



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D144/14

In the matter between:

**DR BHELEKAZI MHLAULI**

**Applicant**

and

**MANGOSUTHU UNIVERSITY OF TECHNOLOGY**

**First Respondent**

**COMMISSION FOR CONCILIATION**

**MEDIATION ARBITRATION**

**Second Respondent**

**COMMISSIONER BESS PILLEMER**

**Third Respondent**

**Heard: 24 February 2015**

**Delivered: 31 July 2015**

**Summary: Review of award – applicant charged with various acts of misconduct – successful on majority – numerical superiority of her success not**

**the sole deciding factor to her fate – remaining counts outweigh mitigating factors- dismissal procedurally unfair entitling compensation.**

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## **JUDGMENT**

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CELE J

### Introduction

[1] This is a review application in terms of Section 145 (2) of the Labour Relations Act<sup>1</sup>. It seeks to review, set aside and substitute an arbitration award dated 19 December 2013 issued by the Third Respondent as a commissioner of the Second Respondent. The Applicant wants to be re-instated into the employment she had with the First Respondent. The application was opposed by the First Respondent on the basis that the award is reasonable and does not deserve to be disturbed. Condonation for the late filing of the First Respondent's heads of argument was sought. It is granted.

### Factual Background

[2] The Applicant commenced her employment with the First Respondent during February 2008 in the senior position of Deputy Registrar: Academic Administration. She reported directly to the Registrar, Mr Selvanathan Naidoo. The First Respondent is a university of technology with its Vice-Chancellor and Principal as Professor M R Kgaphola. The Applicant and Mr Naidoo had a troublesome employment relationship. Attempts to resolve their issues were not successful. On the side of Mr Naidoo, the source of the misunderstanding was a failure of the Applicant to carry out instructions given to her by him. Seen from the perspective of the Applicant the challenge came about as a result of Mr Naidoo failing to give her a proper job description with the result that Mr Naidoo kept interfering with the work that she had to do. At various periods of time Mr Naidoo

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<sup>1</sup> No. 66 of 1995 as amended ("the Act").

issued written instructions to the Applicant and the Applicant, either did not carry them out, or she would ask for further details or clarification from Mr Naidoo. The result was that such instructions were never carried out.

- [3] On 10 January 2013 just after 15h00, the applicant was served with a notice of intention to suspend her in the following terms:

'My office is in receipt of a report in terms of which allegations have been made against you. These allegations include, but are not necessarily limited to, you(r) refusing to follow or abide by work related instructions given by your supervisor (Naidoo, the Registrar) as well as you refusing to participate in and/or cooperate with university operational processes'

In view of the seriousness of the allegations against you, I am considering suspending you from the university pending the holding of a disciplinary hearing against you. However before I make a final decision in this respect I require you, should you so wish, to make submissions to me why you should not be suspended. These submissions must reach my office by no later than 16h00 today, Thursday 10 January 2013'.

- [4] The Applicant duly complied and replied to the notice by 16h00. Her response notwithstanding, on the following day, 11 January 2013 the Head of Security, Mr Nkabinde, served a notice of suspension with immediate effect upon the Applicant. He remained in her office until she had collected all her private things and had surrendered some of the office tools to him. He then escorted her out of the premises of the University. The notice *inter alia* stated:

- a. That the Applicant was suspended with immediate effect pending the holding of a disciplinary hearing.
- b. That the Applicant was required to leave the premises immediately.
- c. That the Applicant was directed not to have any form of communication, either directly or indirectly, with any of the employees of the employer

regarding the pending disciplinary enquiry without the permission of the Office of the Vice Chancellor and Principal.

- d. That Applicant is specifically required before she leaves the University to hand over to Naidoo all details and plans that she had made to date towards the coming registration of students for the current academic year.
  - e. That the Protection Services Directorate of Respondent has been mandated to manage her smooth departure from the campus, and that it is expected that she will cooperate with them, and abide by any appropriate instructions that they may give her.
  - f. That Applicant must be available at all times on her phone during work hours.
- [5] The Applicant left the premises of the respondent on that day but she did not conduct that formal handover of her portfolio to Mr Naidoo as duly instructed by Professor Kgaphola in the notice of suspension. The internal disciplinary hearing was scheduled for hearing on 20 February 2013. Applicant submitted a request for the hearing to be postponed. No response was forwarded to her request. On 20 February, she did not attend the hearing nor did she notify the First Respondent that she would not be in attendance. On the same date, she instead went to have a meeting with her attorney in his office and a reply to the ten allegations made against her by the Respondent was prepared and telefaxed to the First Respondent at about 9h45. When Applicant telephoned the First Respondent to enquire as to whether the telefax had been received she was told that the disciplinary hearing had taken place in her absence and had been completed prior to receipt of her telefax. Later on that day she attended to a specialist psychiatrist Professor D L Mkhize and she obtained a medical certificate of indisposition for that day. She was subsequently found to have committed all the ten counts of misconduct with which she was charged and was dismissed.

[6] Without pursuing an internal appeal, the Applicant referred an unfair dismissal dispute for conciliation and when the dispute could not be resolved, she referred it to arbitration. Having listened to all the evidence and submissions the Second Respondent found that the First Respondent had not proved the commission of counts 6 and 7 and she acquitted the Applicant of them while finding the Applicant guilty of the remaining eight counts. She found that the dismissal was procedurally and substantively fair and confirmed the dismissal. The eight counts that she was found guilty of were described by the First Respondent in the following terms:

Charge 1 – Gross misconduct

It is alleged that you were instructed in terms of your letter of suspension dated the 11<sup>th</sup> January 2013 to do a handover report to your Supervisor and that you refused to do the said handover report and even at the date of drafting these charges, you had not done the said handover report;

Charge 2 – Gross Misconduct

‘It is alleged that you were instructed by e-mail of the 10<sup>th</sup> January 2013 by your supervisor to authorise the order for the purchase of the megaphones to be delivered on the 11<sup>th</sup> January 2013 but you responded by e-mail that you do not expect an instruction from your supervisor and you did not follow the instructions given and the megaphones were not delivered on the 11<sup>th</sup> January 2013;

Charge 3 – Gross misconduct

‘It is alleged that you were instructed by e-mail of the 8<sup>th</sup> January 2013 by your Supervisor to amend all records to reflect the adjusted fee increase but you responded in a defiant manner by e-mail of the 8<sup>th</sup> January 2013 and then defied the instruction by not effecting the amendment on the Exemption/Credit Application Form from R20.00 to R50.00 per subject as instructed;

Charge 4 – Gross misconduct

'It is alleged that you were instructed by e-mail of the 7<sup>th</sup> January 2013 by your Supervisor to attend a Registration Planning Meeting on the 9<sup>th</sup> January 2013 but you failed to attend it and did not even make an apology;

Charge 5 – Gross misconduct

'It is alleged that you were instructed by e-mail of 12<sup>th</sup> December 2012 by your Supervisor to give a report on Registration but you responded by e-mail of the 13<sup>th</sup> December 2012 alleging that Registration is your responsibility and then you failed to give the report;

Charge 8 – Gross misconduct

'It is alleged that you were instructed by e-mail of the 3<sup>rd</sup> December 2012 to extend an invitation to Ms. Mbali Mkhize, a Director at the University, to attend a Selection and Registration Planning meeting that you had convened, however, you defied the instruction and you even barred Ms. Mkhize from attending the meeting;

Charge 9 – Gross Misconduct

'It is alleged that you were instructed by e-mail of the 23<sup>rd</sup> May 2012 to convene a meeting to discuss inter-alia registration but you responded by e-mail to the effect that you have a problem with the instruction and you did not convene the meeting;

Charge 10 – Gross misconduct

'It is alleged that you gave instructions to the Faculty Officer to change and increase a PreTech student examination mark and to further unblock the student without following a due process and no re-marking having taken place'.

Evidence led at arbitration

- [7] The first respondent called and led the evidence of six witnesses. They are Mr S Naidoo the Registrar, Mr S G Mkhize the interpreter at the internal disciplinary hearing, Mr R S Nkabinde the Security Head, Mr S Mthembu the Faculty Officer; Engineering, Ms N Xaba the Secretary in the Deputy Registrar's Office and Mr T Ntsikwe the Secretary in

the Protection Services, working under Mr Nkabinde. Mr Naidoo was recalled for further cross examination. The applicant was the only witness for her case. A brief outline of the evidence shall be dealt with. The sequence in which witnesses testified shall not necessarily be followed.

- [8] Mr Mkhize said that he attended the internal disciplinary hearing and that it commenced in his presence just after 09h00. He expected to see the applicant and a union official but none appeared. Mr Naidoo testified and a number of documents were handled. The proceedings were conducted in English between the Chairperson, Mr Jafta and Mr Naidoo. There was no cross examination. He did not interpret but just sat and listened. The hearing lasted for about 35 minutes and the Chairperson concluded by saying that he would make his decision later.
- [9] Mr Nkabinde testified on counts 1 and 2. In respect of count one he said that on 11 January 2013 he was given an instruction by the Vice-Chancellor to serve a letter of suspension upon the applicant and he had specific instructions to carry through in the process. He had to serve the letter, to get a return of service and to afford the applicant an opportunity to do a handover with Mr Naidoo who occupied an office next door to that of the applicant. He did as instructed. When it came to the handover, the applicant specifically said that she was not going to go to Mr Naidoo's office to do a hand over, saying that it was just not going to happen as she would not bow down to him or his authority. He spent about one to two hours waiting for the applicant to collect her things and to bid farewell to her friends and to some of the students. She made some telephone calls and her friends and students came to talk to her. He could not tell where Mr Naidoo was when he handed the suspension letter to the applicant. He had last seen Mr Naidoo going to his office as he, Mr Nkabinde, approached the applicant's office. He could not deny that Mr Naidoo was at the Human Resources offices when the suspension notice was served on the applicant. He disputed any suggestion that he prohibited the applicant from moving around in the office due to being on suspension. Upon her leaving the office she handed to him her office key, the office laptop and the staff card.

- [10] In respect of count 2 he said that he attended a planning meeting held on 12 December 2012 by various stake holders. It was to discuss what was needed for the registration process of 2013 process which was to start around 14 January 2013. The meeting was held in Mr Naidoo's office but the applicant was not in attendance. In that meeting he was asked to get a quotation for megaphones. They would be used to address a large group of students for instance to address them on fraud awareness on campus. After the meeting his secretary obtained the quotations from a company listed in the database of the university. In January 2013 it emerged that the company which gave the quotation was not going to deliver the megaphones in time. He discussed the issue with Mr Naidoo who wanted to use his money to purchase the megaphones. The Department of Protection Services was however able to source the megaphones from another company called Teamloco Audio and Electronics on 12 January 2013, a Saturday. The university was to open on the following Monday. He denied having discussed the issue of megaphones with the applicant in December 2012. He recalled that on 15 February 2013 he went to the applicant's house to deliver a 35 paged bundle of documents.
- [11] In relation to the internal disciplinary hearing of the applicant, Mr Nkabinde said that he attended it and was the first witness to testify. He gave his evidence in English, which took him about six minutes and he left. He was later called back to the hearing to give further evidence. By then it was about 11h00. In his view therefore the hearing could not have lasted for about 35 minutes.
- [12] Mr Nkululeko Xaba testified that he was employed by the first respondent as a Secretary in the Deputy Registrar's office and therefore a secretary to the applicant at times material to this matter. On 8 December 2013 he received a quotation from the Registrar's office with an instruction to process it further for the purchase of megaphones. He stamped it to indicate the date of receipt and handed it to the applicant with a request that she authorized him to proceed with the making of the order. It was the only quotation for consideration. Normally there were to be three quotations to choose from. The applicant authorized him to proceed with the first leg of the order. He processed the order in the computer system and a serial number with

letter XY was generated by the system. He processed the requisition so as to await final approval, which if electronically granted creates another serial number with letters RY in the documents that are then produced. He then went back to the applicant for the second leg, which is the final authorization process. The applicant told him she knew about the order and would authorize it.

- [13] When on the next day, 9 December 2013, the Applicant had not given him authorization, he sent her an email as a reminder. He also went to her to remind her and she told him she was aware of what was to be done. He met the Registrar who wanted to know if there was progress in the order and he told the Registrar that he was still awaiting the Deputy Registrar's approval. Then on 10 December 2013, Mr Xaba received an email copied to him by the Registrar. It was directed to the applicant about the order. He again went to the applicant for approval but none was given. Such approval would have come to him electronically by an email that would be automatically generated when the Applicant issued the approval. He would then send it to procurement that was to process the final stage of the order. Seeing that there was a delay in the matter, he telephoned the megaphone suppliers who had given the quotation. That was when he discovered that the suppliers did not have the stock they required. He went to the Applicant and reported the problem. The response from the Applicant was that it was obvious that the order had to be cancelled. He denied that each time he went to the Applicant he found her always busy with something.
- [14] Mr Naidoo testified and he initially described the organogram with its reporting lines. He was the registrar and two Deputy Registrars reported to him. They had teams reporting to them. He described an advertisement issued in 2007 for the post of Deputy Registrar Academic with duties of the incumbent and key performance areas reflected in it. He said that the Applicant was appointed against that position in 2008. According to him the Applicant was familiar with the processes followed by the Human Resources, (HR) Department. If there was a need for the Applicant to get a job description she had to approach the HR Department. In relation to the attendance of disciplinary hearings he said that the Applicant had to be familiar with how to report her absence if she could not

be in attendance. He said that she was a Secretary of the Academic Disciplinary Committee dealing with disciplinary hearings of students.

[15] Mr Naidoo's evidence then dealt with each count of misconduct faced by the Applicant. Evidence in relation to just a few of the charges shall be dealt with here. In respect of count 1, he confirmed that he received no indication from the Applicant that she would do the handover she was directed to do on her last working day. In respect of count 2, he said that he was alerted by Mr Xaba that the order for megaphones was delayed by the absence of final approval by the Applicant. He then issued an email to her and copied it to Mr Xaba, saying:

'Dear Dr Mhlauli, please authorize the order for the purchase of the megaphones. We need this to be delivered tomorrow. Thank you. S Naidoo. Registrar'.

[16] He said that the applicant responded on the same day at about 11h00 to his email and she said that:

'Mr Naidoo, (the Dear is missing) please note that I planned the 2013 registration in October 2012. The megaphone order was one of the orders we discussed with protection services towards the end of last year since we once used them. Therefore I do not expect an instruction and deadlines about it from you especially that I am also aware that they are needed next Monday'.

[17] He described the megaphone as a voice amplifier with a siren to be used in addressing crowds of students to avoid any stampede by them as it happened at the University of Johannesburg where a stampede led to the death of a parent. He said that had the Applicant ordered the megaphones towards the end of 2012, they would have been delivered before the end of that year, which did not happen. The megaphones were finally sourced through the protection services and were delivered on Saturday, 12 January 2013.

[18] In respect of count 3, Mr Naidoo said that he issued an email dated 8 January 2013 to the applicant, directing her to amend records to reflect adjusted student fees in the following terms:

'Dear Dr Mhlauli, in addition to the general increase of 9% on tuition and residence the following were also approved by council on 5 December 2012:

1. Fee for replacement certificates increase by 9%, fees for remarking increase by 9% and application for exemption/credit increase to R50 per subject.

Kindly amend all records to reflect the adjusted fees. Regards, registrar."

[19] The applicant responded to the email on the same day saying:

'Dear Mr Naidoo, is it possible to have background to this fee increase. I look forward to hearing from you. Dr B Mhlaul'

[20] He said that such increases happened annually and once council had decided on the matter, the Departments had to implement those decisions, failing which they would be committing serious misconduct. According to him a head of one of the Departments communicated to the applicant that the fee charged by the University for exemption, or credit increase was too low comparatively. The Applicant showed him that communication. So the applicant had that background but failed to effect the changes until he made the changes himself.

[21] In relation to count 4, Mr Naidoo said that an invitation to attend the meeting of 9 January 2013 specifically indicated that the applicant had to present a report on the selection of new candidates. She did not attend the meeting neither did she give him a report to present. He testified that the registration of students at higher learning institutions had become the focal point at the beginning of the year so much so that officials of the National Higher Education Department required to be briefed regularly on it. He said that the applicant was compelled to attend the meeting and present her written or verbal report as he and the Principal would also address the meeting.

[22] On 12 December 2012, Mr Naidoo issued an email to the Applicant, pertaining to count 5, seeking to be furnished with information relating to various issues including criteria used in the selection of student assistants, the breakdown of items that were to be accommodated by Applicant's registration budget and he asked for a copy of the advertisement to be put on a newspaper and the name of that newspaper. The

information was to be furnished to Ms Mkhize on the next day. That information was relevant to the state of readiness of the University in selecting and the registration of new students for 2013. The Applicant responded by email on the next day by saying:

'In response to your email I wish to be enlightened if the application, selection, admission and registration procedures that I developed and were approved by the last senate meeting have changed? Why and when? What I am referring to is that according to this senate approved document, registration, planning is my responsibility and it has always been my responsibility. Thank you. Dr B Mhlauli'.

[23] Mr Naidoo understood the response to be a refusal to supply him with the information he needed. He then issued another explanatory email to her on the same day, saying;

'Dear Dr Mhlauli, it is unfortunate for you not to respond to the concerns. Please allow me to remind you that you report to this office any referrals must be responded to. With regard to the selection and registration, the vice-chancellor and principal, through the office of the executive director, had delegated the registrar to oversee the entire process which includes the centralization of the budget. As indicated to you, you were to be briefed of the developments which were scheduled on Wednesday at 9 'o clock. You were also invited to the follow up meeting of the planning committee on the same day. Unfortunately you were not at work. In order to avoid any duplication and [indistinct] shortcomings, please can now have your responses'.

[24] Mr Naidoo said that no response was ever forthcoming from the Applicant, his explanatory email notwithstanding. He was concerned about weaknesses he said there were in the first registration semester where he said there was quite a bit of congestion at some of the steps during that registration process. He conceded that at operational level the applicant was responsible but added that at strategic and executive levels the Registrar featured.

[25] Mr Naidoo then testified in respect of counts 8, 9 and 10 in a similar manner as with the previous counts.

[26] The Applicant testified in defense of herself. She began with a background of the difficulties she said she experienced when she assumed her duties, saying she was not

inducted which meant that no job description was given to her. The result was that within a month of her starting to work there were clear communication channel issues. She began to receive instruction from Mr Naidoo through her subordinates. In some instances she would issue instructions only to be told by subordinates that different instructions were given to them. To resolve that problem she wrote an email dated 13 March 2008 to Mr Naidoo asking for a meeting to resolve the issues and to be informed what her role and responsibilities would be. She was not favoured by any response to that letter.

[27] There was no improvement in the working conditions and therefore she wrote an email to the Deputy Vice-Chancellor Academic, Professor Zingu, dated 7 April 2008. Again she was calling for a meeting to clarify unclear lines of communication between her office and that of the Registrar, whom she accused of interfering in her responsibilities in the admission, registration examinations and graduations. At her instance a meeting of Mr Naidoo, Prof Zingu and the applicant was convened. She was informed that Mr Naidoo used to perform the functions allocated to her. As she was appointed to assist him, Mr Naidoo was asked to create space for her so that she could work freely when attending to the matter of roles and responsibilities. She said that no such space was given to her by Mr Naidoo. It was graduation period. After that they had to prepare for the admission and registration of students. She convened meetings with role players and Mr Naidoo never offered any assistance to her.

[28] When she asked for a budget to cater for the registration process Mr Naidoo refused with it. He also refused to have her move to a new office allocated to her. She had no computer and office telephone until the intervention of a Director for HR. Mr Naidoo refused to have her attend an off-campus training that was relevant to the performance of her duties. At the beginning of the second semester of 2008 she was even served with a summons to appear before a disciplinary hearing, which hearing never materialized. The University had problems in 2009 leading to the appointment of external consultants. She reported her problems to those consultants. Nothing came of it. A new Vice-Chancellor was appointed and in 2010 she reported her problems to him as well. Mr Ngcamu an organizational Development Officer was appointed in 2010. He

worked with two ladies. The applicant wrote a letter addressed to Mr Naidoo requesting the intervention of Mr Ngcamu. Mr Naidoo consented to such request and the applicant was interviewed by Mr Ngcamu and his team. Nothing turned on the intervention by Mr Ngcamu.

[29] In 2011 the applicant reported her problems to the Executive Director In the office of the Vice-Chancellor. She learnt that her colleague, the Deputy Registrar Policy had made similar complaints about Mr Naidoo. Advocate Ndaba was appointed by the University to attend to the complaints. He held various group sessions in a kind of team building workshop with employees of the Registry Department. In Applicant's group it transpired that the main problem was the absence of a job description for each Deputy Registrar and Advocate Ndaba supplied a copy of the job description for the whole Department. Any further interventions did not help to resolve her miseries to her satisfaction as her exclusion from the attendance of important meetings continued even after she had authored and presented a document entitled 'selection, admission and registration of students' to all the faculty boards and the senate at the end of 2012. At one stage she was questioned by the Vice-Chancellor on why she articulated her complaints to the Deputy Vice-Chancellor Academic instead of reporting to her line manager.

[30] On 9 January 2013, she wrote a letter of complaint about a parallel registration committee and addressed it to the Deputy Vice-Chancellor, requesting an urgent intervention in the matter. On the next day she was served with a notice of intention to suspend her, to which she had just 30 minutes to respond. It was served on her at 15h30 while she was at D Laboratory. She had to rush to her office to draft a response and find a student assistant to send the response through. She had to come to terms with the pain of being served with the notice and to deal with its urgency.

[31] On 11 January 2013, at about 09h00, Mr Nkabinde served her with a notice of suspension, also telling her to do the hand-over with Mr Naidoo. The notice suspended her with immediate effect, pending the holding of a disciplinary hearing with immediate effect. She was to leave the premises of the University with immediate effect upon being

served with the notice. She was also required to hand over to Mr Naidoo all details and plans that she had regarding the 2013 registration. Six items of such details were listed in the letter. She said that the notice confused very much as she had not slept well due to the notice of intention to suspend and due to the fact that she was at the end of a long hard working week. Some of the information sought was public knowledge and it confused her to be asked to hand it over. To furnish appropriate statistical information she needed help from another person.

[32] Just after finishing reading the letter two telephone calls came in for her. One came from a student representative council member, Mr Mpanza, telling her not to leave as he was coming to her office. Another came from Mr Xaba who informed her that Mr Naidoo wanted to see her at the HR offices, which were a distance away from hers. She had a problem of where and how she had to do the hand-over if Mr Naidoo was at the HR Offices. Having been told that Mr Naidoo was at the HR offices she turned to Mr Nkabinde and said that she was not going to be able to handover but she said it using IsiXhosa, her home language. She started packing her belongings and a number of people congregated in and around her office, including Mr Mpanza. Mr Mpanza told her he came to fetch her to go to the HR offices where there was a meeting of Mr Naidoo, the HR Director and Mr Mpanza. Mr Nkabinde reacted by shaking his head and she conveyed that message to Mr Mpanza. At about 10h00 she was escorted to her car and she left the University premises, having been suspended by the very Vice-Chancellor from whom she had, on a number of occasions, elicited help.

[33] She spent two weeks at home and in that period she took ill and had to consult Professor Mkhize, a Psychiatrist. He put her on treatment for six months. Then either on 4 or 5 February 2013, a Monday, Mr Nkabinde with another colleague arrived at her house to serve her with a copy of a charge sheet. On reading the charges her medical condition worsened. She gathered strength and on Friday she began to work on her responses to the charges as she was required to do within ten days of the receipt of the charges. The date of hearing was 20 February 2013. A number of emails of various dates were referred to in the charges. She needed them to enable her to respond to the charges. She first telephoned Mr Nkabinde who referred her to his secretary as he was

not in his office. The Senior Director of legal services she tried to contact was not available.

[34] The Applicant then wrote a letter requesting emails mentioned in the charges and sent it on 11 February 2013 by fax to the Vice-Chancellor. When she was not favoured with a response, she wrote another letter on 14 February 2013, requesting for documents and an extension of time by 5 days to submit her response. She was not feeling well on that day and she went to consult with her Psychiatrist. On 15 February 2013, Mr Nkabinde and his colleague arrived at her house to give her an envelope which once opened had about 35 documents. She signed for the delivery. She made an appointment with her lawyer who helped her formulate her responses to the charges.

[35] On 19 February 2013, she followed up the request of the extension of time to submit her response but the Vice-Chancellor's secretary told her there was no response to her request. She also met her lawyer on the same date to finalize her responses and a letter. They arranged to meet early on the next day at the attorneys' offices. She fell ill as a result they finished the letter late and faxed that at about 09h45 on 20 February 2013. The letter requested that a new date of hearing be set and communicated to her lawyer. It also requested further information. It was then faxed and a telephone call was made to the Vice-Chancellor's secretary who acknowledged its receipt. The secretary confirmed also that the disciplinary enquiry was proceeding, with Mr Jafta as the initiator. Mr Luthuli, her lawyer telephoned Mr Jafta who said that the hearing had finished and the chairperson has already left. The Applicant left offices of her lawyer and went to consult her Psychiatrist. At her request a medical certificate was sent to the University and she confirmed its receipt when she telephoned the Secretary of the Vice-Chancellor. Further correspondence was entered into between her lawyer and one for the University.

[36] On 25 March 2013, a letter terminating her employment with the University was delivered at her house. She took the letter to her lawyer who, in turn wrote to the University asking for information on the internal appeal procedures but no response was given to that letter. The applicant was dismissed without being given a chance to give

evidence in mitigation after she was found guilty of all 10 counts she had been charged with.

[37] In her evidence, the Applicant proceeded to testify on each count of misconduct. Her written responses are encapsulated in the award and shall not be repeated here. In respect of count 2, she said that ordering the megaphones was not her job but she had volunteered to order them due to the lack of funds by the protection services whose duty it was to make that order. She said that she did grant the final authorization of the megaphones in the computer system as she had no reason not to. Mr Xaba declined to supply her with a document to support her claim as it would be obvious that, if she produced it, she would have obtained it from him, a violation of one of the conditions of her suspension. In respect of count 3, she admitted asking for a background to the fee increase. Her evidence was that the fee increase was part of the matters for discussion in 2010 where she was also involved but that the Vice-Chancellor expunged it from the agenda then. She was surprised to be told that the fees had been increased and wanted to know how it came about.

[38] In respect of count 4, the Applicant was of the view that Mr Naidoo had nothing to do with the convening of meetings for registration as it was, and had been for the past five years, her prerogative to do so. It surprised her to be called to such a meeting by Mr Naidoo. She regarded his conduct as interfering with the performance of her duties, something she had been complaining about for a while. She said that the past experience of the University was never to charge people who were invited to meetings but did not attend. The attendance register would merely indicate those present, apologies made and indicated absentees. Even those who did not attend senate meetings were never charged, she said. She added that Mr Naidoo knew how busy she was in that week and should have understood that it was not possible for her to attend. In respect of count 5 she said that it was fair of her to have asked Mr Naidoo if there was a change in procedures which had been adopted by Senate since their last meeting. She regarded the contents of the report sought from her as a matter falling within her domain of work in respect of which Mr Naidoo had no say, as with count 4. She said that Mr Naidoo was exhibited an autocratic style of management and that he

gave de-contextualized instructions, showing communication problems they were experiencing in the Department. She said that had he responded to her question she would have been able to give the report he asked for, as she gave the report on 5 December 2012.

- [39] In relation to count 8, the Applicant said that the meeting forming the subject matter was convened at the Senate Chamber for academic heads of departments. The count is about a failure to invite Ms Mkhize, a liaison officer between the University and the media, into the meeting. The Applicant said that she did not think that Ms Mkhize was to be invited to attend that meeting. In any event she did not know that Ms Mkhize was already waiting outside the Senate Chamber when Mr Naidoo asked that Ms Mkhize be invited to attend the meeting. For Ms Mkhize to be waiting, it meant Mr Naidoo had invited her to the meeting without him telling her, again interfering with the performance of her duties. She denied disallowing Ms Mkhize from entering the chamber. She said that if Ms Mkhize had come into the meeting she would not stop her as she had not stopped a head of mathematics department who was not supposed to be there.
- [40] Count 9 relates to an alleged failure of the applicant on 23 May 2012 to convene a meeting to discuss, inter alia, registration issues, when she responded to Mr Naidoo's instruction on the same day by saying that she had a problem with de-contextualized instructions from him. She said that it was unfair for the employer to wait for about a year to charge her when she was mostly at work in that period. Her main problem, she said, was that Mr Naidoo did not induct her upon her appointment as a result of which she worked independently but he would still just come and give her instructions out of the blue. As with count 3 she said that she wanted him to give her background to the instruction.
- [41] The last is count 10 which relates to the applicant having given an instruction in January 2011 to a faculty officer, Ms Mthembu, to change and increase a PreTech student examination mark and to further unblock the student without following a due process and no re-marking having taken place. She said that for the period 27

January 2011 to February 2013 nothing prevented the University from charging her with this misconduct. She said that, in any event she had discussed the matter with Mr Naidoo before going on her sick leave and he agreed to the change being effected and that she therefore had committed no wrong. She compared the case with of another student which she said was wrongly approved by Mr Naidoo. She picked up the wrong approval for the graduation. She asked Mr Naidoo about it but he offered no explanation and yet he was never charged for it.

### Chief findings of the Third Respondent

[42] The Commissioner issued an award by examining evidence and submissions count by count. She therefore made individual findings per count. It will do justice to quote each finding made and I do so verbatim below.

#### Count 1

'The reason Applicant gave for not complying with the instruction that it was impossible to do so, is not true since it obviously was possible. Her alleged belief that it was impossible is not reasonable and is no defence to the charge, but at best a mitigating feature. It clearly was not impossible to do the handover, and if she had said that she was too upset and not in a state of mind to deal with it, that may have ameliorated her insubordination, but that was not her response. She should have met with Naidoo, and done the handover as best she could in the circumstances so as to ensure that the registration process was not disturbed. In these circumstances I find that the Applicant is guilty of misconduct. I deal with sanction later in the award...

#### Count 2

If the Applicant had authorised the purchase her failure to inform Naidoo that she had done so and to have responded in the rude way in which she did constituted insubordination and misconduct on her part. The probabilities point to Applicant not having authorised the purchase. Xaba said he continually reminded her and there would be no need if she had done what was required of her. On balance I prefer the version of Xaba and find that Applicant failed/refused to authorise the purchase of the megaphones and then responded rudely to Naidoo when he made enquiries about it. This had the effect

that the process was handled through a different account because of the Applicant's obstructive attitude...

### Count 3

Naidoo's email made it clear to Applicant that it was a Council instruction to amend the fees. To ask for particulars in the circumstances is unreasonable and leaves me with the impression that she was simply being defiant. If she had a genuine concern that there was a mistake, as she now seems to be saying, then surely she would have made that clear at the time. The tone of her e-mail does not indicate that there was some mistake in the figures. Applicant's conduct constitutes insubordination. It was her responsibility to adjust the fees, she received a legitimate instruction to do what was required of her and she refused or prevaricated such that Naidoo had to make the adjustment himself...

### Count 4

In my assessment the Applicant's excuse for refusing to attend the meeting is unacceptable. Naidoo, the Registrar, and her line-manager, called the meeting to deal with registration, a meeting that was to be attended by the Principal and Vice Chancellor and at which the Applicant had a role to play. Her deliberate refusal to attend because she did not herself call the meeting or was too busy constitutes in these circumstances insubordination. Applicant holds a responsible position in the institution. Registration is vital and the process has to run smoothly. Even if she had some objection to the Registrar calling the meeting, and not asking her to call it, simply ignoring the meeting when she had an important role to play, without saying she would not attend, is most irresponsible...

### Count 5

If the person to whom one reports, and in this case the Registrar, who holds a senior position in the institution, instructs such a person to prepare a report he says he needs then he is entitled to have the report prepared and not have to engage in a debate as to the necessity for it. What Applicant did was to fail to comply with the instruction without refusing point blank but nonetheless her conduct appears to be designed to frustrate Naidoo in the performance of his duties. It is clearly insubordinate; it was not a genuine request for information that would have been necessary to prepare an appropriate report. It was instead, as Applicant explained, a refusal to do what she was instructed to do

unless she was satisfied that there had been changes made to the registration procedure...

#### Count 8

It is common cause that an instruction was issued from the office of the Vice Chancellor which said that Mkhize should attend the meeting. It is also common cause that Naidoo sent an e-mail setting this out. It is common cause that Naidoo was at the meeting and he requested the Applicant to permit Mkhize to attend the meeting, and it is also common cause that she did not attend. Naidoo said that it was because Applicant refused to allow her to attend and Applicant's position was that the meeting was for the academic departments and marketing had no business being there. It is most improbable in those circumstances that Naidoo would not have told her the reason why the Vice Chancellor wanted Mkhize to attend the meeting, and that she was waiting outside for permission to come in. Applicant's refusal to allow Mkhize to attend the meeting constitutes insubordination...

#### Count 9

It is clear that there was an instruction that Applicant decided not to obey. Her refusal to comply with the instruction constitutes insubordination. The delay in raising the allegation is explained by the Respondent that there was an intervention to mend relationships in the department and it would have been inappropriate to pursue it at that time. I find this to be an acceptable reason and that when the intervention failed it was not unfair to introduce the event as one of the charges of misconduct...

#### Count 10

[a] It is common cause that Applicant changed the student's mark without following the required process. Whether it was a legitimate change is not relevant. The fact is that she did not follow the process. Applicant's excuse is that Mthembu, the underling, should have known and followed the process, which seems improbable, but even then she surely should have checked that the process had been properly adhered to. On the common cause facts Applicant is clearly guilty of misconduct as reflected in the charge.

- [b] Naidoo's evidence adequately explained the reason for the delay in raising the allegation.

#### General Motivation and analysis of evidence and argument

##### Substantive fairness

[6.1.1] The applicant spent a disproportional part of her evidence in chief complaining about Mr. Naidoo and his management style. Her perception she said was that he lacked leadership skills and her clear inability to work with him in a normal productive manner demonstrated that the relationship between the two of them was very strained.

[6.1.2] On applicant's own evidence the relationship appears to have broken down. There is nothing to suggest that if she were to return to work the situation would be any different.

[6.1.3] The applicant's complaint that there was no proper job description is no excuse for her not to do what she was instructed to do. She held a senior position and there were attempts (endorsed by Naidoo) to deal with the problems through a number of interventions. The fact that there was no job description is no excuse for insubordination.

[6.1.4] The accumulated effect of Applicant's insubordination was to destroy the employment relationship. Each event that constituted misconduct cannot be viewed in isolation as it was part and parcel of a pattern and taken cumulatively was serious, so serious in fact that dismissal is in my view a fair and appropriate sanction.

[6.1.5] I find that the dismissal was substantively fair.

##### Procedural fairness

[6.2.1] Applicant chose not to attend the disciplinary hearing. In the result when it commenced she was not present. She was instead busy in her attorney's office drafting a reply to the allegations. The response was sent to the Respondent approximately forty-five minutes after the start of the hearing,

and after it had been completed. Applicant did not inform anyone that she would not attend, nor did she send a representative. If Applicant was well enough to be in her attorney's office at that time, she was certainly well enough to attend the disciplinary hearing, even if it was to apply for a postponement if she was sick or needed more time to prepare or to ask for relevant documentation. Applicant only visited Dr Mkhize, a specialist psychiatrist, after she heard that the disciplinary hearing had been held, who recommended that she take sick leave that day. While Applicant claims she wrote a letter asking for documentation, she had no right to presume that the matter was postponed without confirmation and she failed to attend at her peril. Applicant chose not to attend the disciplinary hearing and cannot subsequently claim that the dismissal was procedurally unfair because it took place in her absence. In my opinion Applicant was given sufficient time to prepare a reply to the notice of intention to suspend, which she did and submitted.

[6.2.2] In the circumstances I find the dismissal procedurally fair.”

#### Grounds for review

[43] The Applicant submitted that the Third Respondent committed a gross misconduct in relation to the duties of the Commissioner when she made her findings in respect of each of the eight counts, inter alia, in that:

Count one: It was impossible to do the hand-over with Mr Naidoo because she had been suspended with immediate effect. Also, because Mr Naidoo was at the HR offices, a distance away from hers and because the suspension notice listed a number of things she had to do as a hand-over which required a period of about a week.

Count two: She approved the authorization for the purchase of megaphones and there was a document to prove it.

Count three: Mr Naidoo's instruction to amend all records to reflect the adjusted student fee increase was emailed to the applicant on 08 January 2013 and

no time frame was mentioned therein for the amendment of the records. The applicant was suspended on 11 January 2013. When the applicant testified at the arbitration, she stated that the appropriate committee to approve the fee increase was one of the Council committees, namely, the finance and remuneration committee. Mr Naidoo was unreasonable to expect someone occupying a senior position like the one occupied by the applicant to simply carry out any instruction without seeking clarity if there were issues to be clarified and that there was nothing wrong with the enquiry made by the Applicant in this regard.

Count four: To a charge of failing to attend the Registration Planning Meeting and for failing to make an apology, the totality of the evidence presented at the arbitration clearly indicated that it was common cause that it used to happen that some officials or employees of the First Respondent would be invited to attend the meetings, including the Senate meetings but they would not attend such meetings and they would not apologize for failing to attend. It was common cause also that such officials or employees were not disciplined for failing to attend the meetings without any apology. Further, it was common cause that the Senate Meetings were most important meetings at the First Respondent's workplace.

Count five: To a charge of failing to give Mr Naidoo the report on registration, in terms of the written communication which took place between the applicant and Mr Naidoo on 12 December 2012, there was no refusal by the applicant to give Mr Naidoo the report he wanted. The applicant merely sought clarity from Mr Naidoo on whether or not the application, selection, administration and registration procedures which she developed and which were approved by the Senate Meeting had changed. Thus, it formed part of the applicant's testimony at the arbitration that she sought clarity from Mr Naidoo on the issue because it came as a surprise to her that Mr Naidoo had decided to usurp her function without any consultation with her. It was reasonable and or expected to have someone occupying

the position of the applicant to discuss issues with the line Manager, especially, if there was uncertainty on why things were to be changed or done differently.

Count eight: In respect of the charge for defying the instruction to invite Ms Mkhize and for having barred her from attending a meeting, it formed part of the applicant's testimony at the arbitration that she did not see Mr Naidoo's email in question as same would have reached her office after she had already left for the meeting. When Mr Naidoo discussed Ms Mkhize's invitation with her in the chamber, she explained to him as to who were the relevant officials to attend the meeting, that she never barred Ms Mkhize from attending the meeting, that she would not have stopped her if she entered in the chamber as with the head of mathematics department who was in the meeting but was not prevented from attending the meeting although he was not supposed to attend it.

Count nine; To a charge of failing to convene a meeting to discuss amongst other things registration, a charge emanating from the incident which allegedly took place on 23 May 2012 and which the first respondent always knew about, the first respondent failed to discipline the applicant for the said allegation within a reasonable period. The first respondent was always aware of the alleged misconduct but it decided not to charge the applicant with it because Advocate Ndaba was trying to intervene to correct the relationship amongst the employees. The relevant charge sheet is dated 04 February 2013 and it was served on the Applicant after the said date. There was no intention by the first respondent to discipline the applicant for the alleged misconduct and that it only decided to charge her for same after there were new allegations of misconduct against her. Mr Naidoo failed to link Advocate Ndaba's intervention with the period of the relevant allegation. The first respondent conveniently used Advocate Ndaba's intervention as a scape goat herein. The employer's failure to discipline the employee for misconduct within a reasonable period

amounts to the employer's waiver of its right to discipline such employee. In relation to the merits of the charge, the applicant testified at the arbitration that's she did not refuse to comply with Mr Naidoo's instruction but she indicated her concern about the type of instruction issued to her by him.

Count ten: To the charge of instructing the Faculty Officer to change and increase a Pre-Tech Student examination mark and for unblocking the student without following a due process and no remarking taking place, emanating from the incident which allegedly took place in October 2010, no valid reason was given by the First Respondent at the arbitration as to why there was such a lengthy delay in charging the applicant for this charge. The first respondent's lateness in this regard was worse and that it definitely waived its right to discipline the applicant for the alleged misconduct. It was common cause that the issue about assisting the student was discussed and agreed upon by the applicant and Mr Naidoo. The applicant testified that all she did was to ask the Faculty Office to assist the student accordingly and that she never instructed her to ignore or not to follow the applicable procedures when assisting the student. Her evidence was largely supported by that of the Faculty Officer, Ms Mthembu and by that of Mr Naidoo himself. The Applicant testified that Mr Naidoo, Chetty and the then acting HOD of the Electrical Department wrongly assisted Mr Sampeyi to graduate in 2012 instead of 2013 and that they did this in contravention of the applicable Rules and Regulations of the first respondent but they were never charged for this.

#### Opposition to the review application

[44] In opposing the review application a number of submissions were made by the Third Respondent. It was, inter alia, contended that as assessed against the test of reasonableness, the award is one which is both reasonable and rational. In arriving at her decision, the Third Respondent:

- 1 gave both parties a full opportunity to present their respective versions in evidence;
- 2 correctly identified the issue before her, being whether or not the dismissal of the applicant was substantively and procedurally fair;
- 3 understood the nature of the dispute which she was required to arbitrate, being whether or not the applicant was guilty of any or all of the acts of misconduct complained of and, if she so found, whether the sanction of dismissal was a fair sanction;
- 4 dealt with the substantial merits of the dispute; and
- 5 arrived at a decision which another decision maker could and would have arrived at on the evidence before her.
- 7 As such, the Award does not fall to be interfered with on review.

[45] The Applicant was said to have categorised her grounds of review as 'gross misconduct' and 'gross irregularity in the conduct of proceedings' on the part of the third respondent. As may be seen from the complaints which form the several bases for such alleged grounds of review, the applicant's various challenges to the award were said to be amounting to nothing more than the applicant's disagreement with several of the third respondent's findings of fact. The Applicant was described as attempting to prosecute an appeal, rather than a review. In respect of each ground the submission was that the Third Respondent's conclusions do not evince a disregard of the evidence before her, and do not amount to gross misconduct as envisaged in section 145 of the Act. A response to each ground of review for each count was then deliberated upon.

### Evaluation

[46] In respect of each of the eight counts it is to be determined whether the decision reached by the third respondent is one that a reasonable decision maker could not

reach.<sup>2</sup> In *Herholdt v Nedbank Ltd and Others*<sup>3</sup> the court explained the review test to be followed in applications as the present in the following terms:

‘In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2) (a) (ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.’<sup>4</sup>

[47] Therefore, the success of this application lies in determining whether the Commissioner misconceived the nature of the enquiry or arrived at an unreasonable result.

### 1. Substantive fairness

#### Count1:

[48] The Applicant confessed that she did not do the hand-over as she was directed in the letter of suspension. The question is whether her explanation is reasonable in the circumstances of this case. She did not know where Mr Naidoo was except what was told to her. For the instruction to be reasonable, Mr Naidoo ought to have availed himself as her supervisor to receive the hand-over. His whereabouts became a subject of dispute in this case. It was not the responsibility of the Applicant to have to go search for him either in his office or at the HR offices. Mr Naidoo ought to have come to the office of the Applicant as her normal place of work. The applicant would not only hand over the electronic information in the computer she worked with but also all hard copies

<sup>2</sup> *Sidumo and Another v Rustenburg Mines Ltd and Others* (2007) 28 ILJ 2405 (CC).

<sup>3</sup> (2013) 34 ILJ 2795 (SCA) at para 25.

<sup>4</sup> See also *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* (2014) 35 ILJ 943 (LAC) at paras[14] to [21]

of any documents lying in her office as were identified in the suspension notice. Mr Naidoo is the one who should have directed the Applicant on how to do the hand-over within the time then available on that day, and indeed it could be done. He shirked his responsibility as her supervisor and so made the carrying out of the instruction impossible. The Applicant, who understandably was emotional then, was entitled to her suspension being carried out in a dignified manner. To move her around the campus in search of Mr Naidoo when the news of her suspension was spreading would be unfair. Therefore the absence of Mr Naidoo at the applicant's office to accept the hand-over made the instruction given to her unreasonable. She was entitled to an acquittal on this charge.

Count 2:

[49] During the arbitration hearing a document marked as exhibit 'T' was accepted. According to Mr Xaba such a document was generated when a final electronic approval is granted by the Deputy Registrar in the process of authorising a purchase. This document bears a serial number with letter RY. The significance of this is that at some point in this debacle the Applicant did approve the purchase of the megaphones. Before the Applicant was charged with this misconduct, an investigation into her computer system ought to have been conducted. It would have revealed the time when she approved the purchase and then the First Respondent would take it from there. She was entitled to an acquittal on this charge.

Counts 3 and 5:

[50] There was no question about it. Mr Naidoo was the line Manager and supervisor of the Applicant. The Applicant was thrown a life line when she was reprimanded for going pass Mr Naidoo and communicated directly with the Deputy Vice-Chancellor on a matter involving Mr Naidoo. The corporate ladder exists for a reason and it has to be respected for the mutual co-existence of all staff working together. The grievance procedures exist for any disgruntled employee to follow. The two instructions given to the applicant by Mr Naidoo were clear, reasonable and called for action on the part of the Applicant. The remarks she made in count 3 were highly provocative in the

circumstances. It was not for her to enter into an intellectual debate with Mr Naidoo. A decision had been taken, obviously in her absence, by a body that had the power to do so and hers was simply to give effect to it. The instruction on count 5 was similarly clear, simple and called for compliance. The Applicant somehow imagined that she was by rank equal to Mr Naidoo and could work independently without him. The remark that Mr Naidoo was interfering with her duties is ridiculous as flying on the face of a clear organogram of the Registrar's Department. In this respect the Commissioner committed no defect in terms of section 145 of the Act and her award is not only sound but is reasonable.

Count 4:

[51] From the facts of this case it became clear that there are, at least, two types of meetings attended by the University staff. The one is by invitation of the convener and the other is attendance upon instruction by senior personnel. A meeting by invitation would understandably accommodate absenteeism without an apology and no disciplinary action should necessarily follow. An instruction by a supervisor to an incumbent to attend a meeting is a directive for that incumbent to perform his or her duties in a prescribed manner. Once that instruction is given in a clear, reasonable and is given in a fair manner, compliance with it becomes obligatory. The Applicant was obliged to attend the registration planning meeting of 9 January 2013. Her failure to attend the meeting without an apology or plausible explanation made her guilty of this charge.

Count 8:

[52] It remained common cause that the Applicant might not have read the email informing her of Ms Mkhize's attendance of the meeting. The Applicant expressed her opinion on whether the attendance of the meeting by Ms Mkhize was appropriate. She was talking to her supervisor and she was entitled to be wrong. It was left to the supervisor to own up to his position as supervisor by issuing a verbal directive that Ms Mkhize attends the

meeting. He did not do so and he allowed the opinion of the Applicant to carry the day. The Applicant was never proved to have barred Ms Mkhize from attending the meeting. She should have been acquitted of this count.

### Counts 9 and 10

[53] Both of these counts relate to a delayed decision to charge the Applicant. It was incumbent on the First Respondent to produce evidence of a link between its decision to delay taking a disciplinary action and the intervention of Advocate Ndaba. The evidence of such a link remained very weak. The probabilities are that the intervention of Advocate Ndaba came after the third respondent had waved its decision to discipline the applicant and it then wanted to renege on its decision. On the aspect of a waver alone the applicant ought to have been acquitted of the two counts. As a passing remark, on the merits of the matter count 9 would have been dealt with as counts 3 and 5. Evidence did not sustain a conviction on merits in count 10.

### 2 .Procedural Fairness

[54] The First Respondent had to prove that in dismissing the Applicant it followed a fair procedure. The Third Respondent's reasoning, on the evidence led by parties, which led to the decision she made was indeed flawed and amounted to gross irregularity in the conduct of the arbitration proceedings. It led to her issuing an unreasonable award. This is due to the fact that the applicant produced unchallenged evidence that:

- She was given insufficient time to respond to the notice of Intention to suspend. 30 minutes given to her could not be reasonable time for her to respond to such a serious matter which took her by surprise. She was confronted with *a fait accompli* ;
- That she was not given some documents which she requested for preparation purposes. She corresponded with the secretary of the Vice-Chancellor as a follow up of her request. She even asked for more time to make her responses to the charges. This should have served as an indication that she might not be ready for the hearing. It would have been fair

to telephone her on the morning of the hearing, knowing she had requested for more time to prepare;

- That she was not given an opportunity to mitigate before she was dismissed. Notwithstanding her failure to pitch up for the hearing, once a guilty verdict was made, she was entitled to a further hearing convened for mitigation and aggravation of sanction, and
- That she was denied an opportunity to lodge an appeal, the right of which is stipulated in the Disciplinary Code of the first respondent.

[55] In respect of the submission by the Applicant that she was denied an opportunity to be heard and that she was dismissed despite the fact that she had submitted a medical certificate, the Applicant contributed to her misery. She had no reason to assume that the hearing would not commence as scheduled. The Applicant and her attorney ought to have been at the hearing when the time of it came. No excuse was proffered why they met at the attorneys' office instead of rushing to the venue for hearing and once there apply for the postponement of the matter to sort out the outstanding issues. The chairperson could even have been asked to order the First Respondent to produce document that the Applicant was still seeking. These observations notwithstanding, the Third Respondent erred by simply finding the dismissal to be procedurally fair because the Applicant chose not to attend the hearing. She consequently issued an unreasonable award in this respect.

[56] Out of eight counts that the Applicant was found guilty of by the Third Respondent, she has been successful in respect of five, which are counts 1, 2, 8, 9 and 10. She is not successful in respect of three counts namely 3, 4 and 5. Numerical superiority of her success in this regard is not the sole deciding factor to her fate. She remains guilty of three charges of gross misconduct. Her assertion that she can still work with Mr Naidoo was not supported by her own evidence as she treated him with disdain. She has previously been reprimanded by the Vice-Chancellor, a fact that she might not work well with him as well. When her clean record, her experience, her academic achievements and the full implications of a

job loss at the current times are seen against the seriousness of her misconduct, it becomes clear that reinstatement she asked for is not the appropriate route to take. A continued employment relationship would be intolerable. For procedural unfairness the applicant is entitled to compensation.

[57] I conclude by finding that the dismissal of the Applicant by the First Respondent was substantively fair but procedurally unfair.

Order:

1. The arbitration award issued in this matter by the Third Respondent is review and set aside only to the extent that the dismissal of the Applicant was procedurally unfair
2. The First Respondent is ordered to compensate the Applicant in an amount of money equivalent to four months of the salary she earned on the date of her dismissal. This compensation is to be paid within twenty (20) days from the date of the order.
3. No costs order is made.

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Cele J.

Judge of the Labour Court of South Africa.

APPEARANCES

For the Applicant: Mr Z.Luthuli

Instructed by: AP Shangase & Associates

For the Respondent: Adv.G van Niekerk SC& Adv.K Allen

Instructed by: Jafta Incorporated

LABOUR COURT