to the **ABSA Bank Ltd v Hoberman**[15] where it was said that it is not required of presiding officers to maintain the "*icy impartiality of Rhadamanthus*."

358. Third Respondent's counsel submitted that the DAC asked difficult questions of and interrupted both Mr Fullard and Mr Hess.

359. With reference to **Bernert's**[16] case, on behalf of Third Respondent, it was submitted that there is presumption of impartiality of a presiding officer that is a formidable hurdle to overcome for it is natural for an appellate tribunal who receives the heads of argument, to form a provisional view favourable to one side but that is not bias.

360. Third Respondent's counsel referred to the case of **S v Basson**[17] for the view that interventions and remarks by a presiding officer can be better ascribed to irritation or impatience for how a case is being litigated but not bias.

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[15] 1998 (2) SA 781 (C) at 799g – 800 E; Citing Woolf and Jowel Judicial Review of Administrative Action 5th ed (1985) paras 12-001 – 12-006 at 521 – 525.

[16] At [86].

[17] 2007(3) SA 582 (CC) at [42]; *Bernert* at [96].

361. It was argued on behalf of Third Respondent that a rector is entitled to hold and express his *prima facie* views but that does not mean that he dictates to the independent tribunal what its findings should be.[18]

362. Third Respondent's counsel argued that although Applicant attempts to enforce his Constitutional Right to just administrative action, the **Biowatch**[19] principle does not apply because the Applicant seeks to advance only his own interests and does not seek to establish any fresh constitutional terrain for the greater benefit and this case does not raise any genuine and substantive constitutional considerations, therefore Respondents should not bear the costs.

The Application from the Bar for leave to allow a further supplementary affidavit filed by Applicant's attorney

363. Before us, the Applicant's legal representatives simply filed a further supplementary affidavit in the file containing new allegations and annexures, for which no leave was sought from this Court.

364. After some debate with the Court, the Applicant's counsel moved from the Bar that we allow the further affidavit because the Respondent had allegedly responded to it.

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[18] Hamata v Chairperson, Peninsula Technikon IDC 2000 (4) SA 621 (C) at [69] to [70] & 2002 (5) SA 453 (SCA).

[19] Biowatch Trust v Registrar, Genetic Resources 2009 (6) SA 232 (CC).

365. Respondent had filed an affidavit opposing the admission of the further affidavit and had provided some answers to its allegations on a conditional basis, namely in the event that this Court allowed the further supplementary affidavit of Applicant.

366. In the absence of a substantive application for leave to admit the further affidavit, we had before us, no facts to support the allegation that the University had allegedly tried to suppress information contained in that affidavit.

367. The issues allegedly raised in the affidavit under consideration, relate to new issues that arose subsequent to the findings of the CDC and the DAC and have no bearing on the issues before us.

368. Filing the affidavit without the leave of the Court amounts to attempting to slip it into the pleadings while not being allowed to do so.

369. The affidavit relates to other alleged misconduct of other students and sanctions imposed with insufficient relevance to the issues before us.

370. No reason has been offered for why Applicant could not have first brought an application to compel Respondent to make the information contained in that affidavit, available to it sooner, if it was indeed relevant information.

371. In the circumstances, the Application for admission of the further supplementary affidavit deposed to by Applicant's attorney dated 3 October 2023, was refused. Applicant, in my view, ought to pay the costs occasioned by the filing of that affidavit, which includes but is not limited to Respondent's costs in receiving, perusing, considering and responding in limited form, to that affidavit as well as the Respondent's costs of presenting argument in opposition to the admission of that affidavit.

The Respondent's Application to Strike Out

372. On behalf of Respondent a substantive application to strike out was brought.

373. Respondent sought to have struck out paragraphs 5 to 7 of the replying affidavit on the basis that it refers to hearsay and inadmissible new matter in reply.

374. Respondent seeks to have paragraphs 10 to 16 and annexures "TD16" to "TD 27" of the replying affidavit struck out as vexatious, irrelevant and inadmissible new matter in reply.

375. The Applicant did not explain in the replying affidavit, why he did not make the allegations contained in paragraphs 5 to 7, in his founding affidavit.

376. The allegations contained in paragraphs 10 to 16 of the replying affidavit deal with nepotism charges made against the Rector, the findings of a committee chaired by a retired judge and the conclusion by the University council as well as

the annexed media articles. None of those are relevant because the entire allegation arose subsequent to the findings before the CDC and the DAC.

377. Neither can this Court have regard to the comments of a media personality and his readers' comments on those allegations.

378. I am of the view, that paragraphs 5 to 7 and 10 to 16 as well as annexures TD16" to "TD 27" of the replying affidavit ought to be struck out as inadmissible hearsay. In the case of paragraphs 5 to 7, it is inadmissible new matter in reply and irrelevant information as well.

379. The Applicant is represented by an attorney and both senior and junior counsel. He therefore ought to have been advised not to include hearsay, irrelevant and vexatious allegations in his replying affidavit.

380. In the circumstances the Applicant must bear the costs of the striking out.

Application of the Law to the facts

381. The procedure followed by the CDC was indeed in accordance with the Code and was meant to be inquisitorial and informal.

382. The procedure adopted by the DAC was also in terms of the relevant provisions of the Code, namely clauses 37.20; 40.3; 40.5.4; 40.10; 40.11 and 40.12.

383. The DAC did not merely adopt the findings of the CDC but made its own findings in terms of its wide powers of appeal. For example, it differed from the CDC with regard to admitting the written statements of the victim in terms of Clause 30.7 of the Code and instead found that in terms of clause 37.5, the CDC ought to have considered the statements as part of the preliminary investigative record.

384. The reliance on clause 30.7 of the Code by the CDC was correctly found by the DAC, to be an immaterial error or misdirection in that sufficient grounds exist and the CDC is vested with sufficient authority, to admit and have regard to the initial written statements and documentary material generated by Mr Ndwayana, in terms of clause 7.11 of the Code.

385. In the case of **Bokaap**[20] the SCA after considering the ambit of judicial review held that:

> *"[77] In determining whether a decision was reasonable or not, factors to be considered are the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved, and the impact of the decision on the lives and well-being of those affected. As taught by the Constitutional Court, although the review function of courts now has a substantive as well as a procedural ingredient the distinction between appeals and reviews continues to be significant. "*

[20] Bokaap Civic & Ratepayers Association v City of Cape Town [2020] All SA 330 (SCA).

386. Ordinarily a court of review would not be concerned with whether the decision was taken was correct but rather with whether the decision maker was permitted to make the decision in the way it did.

387. Where a matter is reviewable based on errors of fact, the court in **Pepcor**[21] held that the review court will not re-evaluate the evidence merely because it believes the tribunal was mistaken, for to do so would blur the distinction between appeals and reviews. Therefore the uncontentious error must be shown to have vitiated the proceedings.

388. The reviewing court will only substitute its finding of fact for that of the tribunal in circumstances where the fact are objectively verifiable and uncontentious.[22]

389. Since the appeal before the DAC turned only on charge 3 and the sanction, the admission of the written statements of the victim, which is an alleged error, do not constitute uncontentious facts that the tribunal failed to evaluate correctly because the Code provides for the reception of evidence by way of written statements that form part of the preliminary investigation. The reception of those statements were uncontentious before the CDC and its admissibility was objected to for the first time before the DAC. In fact, Mr Fullard expressly requested that the CDC hearing proceed in the absence of oral testimony from

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[21] Pepcor Retirement Fund v Financial Services Board 2003 (6) SA 38 (SCA) at [48]; ACSA v Tswelokgotso Trading 2019 (1) SA 204 (GJ) at [8].

[22] Dumisani v Nair 2013 (20 SA 274 (SCA) at [32]).

the victim, which absence of testimony, he subsequently bemoaned as unfair to the Applicant when he argued before the DAC.

390. In **Telcordia**,[23] it was held that an arbitrator has the right to be wrong.

391. The Applicant's counsel relied on the evidence of Mr X which he argued was incorrectly interpreted by the CDC and DAC. Simultaneously it was argued both before the DAC and this Court, that regard could not be had to written statement of the victim, save and except insofar as it alleged that the Applicant had made the offensive last utterance. That allegation of the last offensive utterance contained in the victim's written statement, we are implored to have regard to, only for the purpose of finding that the said allegations is so inconsistent with the evidence of Mr X and the later video interviews given by the victim, that the allegations ought to be disbelieved and rejected as false.

392. An objective reading of the evidence of Mr X both his in- chief testimony and cross- examination, as it were, reveals that he confirmed that he observed the Applicant responding to the victim's second question about what he was doing, but he could not hear what the Applicant said.

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[23] Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA) at [85].

393. That evidence is objectively verifiable but is only contentious because Applicant's counsel seeks to place a construction on it which is at odds with its unequivocal meaning.

394. Even if both tribunals were incorrect in finding that Mr X's failure to hear the utterance of the Applicant does not mean that no utterance was made, it is well within their powers to make that finding and that is no ground for this Court to interfere therewith.

395. Once the DAC found that the admission by the CDC of the written statements by the victim was permissible under clause 37.5 to 37.10 of the Code, there were no remaining rules of evidence that can be used to declare the statements inadmissible in a forum where the CDC was at liberty to adopt an informal procedure not akin to a court of law. Put differently, if all information elicited before the CDC was not under oath, it did not comply with the Laws of Evidence applicable to Courts of Law. Similarly, the admission of the record and results of the preliminary investigation also did not comply with how documentary evidence is admitted in a Court of law. Nor did the questioning of witnesses comply with the rules of evidence applicable to cross-examination in a Court. It is not irregular with the procedure that the CDC was empowered to adopt, therefore, the CDC could admit hearsay evidence. It must be borne in mind that Mr Fullard, on behalf of the Applicant also elicited hearsay evidence. Even in Court, the rule against the reception of hearsay evidence is not absolute and may be admitted under section 3(1) (c) of the Law of Evidence Amendment Act.

396. There is no rule against hearsay evidence being presented at the CDC. Therefore all interested parties were granted an opportunity to question persons who relied on hearsay evidence.

397. The DAC is the appeal body who confirmed the finding of guilt on charge 3 and imposed the sanction of expulsion that was appealed against.

398. If this Court finds no grounds on which to interfere with its finding and sanction, there is no ground on which the CDC's finding can be reviewed because the Applicant had not exhausted the internal remedy [24] of appeal in relation to the findings on charges 1 and 2.

399. No reasons have been advanced why those internal remedies were not exhausted with regard to charges 1 and 2.

400. In clause 37.12.1 of the Code provision is made for consideration of proportionality in determining an appropriate sanction.

401. That is not too dissimilar to the Criminal Law consideration of a punishment that must fit the offender and the nature of the offence.

402. Therefore, applicant's counsel misconceives the CDC's discussion on proportionality as constituting a different test to the balance of probabilities. What

[24] Section 7(2) of PAJA.

was considered by the CDC, was an appropriate sanction taking account of all the factors listed in clause 37.12.

403. Turning to the complaint of bias, the *onus* that Applicant bears is a dual one. He has to show that he acts reasonably in alleging bias and then he must proceed to demonstrate that the alleged errors made by the CDC and the DAC are so unreasonable that they can only be explained as bias.

404. There is a double presumption against judicial impartiality as set out in **De Lacy**[25] with reference to **Bernert** [26] where it was said that a judge's intervention in proceedings by making remarks do not necessary constitute bias and is invariably ascribed to irritation and impatience.

405. With regard to the proceedings before the CDC, there is no evidence on the record, of impatience on the part of the members of the CDC. The judgment of the CDC went further than merely criticising the behaviour of the Applicant. It effectively castigated the leadership of Huis Marais and the University for not doing enough to eradicate the culture of alcohol abuse and disrespect for the rights of others. The CDC's recommendations and suggestions concerning the Residence's and the University's need to take appropriate measures evince a CDC that was not hesitant to apportion blame to the University and its Residence as well, nor did it hesitate to find that it cannot simply shift all the blame onto the

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[25] De Lacy v South African Post Office *supra* at [69].

[26] Bernert v ABSA Ltd *supra* at [84] to [86].

Applicant. In so remarking, the CDC demonstrated fierce impartiality and no bias towards the University.

406. With regard to allegations of bias and ulterior purpose by the DAC, on a reading of the interaction between the Chairperson of the DAC and Mr Fullard, as set out in detail earlier, it is clear that the latter was not accustomed to having his presentation of argument interrupted with questions whereas in this Court, that is precisely how proceedings are conducted. That process is necessary, so that judges do not end proceedings without having the issues for consideration clarified orally by counsel in response to their questions and debate.

407. It is in the nature of inquisitorial proceedings that the members of the tribunal would question, debate and engage with a legal representative and have him/her focus his/her attention on the relevant aspects of the case under scrutiny.

408. Ultimately the DAC's said that even if it were incorrect to find on a balance of probabilities that the Applicant uttered the words: "*it's a white boy thing*" the Applicant would nonetheless be guilty of racism by virtue of the urination, namely charge 2. The DAC considered that when weighing up the interests of the Applicant against the interest of the university community and the victim, on who the act of urination was deeply humiliating, degrading and destructive and that assailed his dignity, an expulsion was still warranted, bearing in mind that the Applicant in his plea admitted that the urination incident assailed the dignity of Mr Ndwayana.

409. Section 10 of the Constitution of the RSA, 1996, entrenches in the Bill of Rights, the right to human dignity. It states that: "*Everyone has inherent dignity and the right to have their dignity respected and protected*."

410. Section 9(4) of the Constitution prohibits any person from unfairly discriminating directly or indirectly against a person on the grounds of *inter alia*, race.

411. Both the human dignity right and the right to protection against unfair discrimination on the basis of race are relevant to the complaint of the victim.

412. In **Qwelane**,[27] the Constitutional Court opined that: *"This Court emphasised in Harksen that the prohibition of unfair discrimination in the Constitution is instrumental in that it provides a bulwark against invasions of the right to human dignity. While equality and dignity are self-standing rights and values axiomatically, equality is inextricably linked to dignity.*" (footnotes omitted)

413. In **Freedom of Religion**[28] the Constitutional Court described the right to human dignity thus: *"[45]There is a history and context to the right to human dignity in our country. As a result, this right occupies a special place in the architectural design of our Constitution, and for good reason. As Cameron J, correctly points out, the role and stressed importance of dignity in our Constitution aims "to repair indignity, to renounce humiliation and degradation, and to vest full moral*

[27] Qwelane v South African Human Rights Commission and Another 2021 (6) SA 579 (CC) at [62].

[28] Freedom of Religion, S.A. v Minister of Justice & Constitutional Development 2020 (1) SA 1 (CC) at [45].

citizenship to those who were denied it in the past. Unsurprisingly because not only is dignity one of the foundational values of our democratic State, but it is also one of the entrenched fundamental rights. And section 10 of the Constitution provides: "Everyone has inherent dignity and the right to have their dignity respected and protected."(footnotes omitted)

414. Once the Applicant admitted through his plea, that the misconduct of urination on the belongings of the victim assailed the latter's dignity, there could be no question that the misconduct in fact did so affront the human dignity of Mr Ndwayana.

415. The issue of the Applicant's subjective intention is irrelevant to the common cause fact that the urination assailed the human dignity of Mr Ndwayana.

416. Conduct in which a white student used a black student's desk and possessions as a toilet and with impunity, proceeded to state and imply, that it is in keeping with the conduct of white students towards a black student, causes impairment of the dignity of the black student and must be objectively, racist.

Evaluation on the probabilities of intoxication as a defence

417. The reasoning of the DAC is however based on the undisputed evidence by the Applicant himself as well as those of Mr Y who accompanied him to Mr Z's room as well as the undisputed information gleaned from the video, namely that to arrive at Mr Ndwayana's desk, the Applicant had to pass by the desk of the roommate.

418. What Second Respondent did in the reasoning complained of, was to question the consequential nature of the Applicant's actions and the likelihood of Applicant having no recollection of his conduct in Mr Ndwayana's room when he behaved consequentially in not urinating on the roommate's desk but passed by it. That is not conjecture. In determining probabilities the question that needs to be asked is if it's more probable or likely, than not.

419. A further consideration, that was advanced in argument on behalf of Respondent is, that when Mr Ndwayana switched on the room light and made Applicant aware that he was in his room, doing something untoward, the Applicant did not react by showing any astonishment at the fact that he was urinating on the desk but simply continued to urinate and responded verbally in a manner that appears to express no shock, embarrassment or regret. What needs to be borne in mind, is that according to Mr X, Mr Ndwayana was raising his voice at Applicant and was upset. Therefore, it is extremely unlikely that at that stage, Applicant would not have been alerted to his ongoing misconduct of urinating on the desk and possessions of Mr Ndwayana.

420. It is the evidence of the Applicant that he usually blanks-out when he is intoxicated. That was stated as a reaction that Applicant has to the consumption of alcohol that is well-known to him. Why then, one asks rhetorically, would the Applicant consider it appropriate to consume alcohol in excess, when he knows

there is a reasonable likelihood of him blanking out and not remembering his actions, yet he expects to be found to have not acted with the requisite intention. Particularly, when he was living in a University residence where all residents were expected to have due regard to the peace and security of their fellow residents.

421. Applicant admits in his Plea and accepts that the video shows him replying to Mr Ndwayana's question about what he is doing, namely, that he is waiting for someone. That is a consequential answer given by someone who knows he is in the room of his friend, namely the roommate of Mr Ndwayana and who further knows that the roommate is not present in the room, hence he is waiting for the roommate. That is not an inconsequential or illogical answer out of kilter with the question and context, given by someone who has "blanked-out", whatever that actually means.

422. The defence raised by Applicant before the CDC, namely that he was too intoxicated to have committed the misconduct intentionally or wilfully and to have had the requisite *mens rea,* does not address Applicant's stated prior knowledge of being prone to blanking-out when drunk and the consequences that must flow from Applicant's decision to consume alcohol in excess and return to live in the University's residence while he was prone to blanking-out. The CDC and the DAC considered how reasonable and lawfully justifiable it was for Applicant to conduct himself thus and seek to escape the consequences of his actions where

it harms his fellow student resident merely because he had no intention of so harming the victim.

423. No argument was presented before the CDC or the DAC that Applicant's knowledge of his tendency to blank-out, is a remote consideration that he could not reasonably have been expected to take into account, when he, like all his fellow students living in the residence, was bound to respect the privacy, safety, security and well-being of residents, irrespective of his state of sobriety. The Applicant's own testimony before the CDC can only be construed as meaning that his misconduct, subsequent to his consumption of alcohol, was a foreseeable consequence.

424. The crucial issue for determination is whether the CDC or the DAC committed material irregularities or errors in its findings that impacted on the fairness and rationality of the result.

425. The CDC weighed up the probabilities with reference to Applicant's testimony on what he could recall and where he moved to, once he had consumed the intoxicating liquor as well as the allegations contained in the written statement of Mr Ndwayana that was repeated in his communication with the mentor, Vice Prim and the SRC and found that the Applicant had some control over his bodily functions to the extent that he was able to walk into Huis Marais, walk into the room of Mr Z, jump on his bed, fall asleep there and then, clearly find his way into

the room of Mr Ndwayana which was further away from the loo than the room of Mr Z. The CDC found that the Applicant passed by the desk of Mr Ndwayana's roommate and specifically reached for the desk of Mr Ndwayana where he not only proceeded to urinate, but also continued to do so after the light was switched on and Mr Ndwayana had asked him what he was doing.

426. The DAC found similarly that the Applicant had some control of his bodily movements and he answered Mr Ndwayana's questions consequentially.

427. Bearing in mind that Mr Ndwayana's roommate was away for the weekend and was a friend of the Applicant who he had visited in that room previously, the answer that the Applicant gives Mr Ndwayana on the video recording, namely "*Waiting for someone, boy*," is in keeping with Applicant having knowledge that the roommate was not present. That is not the answer one would expect from someone who has "*blanked-out.*"

428. The finding that the Applicant was not totally unaware of what he was doing, although he was drunk, is not irrational in the presence of the evidence outlined above and evaluated on the probabilities.

429. The tribunal was not obliged to apply a subjective test of *mens rea* to find that the urination that Applicant admits assailed the victim's dignity, was also racist conduct, on a balance of probabilities.

430. In **SARS v CCMA**,[29] the Constitutional Court held that in regard to racism:

> *"[10] Another factor that could undermine the possibility to address racism squarely would be a tendency to shift attention from racism to technicalities, even where unmitigated racism is unavoidably central to the dispute or engagement. The tendency is, according to my experience, to begin by unreservedly acknowledging the gravity and repugnance of racism which is immediately followed by a de emphasis and over technicalisation of its effect in the particular setting. At times a firm response attracts a patronising caution against being emotional and an authoritative appeal for rationality or thoughtfulness that is made out to be sorely missing.*
>
> *[11] That in my view is a nuanced way of insensitively insinuating that targets of racism lack understanding and that they tend to overreact. That mitigating approach would create a comfort zone for racism practitioners or apologists and is the most effective enabling environment or fertile ground for racism and its tendencies. And the logical consequence of all this gingerly or "reasonable" approach to racism, coupled with the neutralising reference to the word kaffir as the "k word", is the entrenchment and emboldenment of racism that we now have to contend with so many years into our constitutional democracy. Imagine if the same approach or attitude were to be adopted in relation to homophobia, xenophobia, arrogance of power, all facets of impunity, corruption and similar societal ills. That somewhat exculpatory or sympathetic attitude would, in my view, ensure that racism or any gross injustice similarly handled, becomes openly normalised again. Those who should help to eradicate racism or gross injustice could, with that approach, become its unintending, unconscious or indifferent helpers.*"

431. Applying an objective and contextual approach to the common cause conduct of urination, clearly the Applicant's subjective state of mind at the time when he urinated, is not relevant.

432. I find no grounds upon which this Court is empowered to substitute its decision for that of the DAC or the CDC.

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[29] *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2017 (1) SA 549 (CC) at [10] and [11].

433. I would dismiss the Application.

Costs

434. Turning to the issue of costs in the main application, the approach that Applicant adopted toward this review is relevant in determining the nature of the issues that this Court is called upon to decide and how it was presented in the papers and in argument.

435. Applicant who was represented by an attorney, a senior and junior counsel, brought this Application also on the grounds of challenging the CDC'S "orders" made against the leadership of Huis Marais and the University, when Applicant clearly had no *locus standi* to do so and as a matter of fact, no orders were made against the University and Huis Marais, The CDC having made mere suggestions and recommendations on leadership and policy implementation.

436. The challenge to the findings, recommendations and suggestions concerning the University, however gave the Applicant and his attorney, who deposed to not only a supporting affidavit,[30] but also a supplementary affidavit,[31] a supporting replying affidavit[32] and a further supplementary affidavit,[33] the latter having been disallowed, an opportunity to rail against the University and its management in this forum, unduly.

[30] Record: pages 669 to 694
[31] Record: pages 706 to 727(a)
[32] Record: pages 1243 to 1268
[33] Record: pages 1294 to 1302

437. The relief concerning those recommendations and suggestions was only abandoned in replying oral argument when my colleague raised the issue of *locus standi*.

438. In the founding affidavit alone, no less than 8 pages were devoted to criticizing the findings concerning the University, in the Applicant's attorney's supporting affidavit, 11 pages and 2 annexures were utilised for the challenge to the CDC's recommendation and suggestions concerning the University. In the replying the affidavit that Applicant deposed to, several paragraphs were used to describe the musings of a media commentator and his commentators on the findings of the CDC and the DAC, which were totally irrelevant for the review that served before this Court. The Respondent's Application to Strike out is however granted and an appropriate costs order will follow that result.

439. In my view, the costs occasioned by the ill-conceived challenge where the Applicant had no *locus standi* ought not to be borne by the University.

440. In **Biowatch**, it was held that a party should not be immunised from appropriate sanctions if its conduct has been vexatious, frivolous, professionally unbecoming or in any other similar way abusive of the processes of the Court.

441. In **Affordable Medicines**,[34] the Constitutional Court recognised that there may be justifiable grounds for a court to depart from the Biowatch principle where a

[34] Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC) at [138]

litigant ought to receive the censure of the Court in circumstances not necessarily conceived of in Biowatch.

> *"[138]There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious.* ***There may be conduct on the part of the litigant that deserves censure*** *by the Court which may influence the Court to order an unsuccessful litigant to pay costs."*(emphasis added)

442. In **Lawyers for Human Rights**,[35] the Constitutional Court re-affirmed the exceptions to the Biowatch principle that includes:

442.1. Vexatious or frivolous litigation;

442.1. Litigating with improper motives;

442.3. Manifestly inappropriate litigation.

443. The Constitutional Court went on to describe vexatious litigation thus:

> '"[19]…*Vexatious litigation is initiated without probable cause by one who is not acting in good faith and is doing so for the purpose of annoying or embarrassing an opponent. Legal action that is not likely to lead to any procedural result is vexatious* "

444. In discussing what constitutes manifestly inappropriate litigation, the court said the following:

> *"[20] Whether an application is manifestly inappropriate depends on whether the application was so unreasonable or out of line that it constitutes an abuse of the process of court. In Beinash, Mahomed CJ stated there could not be an all encompassing definition of "abuse of process" but that it could be said in general terms "that an*

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[35] Lawyers for Human Rights v Minister in the Presidency and Others 2017 (1) SA 645 (CC)

abuse of process takes place where the procedures permitted by the rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective" The Court held further:

> *"There can be no doubt that every Court is entitled to protect itself and others against an abuse of its processes. Where it is satisfied that the issue of a subpoena in a particular case indeed constitutes an abuse it is quite entitled to set it aside. As was said by De Villiers JA in Hudson v Hudson and Another 1927 AD 259 at 268:*
>
> *'When . . . the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse.'*

What does constitute an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of 'abuse of process'. It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective."

445. The conduct of the Applicant and his legal representatives described in paragraphs 203 to 206, above, is in my view, abusive of this Court's process as it sought to create a public platform for the attorney of the Applicant to air his grievances with the University in regard to the period when he liased as an

alumni, with the University concerning Huis Marais, some two years before the incident involving the Applicant occurred

446. Referring to **Affordable Medicines**, the court in **Biowatch** held that the issues that are raised must be genuine, substantive and must truly raise constitutional considerations.

447. I am not persuaded that the issues concerning alleged orders made by the CDC against the University and Huis Marais were genuine, substantive and truly raised as constitutional issues. Therefore, the shield of Biowatch ought not to protect the Applicant with regard to the costs occasioned by reliance on those grounds for review, up until the stage of replying argument.

CLOETE J:

448. I am indebted to my colleague for her comprehensive judgment. I align myself with much of her reasoning and agree with the result. However I wish to deal further with certain aspects.

449. First, I feel it necessary to highlight the fundamental distinction between appeal and review proceedings. There is no appeal before us. It is a review. This has the legal consequence that different principles must be applied. Whereas in an appeal a court may not only consider the evidence but also how it was evaluated

in order to establish whether the decision is correct, this is not permissible in a review. My colleague has already referred to *Dumani*[36] which in turn referred to *Pepcor*[37] where it was held:[38]

> *'Recognition of material mistake of fact as a potential ground of review obviously has its dangers. It should not be permitted to be misused in such a way as to blur, far less eliminate, the fundamental distinction in our law between two distinct forms of relief: appeal and review. For example, where both the power to determine what facts are relevant in the making of a decision, and the power to determine whether or not they exist, has been entrusted to a particular functionary (be it a person or a body of persons), it would not be possible to review and set aside its decision merely because the reviewing Court considers that the functionary was mistaken either in its assessment of what facts were relevant, or in concluding that the facts exist. If it were, there would be no point in preserving the time-honoured and socially necessary separate and distinct forms of relief which the remedies of appeal and review provide.'*

450. In *Dumani* the court continued:

> *'In none of the jurisdictions surveyed by the authors have the courts gone so far as to hold that findings of fact made by the decision-maker can be attacked on review on the basis that the reviewing court is free, without more, to substitute its own view as to what the findings should have been – i.e. an appeal test. In our law, where the power to make findings of fact is conferred on a particular functionary – an "administrator" as defined in PAJA – the material error of fact ground of review does not entitle a reviewing court to reconsider the matter afresh… The ground must be confined… to a fact that is established in the sense that it is uncontentious and objectively verifiable…'*

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[36] See fn 22 above at para [32].
[37] See fn 21 above.
[38] At para [48].

451. On the objective and uncontested facts: (a) the applicant entered the room of the victim without his permission; (b) urinated on the victim's desk and belongings; and (c) spoke to the victim when confronted. What the applicant said to the victim was a contentious issue before the CDC and DAC. Their reasoning in arriving at their conclusions constituted an evaluation of disputed (or contentious) evidence. It was not a case of them not taking into account an uncontentious and objectively verifiable fact, or of mistakenly failing to represent it properly in their decisions.

452. Second, the applicant has not challenged the lawfulness of either the relevant clauses of the Disciplinary Code or the Amended Residence Rules. While I confess to having difficulty in understanding what the CDC meant in referring to itself as *'an administrative judicial body'* – an apparent contradiction in terms – and have reservations how information gathered can translate into "facts" even where witnesses who "testify" do not do so under oath or sworn affirmation, that is the framework in which all parties involved, voluntarily participated. As a court we have to live with that and deal with the review on that basis. Put differently, and as pointed out by my colleague, the test is whether the applicant received a fair hearing before the CDC and DAC within the permissible procedure in light of the legal principles applicable to a review.

453. Third, as far as the admission of the victim's statements is concerned, the Chairperson's prior directive was that *'(t)he nature of the enquiry will include oral testimony. A submission of sworn statements may be considered if applied for by the parties'.* Accordingly, as pointed out by my colleague, and bearing in mind the agreed status of the documents gathered in the preliminary investigation (which included those statements) it cannot reasonably be concluded that the CDC only envisaged "evidence" given orally or by way of sworn statements.

454. While it is so that the Chairperson of the CDC did not afford Mr Fullard the opportunity to object to Mr Hess' request that the victim's unsworn (and in one instance unsigned) statements be admitted prior to ruling that they could be used, and he was thus left in the invidious position of having to argue what weight should be attached to them, the question remains whether this was a fundamental irregularity which vitiated the entire proceedings. That may have been the case had the only "evidence" before the CDC as to the *'white boy thing'* been that of the victim, but it was not. The CDC (and DAC) also had before them the victim's reports to others, ranging from a few minutes up to 8 hours after the incident. The first two reports to others conveyed that in addition to urinating the applicant also insulted the victim. The third report (within 8 hours) was that the applicant said to the victim *'This is what we white boys do'.* One day later the victim conveyed the *'white boy'* statement to the Equality Unit. Three days later he gave a further statement repeating that the applicant had said *'It's a white boy*

thing'. No objection was made to the admissibility of what others reported the victim to have said.

455. Fourth, the CDC acknowledged that the test to be applied was that of the balance of probabilities, but as part of its decision[39] made the following unfortunate remark in relation to the urination charge:

> *'…In essence Mr Du Toit alleged that he lacked capacity and intention. It is here that we wish to note that, although the legal terminology used is identical to that used in a court of law, the CDC is not a court of law and does not need to conform to being satisfied that the elements of a crime or delict have been met. Albeit, as the CDC does carry out a judicial-like function, we wish to reiterate that it should err on the side of proportionality in carrying out its decision-making process…'*

456. To a reasonable reader the initial impression created by the CDC in making this remark is that it did not understand that proportionality has no role to play in applying the test for a civil onus, i.e. balance of probabilities. But on closer scrutiny of the entire decision it is clear that, despite this remark, the CDC ultimately did apply the correct test to the fact specific conduct of the applicant in respect of the charges he faced. The same applies to the regrettable statement in the CDC decision that not accepting the victim's version *'… would be to conclude that Mr Ndwayana was, and still is, lying. That is a conclusion that will be ill-established and would in many ways be demeaning'.*[40]

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[39] Record p210.
[40] Record pp218 – 219.

457. Fifth, the issue of whether the CDC and DAC correctly relied on "wilful self-intoxication" when the applicant was never called upon to face such a charge is in reality something of a red herring. This is because clause 9.3 of the Disciplinary Code was one of the clauses underpinning the urination charge. For convenience I repeat it hereunder:

> *'9.3 A Student shall not act in a manner that is racist, unfairly discriminatory, violent, grossly insulting, abusive or intimidating against any other person. This prohibition extends but is not limited to conduct which causes either mental or physical harm, is intended to cause humiliation or which assails the dignity of any other person.'* (emphasis supplied)

458. Accordingly clause 9.3 does not require wilfulness (or intention) as an element which must be proven. By any stretch of the imagination, urinating on someone else's belongings can only be construed as "grossly insulting" conduct.

459. Sixth, the submission made on behalf of the applicant that *'it's a white boy thing'* can reasonably be construed, in the context of the incident, as being demeaning of white men reflects, to my mind, a fundamental failure to grasp what a racist remark is. In fact such an approach would redound to the detriment of the applicant's case, but I leave it there because I understood it to be considered in this way, not by the applicant himself but certain members of his legal team.

460. Seventh, in regard to costs, we are bound to heed what the Constitutional Court stated in *Harrielall*[41] when a student sought to review the decision of a University in a matter which only affected her personally. The High Court, Supreme Court of Appeal and Constitutional Court all dismissed her application on the merits. However both the High Court and the Supreme Court of Appeal ordered her to pay costs. The Constitutional Court stated:

> *'[10] But we are not persuaded that the High Court and the Supreme Court of Appeal were entitled to depart from the **Biowatch**[42] principle which requires that an unsuccessful party in proceedings against the State be spared from paying the State's costs in constitutional matters…*
>
> *[11] Although **Biowatch** was decided 8 years ago, it seems that the other courts are yet to embrace its principle… This is unfortunate. In **Biowatch** this Court laid down a general rule relating to costs in constitutional matters. That rule applies in every constitutional matter involving organs of State. The rule seeks to shield unsuccessful litigants from the obligation of paying costs to the state. The underlying principle is to prevent the chilling effect that adverse costs orders might have on litigants seeking to assert constitutional rights.*
>
> *[12] However, the rule is not a licence for litigants to institute frivolous or vexatious proceedings against the State. The operation of its shield is restricted to genuine constitutional matters. Even then, if a litigant is guilty of unacceptable behaviour in relation to how litigation is conducted, it may be ordered to pay costs. This means that there are exceptions to the rule which justify a departure from it. In **Affordable Medicines**[43] this Court laid down exceptions to the rule. Ngcobo J said:*
>
> *"There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the*

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41 *Harrielall v University of KwaZulu Natal* 2018 (1) BCLR 12 (CC).

42 *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC).

43 *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC).

> *litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs.*"'
> [emphasis supplied]

461. The court further confirmed that a review of administrative action under PAJA is a constitutional issue. In the present matter: (a) the applicant ultimately narrowed his case to one of own-interest (his counsel having only conceded during argument that he lacked locus standi to challenge any of the CDC's findings and orders other than those which related to him personally, despite the wide ranging relief sought in the notice of motion); (b) regrettably permitted his case to be used to advance an agenda entirely unrelated to his fact-specific conduct; and (c) as a result, caused unnecessary costs to be incurred and unduly lengthened the hearing. Accordingly the resultant application to strike out, the costs pertaining to the belated attempt to admit the further supplementary affidavit, and the relief sought other than in the applicant's own interest should, applying *Harrielall*, receive this court's censure. Save for that, the *Biowatch* principle must apply.

ALLIE *et* CLOETE JJ:

In the result the following order is made:

1. **The third respondent's application to strike out paragraphs 5 to 7, 10 to 16 and Annexures "TD16" to "TD27" of the applicant's replying affidavit is granted;**

2. The main application is dismissed;

3. The applicant shall pay the costs incurred by the third respondent on the scale as between party and party, including the costs of senior and junior counsel, in respect of:

3.1 the application to strike out;

3.2 the application for admission of the further supplementary affidavit of the applicant's attorney; and

3.3 the applicant's challenge to paragraphs 2 to 5 under the heading "Orders" of the judgment of the Central Disciplinary Committee dated 21 July 2022;

4. Save as aforesaid, no order is made as to costs.

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JUDGE R. ALLIE

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JUDGE J. CLOETE

For the applicant: Adv J C Heunis SC with Adv Q Maxongo

Instructed by: DVN Attorneys (Mr D Van Niekerk)

For the third respondent: Adv I J Muller SC with Adv R Patrick

Instructed by: Cluver Markotter Inc. (Mr P Hill)