IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

Case No: **6501/2020**

In the matter between:

DEAN DART	**Applicant**
and	
CHAIRPERSON OF THE DAC OF STELLENBOSCH UNIVERSITY	**First Respondent**
CHAIRPERSON OF THE FIRST CDC OF STELLENBOSCH UNIVERSITY	**Second Respondent**
CHAIRPERSON OF THE SECOND CDC OF STELLENBOSCH UNIVERSITY	**Third Respondent**
STELLENBOSCH UNIVERSITY	**Fourth Respondent**
RECTOR OF STELLENBOSCH UNIVERSITY	**Fifth Respondent**

Court: Acting Justice JH Loots
Heard: 15 September 2020
Delivered: 1 February 2021

ORDER

Having read the papers filed of record and having heard counsel for the applicant and the respondents, it is ordered that:

1. The application is dismissed.
2. The parties shall each bear their own costs.

JUDGMENT

INTRODUCTION

1. In terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**"), the applicant seeks to review and set aside the decisions of the Disciplinary Appeal Committee ("**the DAC**") of the fourth respondent ("**the University**"):

   1.1. to dismiss the applicant's appeal; and

   1.2. to impose a harsher sanction than had been imposed by the University's Central Disciplinary Committee ("**the CDC**").

2. In addition to the review and setting aside of the DAC's decisions, the applicant wishes this court to substitute the decision of the DAC with the finding that the applicant is found not guilty of a contravention of Rules 9.3 and 9.6 of the Disciplinary Code for Students of Stellenbosch University ("**the Disciplinary Code**").

3. The respondents oppose the application on the basis that the DAC's decision is correct, both procedurally and substantively.

BACKGROUND

4. In May 2017, posters appeared around the campus of the University.

5. Two of the posters invited the "Anglo-Afrikaner Student" to a meeting of the "New Right" and to "Fight for Stellenbosch / Veg vir Stellenbosch". These posters were direct copies of Hitler Youth recruitment posters.

6. The third poster, reminiscent of anti-communist propaganda of the 1970's Chilean military junta, depicted a person falling from a helicopter with the tagline "Commies Deserve Free Helicopter Rides" also containing an internet meme known as "Pepe the Frog", said to denote satire.

7. The applicant, a first year student at the time, participated in the conceptualisation and production of the posters although, due to illness, he apparently did not participate in them being put up on campus. In this regard it is to be noted that the fact that the applicant did not physically partake in the erection of the posters is of no real moment as he clearly wanted them displayed on campus in order to further the agenda of the group of students of which he formed part.

8. The publication of the posters, as was to be anticipated, caused public reaction, media coverage, and the lodging of complaints with the University.

9. Consequent upon the appearance of the posters on campus the University charged the applicant, together with two fellow students who had also participated in one or more aspect relating to the conceptualisation, production, and display of the posters, with the contravention of Rules 9.1, 9.3, 9.5, 9.6 and 9.7 of the Disciplinary Code.

10. Following a hearing by the CDC, the applicant and his two fellow students were found guilty of contravening Rules 9.3 and 9.6 of the Disciplinary Code.

11. Disciplinary Rule 9.3 provides that:

> "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."

while Disciplinary Rule 9.6 provides that:

> "A Student shall not act in a manner so as to disrupt, or potentially disrupt, the maintenance of order and discipline at the University."

12. On 5 September 2017, and in consequence of the aforementioned conviction of the three students, including the applicant, the CDC (as per paragraph 48 of the Condensed Report of Disciplinary Enquiry attached to the document titled "Result of the Disciplinary Enquiry Before the Central Disciplinary Committee ("CDC")") imposed the following sanction in respect of all three students:

> "48.1 100 hours community service to be completed before the end of the first semester 2018.
>
> 48.1.1 60 hours must be completed by the end of the 2017 academic year of which 50 hours must be done at the Transformation Office and 10 hours at the Equality Unit. The last 10 hours must include a mediation session with the witnesses from the CDC.

48.2 The respective students must complete a Restorative assignment of which the key aspect must be on how to constructively engage on campus and address different narratives.

48.3 The first draft must be submitted to the panel not later than the last day of the third term 2017.

48.4 The second draft must be submitted to the panel not later than the last day of classes in the second semester of 2017.

48.5 The final assignment must be submitted not later than the first Monday of February 2018.

48.7 If any of the students fail to comply with any of the above, he (the failing student) will be expelled from the SU immediately."

13. Only the applicant appealed the CDC's decision to the CAD.

14. Following the appeal hearing, where the applicant was represented by both an attorney and senior counsel, the DAC dismissed the applicants appeal against the CDC's decision, and increased the sanction imposed by the CDC to one of immediate expulsion from the University.

15. As referred to above, the DAC's decisions to uphold the appeal and to impose the sanction of immediate expulsion from the University are what the applicant seeks to have set aside.

RULE 53

16. Before turning to the merits of the applicant's application to review and have set aside the decisions of the DAC, it is necessary to discuss the purpose and function of the provisions of Uniform Rule 53 ("**Rule 53**").

17. The reason for this is that, following the respondents filing what the applicant considered to be an inadequate record relevant to the decision of the DAC the applicant, unusually, rather than seeking to compel the respondents to address the inadequacies in the record they had filed, or to utilise the inadequacies in the record to his own advantage, chose to file what he considered to be the complete record.

18. The applicant seeks to rely on the record he has filed in preference of the record filed by the respondents in the same manner he would have relied on the record filed by the respondents pursuant to the provisions of Rule 53, had they filed what he considered to be an adequate record.

19. In deciding whether the applicant is entitled to act in the manner he did, it is important to consider both the purpose of Rule 53 and the mechanisms it creates for achieving this purpose.

20. The purpose of Rule 53 can succinctly be stated to be to facilitate and regulate applications for review.[1]

21. In order to achieve this purpose Rule 53 adapts the application procedure provided for in Uniform Rule 6 ("**Rule 6**").

22. Principal among the amendments of the application procedure provided for in Rule 6 are that the person officially in possession of the record is called upon to:

22.1. show cause why the relief sought should not be granted;[2] and

22.2. dispatch the record of such proceedings sought to be corrected or set aside to the Registrar of the court hearing the application, together with such reasons as he or she is by law required or desires to provide.[3]

23. Thus, in respect of Rule 53(1)(b) Madlanga J, writing on behalf of the majority in ***Helen Suzman Foundation v Judicial Service Commission***, said:[4]

> "[13]…The requirement in rule 53(1)(b) that the decision-maker file the record of decision is primarily intended to operate in favour of an applicant in review proceedings. It helps ensure that review proceedings are not launched in the dark. The record enables the applicant *and the court* fully and properly to assess the lawfulness of the decision-making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review.
>
> [14] Our courts have recognised that rule 53 plays a vital role in enabling a court to perform its constitutionally entrenched review function:
>
> > 'Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed.'
>
> [15] The filing of the full record furthers an applicant's right of access to court by ensuring both that the court has the relevant information before it and that there is equality of arms between the person challenging a decision and the decision-maker. Equality of arms requires that parties to the review proceedings must each have a reasonable opportunity of presenting their case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponents. This requires that —
>
> > 'all the parties have identical copies of the relevant documents on which to draft their affidavits and that they

> and the court have identical papers before them when the matter comes to court'.

[16] In *Turnbull-Jackson* this court held:

> 'Undeniably, a rule 53 record is an invaluable tool in the review process. It may help shed light on what happened and why; give the lie to unfounded *ex post facto* (after the fact) justification of the decision under review; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the decision-maker's stance; and in the performance of the reviewing court's function.' "

24. Despite what is stated above, it is not necessarily the entire record that serves as evidence before the court. Rules 53(3) and 53(4) find application once the record has been provided to the Registrar in terms of Rule 53(1)(b).

25. Rule 53(3) provides as follows:

> "The registrar shall make available to the applicant the record despatched to him or her as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety, and the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to y be made and shall furnish the registrar with two copies and each of the other parties with one copy thereof, in each case certified by the applicant as true copies. The costs of transcription, if any, shall be borne by the applicant and shall be costs in the cause."

26. It is therefore the duty of the applicant to select what is relevant from the filed Rule 53 record to serve as evidence for the purpose of the review application. This selection may, in appropriate cases, be supplemented by the respondent.

27. The fact that the selected portions of the record filed pursuant to the provisions of Rule 53(1)(b) serves as evidence is a further important

departure from the principles that govern applications in that ordinarily only that which is contained in, or attached to, the affidavits filed by the parties constitutes evidence.

28. Although, generally, it is only what is selected that serves as evidence before the court,[5] it has been held that, should it be considered necessary for the due performance of the court's duties, the court may *meru moto* have regard to any part of the record filed, whether extracted by the parties or not.[6]

29. In the context of this application, it is the last mentioned right of the court to have regard to the entire record, which brings the record filed in this matter pursuant to the provisions of Rule 53 into sharp relief.

30. The record filed by the respondents was, undoubtedly, incomplete in material respects.[7] Therefore, already in October 2018, the applicant (as aforementioned) filed what he considered to be the complete record, serving a copy thereof on the Cape Town correspondent of the respondents' attorneys of record.

31. Only after the filing of the supplemented record, did the applicant supplement his founding papers, did the respondents file answering papers, and did the applicant file his replying papers.

32. The respondents did not object to applicant filing the supplemented record at the time, or at any time before the hearing of the review, despite having had sufficient time and opportunity to do so.

33. The provisions of Rule 53 are not peremptory and the court can condone non-compliance with its provisions in appropriate circumstances. I am prepared to do so in the circumstances of this matter, since I hold the view that it allows the court to properly fulfil its function of considering the review of the decision of the DAC. In view of what is stated above I also hold the view that there could be no prejudice to the respondents. I shall, accordingly consider the application on the basis of the full record filed by the applicant, rather than the truncated record filed by the respondents.

34. I, immediately, state this should not be seen as a blanket condonation of the unorthodox method employed by the applicant to have the full record placed before the court.

PRINCIPLES GOVERNING REVIEW

35. In light of the nature of many of the applicant's challenges to the decisions of the DAC, it is furthermore prudent to restate the substantive principles governing reviews, with specific emphasis on the role and powers of the court.

36. These principles, governing the court's function in exercising its powers of review, have recently been restated by the Supreme Court of Appeal in ***Bo-Kaap Civic And Ratepayers Association v City of Cape Town***,[8] where, at paragraph 72, the SCA referred with approval to the following statement by Laws J in ***R v Somerset County Council, ex parte Fewings & others*** [1995] 1 All ER 513 (QB) at 515d-g:

> "Although judicial review is an area of the law which is increasingly, and rightly, exposed to a great deal of media publicity, one of its most important characteristics is not, I think, generally very clearly understood. It is that, in most cases, the judicial review court is not concerned with the merits of the decision under review. The court does not ask itself the question, "Is this decision right or wrong?" Far less does the judge ask himself whether he would himself have arrived at the decision in question. It is, however, of great importance that this should be understood, especially where the subject matter of the case excites fierce controversy, the clash of wholly irreconcilable but deeply held views, and acrimonious, but principled, debate. In such a case, it is essential that those who espouse either side of the argument should understand beyond any possibility of doubt that the task of the court, and the judgment at which it arrives, have nothing to do with the question, "Which view is the better one?" Otherwise, justice would not be seen to be done: those who support the losing party might believe that the judge has decided the case as he has because he agrees with their opponents. That would be very damaging to the imperative of public confidence in an impartial court. The only question for the judge is whether the decision taken by the body under review was one which it was legally permitted to take in the way that it did."

37. This accords with the following extract from *Wade and Forsyth Administrative Law*, also quoted in ***Bo-Kaap Civic***:[9]

> "The system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is "right or wrong?" On review the question is "lawful or unlawful?"
> . . .
> Judicial review is thus a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law. Instead of substituting its own decision for that of some other body, as happens when on appeal, the court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not."

38. I am also mindful of the dicta in matters such as ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others***,[10] ***Carephone (Pty) Ltd v Marcus NO***,[11] and ***Rustenberg Platinum Mines Ltd (Rusternberg Section) v Commission for Conciliation, Mediation and Arbitration***.[12]

39. I am, accordingly, specifically mindful thereof that the question is not whether a court agrees with the decision made by the decision maker, but whether it was one that the decision maker could reach.

40. Finally, it remains advisable to heed the following extract from ***Carephone***:[13]

> "In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' of the matter in some way or another. As long as the Judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order."

THE BASES UPON WHICH THE APPLICANTS SEEKS TO REVIEW THE DECISIONS OF THE DAC

41. The applicant advanced the following broad bases upon which he sought this court to review the decisions of the DAC (and by necessary implication the CDC):

41.1. The DAC was biased, alternatively could reasonably be suspected of bias.

41.2. The DAC did not comply with the mandatory and material procedure prescribed in Rule 40.1 of the Disciplinary Code.

41.3. The whole decision of the DAC was procedurally unfair.

41.4. The DAC took irrelevant considerations into account.

41.5. The DAC did not consider the relevant consideration that Disciplinary Rule 9.6 can only be contravened intentionally.

41.6. The DAC's decision to dismiss the applicant's appeal and to increase the sanction the CDC has imposed is not rationally connected to the information before it.

41.7. The DAC's decision is so unreasonable that no reasonable person could have so exercised the function of deciding the appeal.

42. For reasons that, if not already apparent, will become apparent below, I will deal with the DAC's decision to dismiss the applicant's appeal separately from its decision to increase the sanction imposed by the CDC to immediate expulsion from the University.

THE DECISION NOT TO UPHOLD THE APPLICANT'S APPEAL FROM THE CDC

Bias

43. In the first instance, the applicant complains that the DAC Chairperson refused to order that the audio recording of the proceedings before the CDC be transcribed by the University; and that he was refused permission by the DAC to record the DAC proceedings himself on his own device.

44. This complaint dovetails with the applicant's complaint that the DAC did not follow the prescriptions of Disciplinary Rule 40.1.

45. Disciplinary Rule 40.1 provides that:

> "Immediately upon the lodging of an appeal to the DAC, the HSD must compile the record of the enquiry in the RDC, or the CDC, which includes the transcription of any recordings, and supplement the combined file referred to in clause 27.3.6 accordingly. The combined file must be provided to the members of the DAC as soon as practically possible."

46. Disciplinary Rule 40.1 must be read in conjunction with Disciplinary Rule 40.2. Rule 40.2 provides as follows:

> "Access to the record of the enquiry may be granted to any party to the appeal at the discretion of the Chairperson of the DAC who determines the manner and extent of the access. Copies or transcriptions, as the case may be, may be allowed against payment of reasonable costs thereof."

47. Thus, seen in context, I agree with counsel for the respondent that there was no obligation on the DAC to have provided a transcript of the record of proceedings before the CDC where the applicant had been provided with a recording of the proceedings before the CDC.

48. I also find that the fact that the Head of Student Discipline ("**HSD**") did not make a transcript of the proceedings did not vitiate the appeal before the DAC in the circumstances of this case.

49. Similarly, I find that the fact that the applicant was not allowed to make his own recording of the proceedings before the DAC, in circumstances where the proceedings were already being recorded by the University, and where

he would have access to the recording, established neither prejudice, nor bias.

50. In the second instance, the applicant complained about various primary and secondary factual findings made and conclusions reached by the DAC in its report; including complaining about the DAC's choice of chronology. Specific primary instances include the following:[14]

50.1. That the DAC found the outcry caused by the posters was to be undisputed where, according to the applicant, it was disputed.

50.2. That the DAC described the first two posters as *"Nazi- based posters"* in paragraph 32 of its reasons, when that was one of the issues to be decided.

50.3. That the DAC found the posters to be racially exclusive and associated with the political ideology of apartheid.

51. The above complaints, properly considered, relate to appeal rather than review. This notwithstanding, a perusal of the record of the proceedings before the CDC and the DAC shows that the DAC gave proper consideration to the aspects complained of. These complaints, therefore, do not establish bias.

52. The applicant's contention that the DAC was biased due to it having considered that which was not before the CDC which concerned the

meaning of the third poster – specifically the historical events in Chile and the meaning of the Pepe the Frog meme, must suffer a similar fate:

52.1. In terms of Rule 25.6 of the Disciplinary Code, read with Rule 7.13 thereof, the DAC has wide appeal powers and may "rehear any Disciplinary Matter on the merits to whatever extent the DAC considers necessary. Being a wide appeal, the DAC was therefore not confined to the record before the CDC and was entitled consider additional evidence or information. [86]

52.2. As the first respondent explained in the answering affidavit she deposed to in this application:

> "These symbols have established meanings or connotations, and /or are used in specific contexts. The applicant cannot invoke these symbols for his own benefit to advance his agenda and that of his associates, and then expect not to be judged against and held to the meaning of those symbols."

52.3. Finally, it is also important to note that the CDC and DAC are not criminal courts and their procedures are designed to facilitate an enquiry that complies with the rules of natural justice and to arrive at a just enquiry and decision. This process contains inquisitorial elements, which allows them a wider discretion to include contextual facts in their findings (i.e. they are not required to decide cases in a vacuum).[15] Therefore, unless the rules of natural justice were not followed, the fact that the DAC may have taken into account additional information, does in itself not establish bias.

53. Thirdly, the applicant contended that the DAC was wrong to find that the CDC process was procedurally fair. Having considered the facts advanced in support of this contention and, having measured them against the Rule 53 record the applicant has filed, I do not agree.

54. Fourthly, the applicant alleged that the DAC was biased for *"deliberately ignoring"* evidence of Mr Muller and Mr Kallis before the CDC which supposedly exculpated him. As argued by Mr de Jager on behalf of the respondent, and as appears from the record, the DAC did not ignore this evidence, rather it considered, and then rejected it based on the further evidence before it.

55. This ground of review, accordingly, fails.

The challenge based on contentions that the DAC failed to take relevant considerations into account and took irrelevant considerations into account

56. As the heading suggests, under this ground of review the applicant raises the two arguments; that the DAC failed to take relevant considerations into account, as well as taking irrelevant considerations into account when deciding the applicant's appeal.

57. This challenge based on the taking into account of irrelevant information, is in the first instance again principally founded on the DAC's considerations relating to the posters, addressed above. As already found in the previous section, this ground must fail even in its new guise.

58. The second contention principally revolved around the DAC not finding that the applicant's conduct could be excused on the basis that he did not have the intention of breaching the disciplinary code in the manners contemplated by Disciplinary Rules 9.3 and 9.6, both of which have been reproduced earlier in this judgment. The DAC interpreted the Disciplinary Code and held that Mr Dart's subjective intention in relation to the quoted Disciplinary Rules is irrelevant, and that what was relevant was the fact that his conduct did breach the Disciplinary Code. I do not fault the DAC in this regard.

59. Accordingly these challenges must fail. It must also be borne in mind that the DAC rejected the applicant's version that he was unaware of the origin of the posters, and found that the applicant was well aware thereof that the posters may cause offense and cause a reaction to them being put up on campus.[16]

Alleged procedural unfairness

60. Reminiscent of his earlier challenges, referred to above, the applicant alleges that the DAC acted in a procedurally unfair manner by:

60.1. Not enforcing Rule 40.1 of the Disciplinary Code; and

60.2. Taking into account additional information about the meaning of poster 3 and the Pepe the Frog meme.

61. The issues raised under this heading have already been addressed earlier in this judgment. I again find them to lack merit. In addition I reiterate that the applicant was well served by his experienced legal team, both in the hearing

before the CDC and in the appeal before the CDC who had the full opportunity to present the applicant's case before these tribunals.

The DAC acted irrationally and unreasonably

62. The applicant's final grounds of review are that the decision of the DAC to dismiss the appeal in the first instance not rationally connected to the information before it, and the decision was so unreasonable that no reasonable decision maker could have so exercised the function of deciding the appeal.

63. In this regard the applicant, again, relied on much the same allegations he used in respect of the grounds addressed above.

64. As is the case with the grounds addressed above, a consideration of the record shows that the DAC's (and for that matter the CDC's) findings were reasonable and rationally connected to the information before them.

65. A reasonable decision maker in the position of the CDC, and the DAC could have made the findings made (and reached the conclusions reached) by these bodies.

66. I, accordingly, find that the DAC's dismissal of the applicant's appeal cannot be impeached, and that the decision of the CDC in this regard must stand.

THE INCREASE OF THE SANCTION

67. Having found that the DAC's decision in respect of the dismissal of the applicants appeal from the decision of the CDC is not to be set aside, I now turn to the sanction the DAC imposed on the applicant.

68. As is evident from that which is already contained in this judgment, the DAC increased the sanction the CDC imposed on the applicant from the sanction referred to in paragraph 12, above (essentially a suspended expulsion, coupled with reconstructive mediation and community service) to one of immediate expulsion from the University.

69. A consideration of the Rule 53 record (both the record filed by the respondents and the applicant's supplemented record) revealed that:

69.1. the DAC did not advise the applicant that it was considering increasing the sanction imposed by the CDC;

69.2. the University did not cross-appeal the sanction the CDC imposed on any of the three students sanctioned, including the applicant, on the basis that it was inappropriately light (as it was entitled to in terms of the Disciplinary Code);[17]

69.3. because the applicant's two fellow students did not appeal, the sanction handed down by the CDC (which, as aforesaid was identical to the sanction imposed on the applicant) stood unaltered in respect of both of them, while only the applicant was summarily expelled from the University.

70. A consideration of the affidavits filed of record revealed that the applicant raised two specific grounds of review in respect of the increase of sanction (which were reminiscent of the final review grounds in respect of the dismissal of the appeal on the merits of the findings of the DCD), these being that the decision of the DAC to increase the sanction was not rationally connected to the information before it, and that this decision to increase the sanction was so unreasonable that no reasonable decision maker could have so exercised the function of deciding the appeal.

71. The grounds referred to above did not raise the aforementioned issue of notice of the possible increase of sanction, nor did they specifically raise the issue of a disparity between the sanctions handed down by the CDC and the DAC, either in light of the fact that the sanction handed down to the applicant's fellow students (who had not appealed) remained intact, or at all.

72. Before turning to the two questions foreshadowed above, it is to be noted:

72.1. that the sanction the DAC imposed on the applicant fell within its powers as defined by the Disciplinary Code. To this extent there would be a rational connection between the sanction the DAC was imposed, and facts that served before it, including the fact that the sanction imposed by the CDC contemplated expulsion from the University in the event of non-compliance with any of its other terms.

72.2. The attack on the sanction the DAC imposed appeared to almost be an afterthought in the sense that the applicant relied on the

same factual grounds it had raised in support of the attack on the dismissal of his appeal in respect of his conviction (for want of a better expression). The applicant, therefore did not raise independent sanction specific grounds in of review in respect of the sanction only.

Notification of the possible increase of the sanction

73. The dicta in ***S v Bogaarts*** and ***S v Joubert*** [18] led to the following dictum in ***Samons v Turnaround Management Association Southern Africa NPC and Another***:[19]

> "[27] It is common cause that TMA's appeals committee has wide-ranging powers and was entitled to revisit the sentence.
>
> [28] The appeals committee found the applicant guilty of fewer charges but imposed a harsher sentence. It did so without informing the applicant of its intention to do so. In my view this is procedurally unfair and irrational. A similar scenario can be found in criminal appeals. The power of a court of appeal to increase a sentence imposed by the trial court is well established in our law. It has become practice that, if a court of appeal is prima facie of the view that there is a prospect that the sentence might be increased on appeal, notice be given before the F hearing of the appeal to the interested parties that such an increase is being considered. This is done so that the parties, including the appellant, are not taken by surprise at the hearing.
>
> [29] In *S v Bogaards* the Constitutional Court held that, given the importance of the right to a fair trial and the substantive notion of fairness which it embraces, the failure to give notice constituted a failure of justice, and the appeal was rendered unfair and the sentence imposed was set aside. In *S v Joubert* the court held that a failure to give such notice had materially prejudiced the accused; a prejudice that goes further than a mere lack of adequate opportunity to prepare properly. The court held that the requirement of prior notice to an accused person by the appellate court balances the appellant's right to a fair trial with the court's duty to ensure that the sentence is

> appropriate and, where necessary, to increase an inappropriate sentence.
>
> [30] There is no reason why these principles enunciated by the Constitutional Court and the SCA would not be applicable to a disciplinary hearing. The appellant focused his submissions, on appeal, on the sentence imposed by the disciplinary committee. There was no reason for him to reconsider his position or to make submissions on a possible increase of sentence by the appeals committee. The appellant, if notified, could even have withdrawn the appeal. The prejudice is self-evident."

74. I agree with the reasoning contained in the above quoted extract from ***Samons*** and, likewise, see no reason why the principles enunciated in ***S v Bogaarts*** and ***S v Joubert*** should not find application in respect of disciplinary proceedings, and therefore why they (subject to what is stated below), in principle, should not apply in this matter.

75. Since the issue had not specifically been addressed by either of the parties, the day before the hearing I referred the parties' legal representatives to ***Samons***, and requested them to address me with regard to the effect of the DAC's apparent failure to have notified the applicant that it considered increasing the sanction the CDC had imposed.

76. The applicant aligned himself with the *dictum* in ***Samons***.

77. The respondents on the other hand adopted the position, that notwithstanding the fact that there is nothing on the record to indicate that the DAC had given the applicant notice thereof that it was considering increasing the sanction, the court should not rely on this failure by the DAC, since the applicant did not advance this as a specific ground of review, and it

does not appear from the affidavits filed of record themselves. In support of this contention the respondents' counsel referred to the judgment by the SCA in ***Fischer and Another v Ramahlele and Others***.[20]

78. The passages from ***Fischer*** which have repeatedly been approved by the courts, including the Constitutional Court,[21] are the following:

> "[13] Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for '(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded'. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone."[22]

and

> [14] It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them

> to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits."

79. A court may, therefore, suggest a line of argument or an approach to a case that has not previously occurred to the parties (such as the issue of the apparent lack of notice to the applicant that the DAC was considering increasing the sanction the CDC had imposed on him).

80. Once suggested by the court, it is then for the parties to decide whether or not to adopt the suggested approach.

81. In respect of a pure question of law emerging from the papers this may be relatively simple, but in respect of matters which involve both questions of law and of fact, the position is more complicated. As stated by the Constitutional Court in ***Molusi and Others v Voges NO and Others***,[23] at paragraph 27:

> "It is trite law that in application proceedings the notice of motion and affidavits define the issues between the parties and the affidavits embody evidence. As correctly stated by the Supreme Court of Appeal in *Sunker*:
>
> > 'If an issue is not cognisable or derivable from these sources, there is little or no scope for reliance on it. It is a fundamental rule of fair civil proceedings that parties . . . should be apprised of the case which they are required to meet; one of the manifestations of the rule is that he who [asserts] . . . must . . . formulate his case sufficiently clearly so as to indicate what he is relying on.'"

82. In my view the above principle applies notwithstanding the fact that the selected portion of the Rule 53 record serves as evidence before the court, and the fact that the court may have regard thereto in deciding the review. It

would be a bridge too far to utilise the Rule 53 record in support of an argument not raised in, or appearing from, the affidavits filed of record. To do so would entirely negate the purpose and import of filing affidavits in applications for review.

83. Rule 53 does not purport to replace the application procedure provided for in Rule 6, but merely to amend it in order to facilitate the fair decision in respect of the actions sought to be reviewed.

84. Should a party be allowed to simply rely on the Rule 53 record to support any contention sought to be made, the other party would face the impossible task of attempting to prepare for any issue that may emerge from the Record, whether or not the other side had adopted it and relied thereon in the affidavits.

85. Therefore, while the court may have regard to the entire selected Rule 53 record, or even the entire Rule 53 record filed, the evidence that emerges therefrom first, at least, needs to be foreshadowed in the Notice of Motion and affidavits filed of record, and must relate to an issue that emerges from such papers.

86. In the present instance, because the issue of notice did not appear from either the Notice of Motion or the affidavits filed of record, the applicant, had he wished to adopt the argument flowing from ***Bogaarts***, ***Joubert*** and ***Samons*** in the absence of agreement form the respondents, ought to have sought to amend his papers to properly raise this issue. In light thereof that the issue remains absent from the applicant's (and the respondents') papers,

the court may, therefore, not decide the issue in favour of the applicant, no matter how important it may be.

87. That the determination of an issue may be necessary for the proper adjudication of the case is, accordingly, insufficient cause in itself to allow the court to determine the issue in question. The issue first needs to have been sufficiently canvassed and established by the facts raised in the affidavits, in this case, before its importance can play a role. In this regard, reiterated at paragraph 218 in ***South African Police Service v Solidarity obo Barnard***,[24] a case decided in the context of a review pursuant to the provisions of the Labour Relations Act[25]:

> "The point raised *mero motu* by the court must be apparent from the papers in the sense that it was sufficiently canvassed and established by the facts, and that its determination must be necessary for the proper adjudication of the case."

88. In the premises established above, under the present circumstances the applicant cannot rely on the fact that the DAC did not give him notice of the possibility of the increase in sanction imposed by the CDC.

Disparity in the sanction ultimately imposed on the applicant and the sanction imposed by the CDC

89. Another issue that was canvassed during the hearing of the matter was the issue of the DAC having, in fact, increased the sanction imposed on the applicant to that of immediate expulsion from the University.

90. This raised the question of the apparent disparity between the sanction effectively handed down in respect of the applicant and his fellow students,

but for the applicant's appeal, and the sanction imposed on the applicant because of his appeal.

91. In respect of the increased severity of the sanction, as has been stated above, in increasing the sanction itself the DAC was acting within its powers as confirmed by the Disciplinary Code.

92. In respect of the issue of the disparity between the sanctions imposed on the applicant and his two fellow students by the CDC and the sanction imposed by the DAC in respect of the applicant, the situation is akin to that addressed above in respect of the CDC's apparent failure to notify the applicant of the possible increase of the sanction:

92.1. The applicant did not, in the affidavits he had deposed to in this application, contended that the sanction imposed upon him was reviewable on the basis that it was markedly more severe than the sanction originally imposed on him and his fellow students (whose sanctions had remained unaltered) where the only apparent difference between the applicant and the other students was that the applicant had lodged an appeal.

92.2. Although the disparity may appear to be unfair, there does not appear to be a general principle that disparity in the sanction handed down for like (or even in this case the same) offences in respect of persons with essentially the same personal circumstances are, per se, unfair. In this regard the closest thereto are the rules relating to consistency, the so-called "Parity Principle", as applied with the

necessary caution in respect of misconduct dismissals in the sphere of labour relations.[26]

93. It follows that the same principles applied above in respect the court taking into account the DAC's apparent failure to notify the applicant that it was considering an increase in sanction, would apply *a fortiori* in respect of the issue of the inconsistency of the sanction imposed on the applicant, measured against the sanction imposed on this fellow students.

94. In the premises, as is the case with the question of notice, this issue cannot be determined no matter how important it may be in the circumstances of this matter.

Conclusion

95. The applicant's review of the sanction imposed by the DAC, accordingly, fails.

SUBSTITUTION IN RESPECT OF THE DECISION

96. In light of the above findings it is unnecessary to address the appropriateness of substituting the court's decision for that of the DAC.

COSTS

97. As candidly conceded by the respondents' counsel in the respondents' heads of argument , the principle established by ***Biowatch Trust v Registrar Genetic Resources and Others***,[27] by virtue of ***Harrietall v***

University of Kwazulu-Natal,[28] generally applies in review applications brought against disciplinary decisions of universities.

98. Notwithstanding the concession that the application was not frivolous or vexatious, with which I agree, I was urged to award costs against the applicant, principally on the basis that the applicants affidavits were replete with irrelevant material which unnecessarily drove up the respondents' costs and mostly amounted to an attempt at a further appeal. This being in pursuance of the statement in ***Affordable Medicines Trust and Others v Minister of Health and Another***,[29] as being "conduct on the part of the litigant that deserves censure by the Court".

99. Despite the respondents' invitation to do so, in light of the facts and circumstances surrounding this case, I am not prepared to order that the applicant pay the respondents' costs.

CONCLUSION

100. In the premises I make the order set out above.

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JH LOOTS
Acting Judge of the High Court

Appearances:
For the Applicant: JJS Prinsloo SC (instructed by Marius Stenekamp Attorneys)
For the Respondents: N de Jager (instructed by Cluver Markotter Inc.)

[1] ***Helen Suzman Foundation v Judicial Service Commission*** 2018 (4) SA 1 (CC) at [13].

[2] Rule 53(1)(a).
[3] Rule 53(1)(b).
[4] at [13] to [16]. Endnotes omitted.
[5] ***Venmop 275 (Pty) Ltd and Another v Cleveland Projects and Another*** 2016 (1) SA 78 (GJ) at [17];
[6] ***Vivobet (Pty) Ltd v Gauteng Gambling Board*** 2019 JDR 0470 (GJ) at [19]
[7] The record filed by the respondents did, for example, not include a recording or transcript of the proceedings before the CDC (or for that matter the DAC), or the Disciplinary Code.
[8] 2020 JDR 0456 (SCA); [2020] 2 All SA 330 (SCA)
[9] At [71]. While said in the context of public bodies, equally apposite in respect of private bodies , the decisions of which are subject to review by the courts.
[10] 2004 (4) SA 490 (CC) at pars 44 and 48.
[11] 1999 (3) SA 304 (LAC).
[12] 2007 (1) SA 576 (SCA).
[13] At [36].
[14] This is not an exhaustive list. The remaining complaints under this heading not specifically addressed in this judgment are also without merit; especially given the nature of the proceedings before this court.
[15] ***Patensie Sitrus Beherend BPK v Competition Commission and Others*** 2003 (6) SA 474 (CAC) at 501 to 502.
[16] In this regard guidance may be found in how the courts have addressed hate speech in relation to the breach of the relevant legislation. See for example ***Qwelane v South African Human Rights Commission and Another*** 2020 (2) SA 124 (SCA) at [66] and [67], and ***Nelson Mandela Foundation Trust and Another v Afriforum NPC and Others*** 2019 (6) SA 327 (GJ) at [166] to [168]
[17] 2014 (6) SA 123 (CC) at [
[18] 2013 (1) SACR 1 (CC) and 2017 (1) SACR 497 (SCA) respectively.
[19] 2019 (2) SA 596 (GJ) at [27] to [30]. Endnotes omitted.
[20] 2014 (4) SA 614 (SCA).
[21] See for example ***South African Police Service v Solidarity obo Barnard*** 2014 (6) SA 123 (CC) at [217 to [221], Third Concurring Judgment (Jafta J and Moseneke ACJ), and the cases cited there; ***Molusi and Others v Voges NO and Others*** 2016 (3) SA 370 (CC) at [27] to [29]
[22] Endnotes redacted. Emphasis added.
[23] 2016 (3) SA 370 (CC). Endnotes omitted from the quoted passage.
[24] 2014 (6) SA 123 (CC) at [217 to [221], Third Concurring Judgment (Jafta J and Moseneke ACJ)
[25] Act 66 of 1995.
[26] In this regard see, for example, ***ABSA Bank Limited v Naidu and Others*** [2014] JOL 32445 (LAC)
[27] 2009 (6) SA 232 (CC)
[28] 2018 (I) BCLR 12 (CC) at [16].
[29] 2006 (3) SA 247 (CC) at [138]