THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JS1145/12

In the matter between:

THIDZIAMBI TSHIVHASE-PHENDLA **Applicant**

and

UNIVERSITY OF VENDA **Respondent**

Heard: **31 July-4 August 2017 and 18 September 2017 (Oral argument)**

Delivered: **12 October 2017**

Summary: A referral in terms of which the applicant alleges that she was automatically unfairly dismissed. An employee who alleges automatically unfair dismissal is required to produce credible evidence showing that he or she has been subjected to an automatically unfair dismissal. (First hurdle) Ordinarily, the employer is the one knowing the reason why it dismissed an employee. In *casu*, the respondent states that it dismissed the applicant for misconduct. The applicant on the other hand alleges that the true reason for dismissal is that the respondent unfairly discriminated

her on the ground of sex. An employee must cross the first hurdle before an employer is behoved to show that the dismissal is not for a prohibited reason. The Labour Court can only entertain a dispute that ought to have been referred to arbitration with the consent of the parties and if it is expedient to do so. In *casu*, the parties consented and it was expedient to do so. Held: (1) The applicant was not automatically unfairly dismissed. Held: (2) The dismissal of the applicant is both substantively and procedurally fair. Held: (3) The applicant to pay the costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is a referral in terms of section 191 of the Labour Relations Act[1] (LRA). The applicant alleges that the respondent subjected her to an automatically unfair dismissal within the contemplation of section 187 (1) (f) of the LRA as amended. In the alternative, the applicant alleges that the dismissal was both substantively and procedurally unfair. On the other hand, the respondent disputes that the applicant was subjected to an automatically unfair dismissal. Instead, the respondent contends that the applicant was dismissed for misconduct and thus the dismissal is fair.

Background facts

[2] The respondent is an institution of academic learning. Around 2006, the institution required the service of a cleaning company. At that time the applicant was in the employ of another institution of academic learning known as University of Pretoria. On the respondent's version, the applicant was approached by a potential service provider and paid money to influence the Council of the respondent, where she sat as a member at the time, to award the services to the said service provider. On the applicant's version the delegation of the said service provider

[1] Act 66 of 1995 as amended.

indeed paid her a visit in order to benchmark cleanliness of academic institutions.

[3] Two years later, the applicant obtained employment with the respondent. Later on one of the Unions raised an issue around the improper awarding of the cleaning contract. That led to an agreement to conduct investigations in order to verify the allegations of impropriety. Subsequently, forensic investigators, who fingered the applicant and others for the impropriety, produced a report. Such led to the applicant being charged, disciplined and dismissed.

[4] During the course of the disciplinary hearing, the applicant revealed that she has been subjected to sexual harassment by the Vice Chancellor of the respondent for a period of about two years. After dismissal she laid complaints with some chapter 9 institutions[2]. It is unclear to the Court whether those institutions resolved the complaints or not. Suffice to mention that in one of the court sittings the applicant's counsel informed me that representatives of the Gender Commission were present to keep the proceedings under watch.

[5] Aggrieved by her dismissal, the applicant referred a dispute of alleged automatically unfair dismissal alternatively unfair dismissal. The referral was late but this court condoned the lateness.

[6] Most if not all the witnesses of the respondent confirmed the correctness of their evidence at the disciplinary hearing. The applicant chose to give her evidence afresh in Court. The applicant however changed tack and agreed with the respondent that the evidence of Mulaudzi and Moloto should be that which was tendered at the disciplinary hearing contained in the transcript.[3] The original position of the applicant was that she would lead evidence afresh in respect of her and her witnesses.

[7] It is not necessary for the purposes of this judgment to recount the evidence punctiliously.

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[2] Chapter 9 of the Constitution of the Republic of South Africa. 108 of 1996.

[3] Bundle C4 pages 752-941 Mulaudzi and pages 944-1010 Moloto.

Evidence Led

Professor Peter Mbati

[8] He became the Vice Chancellor of the respondent effective February 2008. During the year 2010, he became aware of some allegations by NEHAWU. The allegations were raised in writing. Initially *PriceWaterhouseCoopers* (PWC) was appointed to investigate the veracity of the allegations. Later on Deloitte and Touché (Deloitte) was appointed to conduct a forensic investigation. In November 2010, they produced a report.[4]

[9] He confirmed that during 2008, certain allegations were made regarding the appointment of Clean Shop to provide cleaning services to the respondent. Allegations were made that the respondent's policies and procedures were not followed in the appointment of Clean Shop. Members of NEHAWU, a trade union representing workers of the respondent, made some of the allegations. The respondent requested its internal auditors PWC to perform a preliminary investigation into the matter. PWC found and reported irregularities in the procurement process. One such irregularity was the fact that Clean Shop did not submit a tax clearance certificate. Following the PWC report the respondent appointed Deloitte to conduct a forensic investigation into the appointment of Clean Shop.[5]

[10] Dr Zaayman was in charge of the process leading to the appointment of Deloitte. Professor Mbati's only role was to support the appointment of a forensic auditor. This followed an agreement[6] between the respondent and NEHAWU to appoint a forensic auditor. Prior to this process he did not know of any allegations against the applicant. The report

[4] Pages 32-62 of Bundle D

[5] Paragraph 2 page 36 Bundle D.

[6] On 14 April 2010, the respondent on the one hand and Nehawu on the other signed an agreement. On allegations of corruption, it was agreed that an independent forensic auditor agreeable between the parties be appointed to probe the allegations of corruption. Pages 28-31 Bundle D.

recommended disciplinary steps against the applicant.[7] After he read the report in utter shock, he sought a legal opinion on the matter. He shared the report with three members of Council who agreed with the recommendation to take disciplinary steps. Bowman Gilfillan Attorneys opined that he must deal with the issue of discipline. The disciplinary code and procedure of the respondent was followed. An independent chairperson was appointed. He did not testify at the internal disciplinary hearing.

[11] He strenuously disputed allegations of sexual harassment. In amplification of the denial, he testified that he first met the applicant in 2008, when he met different schools within the institution. Following that they had a collegial relationship. She acted as a link between the respondent and the Tshivhase Royal Family. The Royal Family served as trustees of the land on which the respondent was located. At that time there were efforts to acquire title deed of the land. The applicant facilitated those efforts.

[12] In the process of the facilitation he had an occasion to share a meal with the applicant and at times in the presence of members of the Royal Family. At times at a hotel or at his official residence. The respondent's Council had delegated him to deal with the issue of the title deed.

[13] In February 2009, there was a function at Kruger Park. At the function, the purpose was to develop a strategic plan of the respondent. The applicant was part of the function. Participants met in the evenings for various reasons. They met at his allocated chalet. One meeting happened at his chalet in order to reflect on the plans for the following day. The applicant was not party to that meeting which was facilitated by one Singo-administration officer.

[7] Prof Tshivhase-Phendla. The Council of the University should consider disciplinary action against Prof Tshivhase-Phendla for accepting to meet with the representatives of Clean Shop without following proper procedure as prescribed by the University policies and procedures relating to the procurement of goods and services. Furthermore, the Council should consider disciplinary action for accepting a gratification from Mr Mulaudzi of Clean Shop in order to influence the Council to award a cleaning contract to Clean Shop. Page 60 Bundle D.

[14] Upon conclusion of the function, he gave the applicant and another colleague a lift to Thohoyandou on their request. He also gave the applicant a lift to Pretoria when her car broke down. He spoke to the applicant over the telephone line on work related issues. On estimation they would speak once or twice in a week.

[15] With reference to the appointment to the Deanship, he testified that Manenzhe would testify to the letter.[8] However he disputed handing the said letter to the applicant.

[16] He was cross-examined at length. He was steadfast in his denial of the alleged sexual harassment. He confirmed that he did deliver a response to the allegations laid by the applicant at the Gender Commission. He objected to the Modise report, which was set aside by a court of law. He admitted the itemized calls from the mobile of the applicant. He however denied any dinners at his home. He was laboriously taken through the calls and consistently denied the alleged purposes of the calls.

Mr Mutshavasindi

[17] He confirmed that he gave evidence at the disciplinary hearing. He had read through the recorded evidence and confirmed it to be his evidence in court.[9]

[18] In cross-examination he denied that the applicant saw him for the first time in August 2011 at the disciplinary hearing. In 2006 he, Mulaudzi and Themedi, did a site visit at the respondent. At the time of the site visit he had not met the applicant as yet. Regarding the purpose of the site visit, Mulaudzi told him that he wanted business from the respondent. He met the applicant for the first time in 2006. That was before the deep cleaning, which happened during the winter holidays. He met her at the University of Pretoria. He could not recall where her office was located nor could he describe the office. He was following Mulaudzi. The meeting lasted for an hour where the company, Clean Shop was introduced and

[8] Page 1351 Bundle D.

[9] Pages 134-197 Bundle C

the report was shared with the applicant. One of the employees of the respondent referred them to the applicant, as she was allegedly an influential Council member. He observed an exchange of money between the applicant and Mulaudzi, in order to thank her for her time. She assured Mulaudzi that Clean Shop will be appointed and that she will "push" for that to happen.

[19] Subsequently Mulaudzi told him that they got the business. When the money was exchanged he counted it and stopped at R500 or R600. The exchange happened inside the office. He did not talk to anyone, as he understood the money to be a gift. He was there as part of Clean Shop, to market it and to get the business. He persisted that the applicant received the money. He disputed the version that Mulaudzi was with Moloto and no money was exchanged, as the purpose of the meeting was to benchmark how clean the University of Pretoria was as being incorrect. When the notes were given to the applicant she said "thank you". He knew Moloto after the business was awarded.

Mr Edgar Djadji

[20] Deloitte employs him since 2006. He was involved in the forensic investigation. He confirmed the contents of the report. He interviewed the applicant in the course of the investigations. He also gave evidence at the disciplinary hearing[10]. He repeated his evidence at the disciplinary hearing.[11]

[21] In cross-examination he testified that he personally interviewed the applicant and has never interviewed Moloto. He was not aware that the applicant received the interim or final report. The only person who informed him about the money exchange was Mutshavasindi and he gave him a sworn affidavit to that effect.

[10] Pages 39-133 Bundle C. he confirmed the evidence to be accurate

[11] Pages 54-55 Bundle C where the applicant admitted meeting with the representatives of Clean Shop and her raising the issue with Council but not being entertained.

Justice Manhenzhe

[22] Since 1995, he is a Director: Human Resources. He deals with recruitment of staff, which includes appointment of Deans. In 2008 eight Deans were appointed. Amongst them was the applicant. He gave detailed evidence relating to the appointment of the eight Deans. All the appointed Deans were given preliminary letters since the conditions of service were not completed as yet. He drafted all the preliminary letters and forwarded them to the Vice Chancellor for electronic signature. All the letters bore a wrong date of 9 August. The letters were not issued on t 9 August but 9 September. He produced two letters, one was electronic and the other was a hard copy. It cannot be true that on 9 August a letter was issued.

[23] At the February 2009 function he came by bus. He asked for a lift from the Vice Chancellor to Thohoyandou. During the trip he and the other occupants were discussing generally and laughing. In cross-examination, he testified that he was seeing the grievance[12] of the applicant for the first time. He could not testify about the discussions between the applicant and Professor Mbati with regard to the lift as he made his own arrangement. He wanted to arrive in Thohoyandou early. He disputed the allegation that he communicated the results of the interviews telephonically.

Angeline Singo

[24] Since 1994 the respondent employed her to do secretarial and administrative work within a department. In 2009, she attended a function/workshop in Kruger Park as a secretary and an administrative person.

[25] On 24 February 2009, the planning meeting took place from 21h00. The meeting was delayed since dinner ended late. Mr Essop facilitated the meeting. She was there to take minutes and to provide logistics. The

[12] Pages 91-100 Bundle D.

planning meetings were held at Professor Mbati's executive suite. The meeting adjourned at 23h30. The meeting took longer because of the complex issues that were discussed.

[26] She did not know of the allegations made in the complaint of the applicant. She did not see Professor Mbati making or receiving a call. She did not see the applicant at the meeting. The applicant was never part of the planning committee.

Applicant-Thidziambi Tshivhase-Phendla.

[27] Regarding employment history, she testified as follows: She was a domestic worker at the age of 11. She became a school principal in 1992. From 2001-2006, she was a Senior Lecturer at the University of Pretoria. In 2007 she became a Professor at the respondent. From 2005 she was a Council member of the respondent. She became a Dean in October 2008. She met Professor Mbati in April 2008.

[28] She described Professor Mbati as a powerful man feared by many. He is a control freak and he disregards policies. She never served in the tender committee and never interacted with potential tenderers.

[29] Regarding the reasons for her dismissal, she prefaced it as a "long journey and a sad story". She was taken by surprise when she received the charges. When she met with Clean Shop, she was told that the state of the respondent was dire. Mulaudzi came to her to see the cleanliness of the University of Pretoria. He came with one Moloto.[13]

[30] She was dismissed not because of what she did but for what she did not do; continue with sexual favours for Professor Mbati. The harassment sexually, commenced on 4 May 2008. He proposed sexual relationship and promised to advance her career. In addition he promised to protect her at all times even if she were to refuse his advances.[14] She had several dinners at Professor Mbati's house.

[13] She described Moloto as a short and light in complexion man.

[14] Paragraph 3 of the 15 June 2012 statement.

[31] On 21 May 2008, Professor Mbati invited her to the house to discuss work related matters. He proposed a sexual relationship, which she turned down. He started touching her all over her body including the breast. He told her that he is aroused and cannot stop. He took off his boxer and raped her. She did not report this since Professor Mbati was a powerful man and in an authoritative position.[15] Later on she received an email for nomination as a board member of SANPAD, she opined that the nomination came as a reward.

[32] Thereafter she had what she termed a "coerced relationship" with Professor Mbati. He called her telephonically almost every day. She at some stage had to undergo a surgical operation. Professor Mbati offered to transport her to the place where the operation was to take place. On their way back from the operation place, he offered her Deanship. This offer happened at the home of Professor Mbati on 12 August 2008. She received a letter inviting her to the interview of the Deanship position on 26 August 2008. There was no policy at the respondent to receive preliminary letters as such she does not believe that any other person received the letter she received from Professor Mbati.

[33] Regarding the Deloitte investigation, she testified that she told the interviewers that Mulaudzi came to her at the University of Pretoria in order to see how a clean toilet looks like. She thought it was a social call. She disputed receiving R500.00 or any money. She only saw the Deloitte report two years after her dismissal.

[34] After she made a decision to stop the sexual escapades, she was charged with misconduct and dismissed on 1 November 2011. On 14 September 2011, she lodged a grievance with the respondent. On 7 June 2012, she lodged a complaint with the Commission for Gender Equality.

[15] At page 241 paragraph 5 statement of 15 June 2012. In court she testified that she did not report the incident because she was traumatized, very few will report and she was afraid of victimization.

[35] Regarding the Kruger Park function, she testified that on 24 February 2009, Professor Mbati called her at around 21h30. He was convincing her to come to his bungalow. Upon failing to convince her he came up to her room and fetched her back to the bungalow. At the bungalow, he raped her without using a condom. She cried uncontrollably she said. He dropped her off at her room around 23h00 that night.

[36] At the end of the function/session, Professor Mbati invited her to travel back with him. She did not report this second incident of rape for fear of stigma and rejection[16]. She persisted with the statements she made when she lodged the complaints. She met Mutshavandini for the first time in August 2011. She never attended a meeting wherein Clean Shop was discussed.

[37] In cross-examination, she testified that she does not know about the appointment of Deloitte. Djadji indeed interviewed her and had asked her about the meeting with Mulaudzi and about Clean Shop. She admitted that only during her cross-examination at the disciplinary hearing did she raise for the first time the issue of sexual favours.

[38] Regarding the 2006 meeting she testified that Mulaudzi told her that he was given an opportunity to clean the University of Venda. Prior to the meeting she got a call from one official alerting her of Mulaudzi who wanted to see the cleanliness of the University of Pretoria. She testified that she was not responsible for toilet cleaning. She did not direct Mulaudzi to the relevant people.

[39] Regarding the Deanship appointment, she testified that when she got the letter on 12 August 2008, she was an applicant and did not inform the interviewing panel that she already had an appointment letter. She did not attach any value to the letter as she saw it as a strategy to lure her to bed. As at 16 August 2008, she knew that she was not offered the Deanship as yet.

[16] In her statement to the commission for gender she stated that she was afraid of her safety and did not summon enough courage since she was almost 200km away from the Thohoyandou police station.

[40] She further testified that the only unprotected sex happened on 24 February 2009. The rape of May 2008 was protected. She terminated the relationship when her marriage was at the brink of collapsing and her husband was becoming suspicious. She however told her husband about what happened for two years. She believes that she was charged because she terminated the relationship.

[41] As pointed out earlier the evidence of Mulaudzi and Moloto is as recorded in the transcript of the disciplinary hearing. It is unnecessary to recount it herein.

Argument

[42] Both representatives submitted detailed written heads of argument to which the Court is grateful. In addition, the parties augmented their submissions orally. It is unnecessary for the purposes of this judgment to repeat all those submissions.

Evaluation

[43] This is one of those matters where the true reason for the dismissal is being disputed. As pointed out elsewhere in this judgment, the respondent contends that the applicant was dismissed for misconduct. The applicant however contends that the true reason for the dismissal is that she had actually been subjected to unfair discrimination. Determining the reason or principal reason of dismissal is a question of fact. As such it is a matter of either direct evidence or of inference from the primary facts established by evidence. The reason for dismissal consists of a set of facts, which operated on the mind of the employer when dismissing the employee[17]. They are within the employer's knowledge. The employer knows better than anyone else in the world why he or she dismissed the employee.

[17] *Abernethy v Mott, Hay and Anderson* [1974] ICR 323. See also *K Screene v Seatwave* Ltd Appeal No. UKEAT/0020/11/RN delivered on 26 May 2011.

[44] When an employee positively asserts that there was a different and inadmissible reason for his or her dismissal, he or she must produce some evidence supporting the positive case, such as being unfairly discriminated. An employer who dismisses an employee has a reason for doing so. He or she knows what it is and must prove what it is.[18]

Was the dismissal of the applicant automatically unfair or not?

[45] The applicant suggests that she has been subjected to an unfair discrimination on the basis of sex. The applicant pegs her case on two legs. Firstly, on section 6 of the Employment Equity Act[19] (EEA). Secondly on section 187 (1) (f) of the LRA.

[46] Commencing with section 6 of the EEA, reliance is placed on section 6 (3), which makes sexual harassment a form of discrimination. Section 6 makes reference to employment policy or practice. In section 1 (m) dismissal is mentioned as an employment practice or policy. Therefore, dismissing an employee on the grounds of sex for instance is prohibited and amounts to an unfair discrimination.

[47] Section 10 of the EEA, excludes unfair dismissal disputes. The question that arises is whether an employee would have two causes of action? One arising from the EEA and the other from the LRA. To my mind once an employee alleges unfair dismissal, his or her cause of action arises from the LRA. If an employee raises unfair discrimination as a cause of action the EEA would apply.

[48] Section 11 of the EEA only applies in instances where an employee claims unfair discrimination within the contemplation of the EEA. Where an employee alleges that the reason for dismissal is one that is prohibited, section 11 does not apply. I am unable to agree with Mr Mokoena for the applicant that in line with section 11 of the EEA, even if an employee does not produce credible evidence, the employer is behooved to prove that the alleged discrimination is fair. To my mind

[18] See *Kuze v Rouche Products Ltd* [2008] EWCA Civ 380 (17 April 2008)

[19] Act 55 of 1998.

section 11 still requires an applicant to produce some facts to prove that unfair discrimination has taken place. Not all forms of discriminations are unfair. The section refers to whenever "unfair discrimination" is alleged. Such implies that there must be evidence to support the allegation that not only did discrimination in the ordinary sense take place but that an unfair discrimination has taken place.

[49] Section 3 (a) of the EEA enjoins that the Act must be interpreted in compliance with the Constitution. Section 34 of the Constitution grants everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. To my mind resolution by the application of law must mean that a party alleging unfair discrimination must produce evidence credible enough to call upon an employer to rebut. It will be inconsistent with the Constitution if an employer is called upon to justify an unfair discrimination with no credible facts to work with. The fact that an unfair discrimination has taken place does not simply lie on the mouth of an employee. It requires credible facts supporting the allegation that unfair discrimination has taken place. Absent credible facts, the employer is not behoved to justify that a discrimination is fair. Put it differently, an employee must first establish unfair discrimination, whereafter the employer must justify that that which the employee termed unfair is actually fair.

[50] What applies is the test set out in *Kroukam v SA Airlink (Pty) Ltd*[20]*,* which is that, the employee must produce credible evidence that shows that an automatically unfair dismissal has occurred. This I call the first hurdle. Should an applicant fail to cross this hurdle such an applicant must to my mind fail. The applicant calls hers a *quid pro quo* sexual harassment. In *J v M Ltd* [21]the defunct Industrial Court had the following to say:

> 'The author (Mowatt) examines the development of the law regarding sexual harassment in the United States of America and in England. If

[20] [2005] 26 ILJ 2153 (LAC).

[21] [1989] 10 ILJ 755 (IC).

> one applies the dictionary meanings of the words, sexual harassment would mean to trouble another continually in the sexual sphere. In the employment relationship the word has a slightly different connotation and is very broadly unwanted sexual attention in the employment environment. The author of the article correctly points out that in its narrowest form sexual harassment occurs when a woman (or a man) is expected to engage in sexual activity in order to obtain or keep employment or obtain promotion or other favourable working conditions. In its wider view it is, however, any unwanted sexual behavior or comment, which has a negative effect on the recipient. '

[51] It does seem to me that what the applicant complained about is sexual harassment in the narrower sense. In support of her argument, the applicant relied on three cases.[22] In *J v M Ltd,* the employee who had been harassed was a young female. The senior executive that harassed her was charged and dismissed for sexual harassment. In *Kok v Commission for Conciliation, Mediation and Arbitration and Others*[23]*,* the employee harassed was a contract cleaner. The branch manager after harassing her told her that if she revealed what happened he would ensure that she is dismissed. The cleaner reported the incident without delay. In *Gaga v Anglo Platinum and Others*[24]*,* the Group Human Resources Manager harassed a personal assistant, who only knew about the grievance procedures at a later stage.

[52] All of the above cases are distinguishable from the applicant's case. The applicant only raised her issue in a disciplinary hearing during her cross-examination. One wonders why the applicant did not mention this to anyone. I do not accept her version that she found Professor Mbati to be powerful. Three years before the ordeal commenced, the applicant was a

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[22] *J v M supra, Kok v CCMA and others* [2015] JOL 32888 (LC) *and Gaga v Anglo Platinum Ltd* [2012] 3 BLLR 285 (LAC)

[23] *[2015] JOL 32888 (LC*

[24] [2012] 3 BLLR 285 (LAC)

Councilor at the respondent. Surely she knew most if not all the Councilors during the period she underwent the ordeal. She gets raped; the worst form of harassment, yet she chooses to remain mum and continue to attend dinners, which she knew of its dangers. If this was unwanted, it could not have continued for a period of two years.

[53] The applicant was not a lowly employee; she was a Dean of a school. She must have been conscious of her rights. It is highly improbable that a Professor can allow herself to be subjected to such a huge violation of her rights and decide to keep quiet. It is not like the applicant did not know what to do and where to go. At one stage she threatened to report Professor Mbati to the Council. The reasons why she did not do so are very flimsy. That nobody will believe her is flimsy and less convincing. The question remains why should anybody believe her two years later?

[54] Her version is truly unbelievable and contradictory in many respects. Why did she wait to be charged and only then did she reveal what she termed a “long and sad story”? According to her, she terminated the horrendous relationship on her own accord. She did that for reasons that suit her. There is no evidence of resistance or persistence on the part of Professor Mbati. Such suggests that she could have stopped all of this a long time ago. In November she threatened to report Professor Mbati to the Council as to why she did not do it remains a mystery to me.

[55] The report of Deloitte was produced in November 2010, shortly before she could end the relationship. Therefore, as at that time there was evidence upon which the respondent could terminate employment. Given the power of Professor Mbati, why did he allow the sexual relationship to end without offering resistance and or flexing his muscles? It was not suggested to Professor Mbati that he also wanted the relationship to end at that time when the applicant ended it. I find it unbelievable that Professor Mbati will punish the school of education by refusing to appoint a secretary and to replace a retired Professor in order to retain a relationship. A *quid pro quo* simply mean something given in return for something else or accepted as a reciprocal part of an exchange.

[56] Regarding the letter of appointment to the Deanship position, I do not find that as any favour to start with. The evidence of Manenzhe is without a shadow of any doubt. It is clear to me that the date of 9 August was a typographical error. On the applicant's own version, at the time Professor Mbati allegedly gave her the preliminary letter of appointment she knew that she was still going to be interviewed for the position, that the interviewing panel would make recommendations as to who should be appointed and that the appointments would only be made after the interviews. She knew that the preliminary letter was meaningless. Her evidence as to when exactly was she given the letter by Professor Mbati vacillates to a greater degree and contradictory at different stages when narrated.

[57] The other worrying factor is the vacillating versions that the applicant gave to the different bodies[25]. In certain narrations some of the worst forms of harassment are not mentioned. It does appear to me that after her dismissal the applicant created events, which may have been consensual and turned them into coerced events. The applicant is not a person who would have suffered in silence. When she testified in court I observed that she only shed a tear once. When Professor Mbati testified she was bravely sitting in court and actively passing notes to her legal team. Ordinarily a person who has been subjected to such horrendous treatment as narrated in the complaints will act different from what I had observed. This is just an observation in passing and nothing much turns on this observation.

[58] I am not convinced that the applicant was subjected to a sexual harassment. Her version is replete with material inconsistencies and cannot be accepted by this Court as being true. The narration of the events occurred after the disciplinary hearing. After the disciplinary hearing the applicant had an occasion to narrate what happened in a spurn of two years. It is difficult to say that the applicant is making all these up. However, I have a strong suspicion that the applicant made

[25] The complaint on 14 September 2011 to the Chairperson of Council makes no mention of the 2008 and 2009 rapes. The rape was mentioned in a statement of 15 June 2012.

this up in order to divert attention from the misconduct that she was charged and dismissed for.

[59] It may well be so that the applicant and Professor Mbati had a consensual relationship, which like many other relationships hit the rough patch. In any event Professor Mbati was not put through a trial nor was he charged for sexual harassment. Given the evidence before me I must accept the version of Professor Mbati that he did not sexually harassed the applicant.

[60] Mr. Mokoena sought to make a case around the timing of the disciplinary enquiry in an attempt to create a nexus between the alleged termination of the sexual relationship and the charges. I am unable to comprehend this point. In terms of the non-contentious chronology,[26] on 5 November 2010, Deloitte submitted its report to the respondent. It is known that the report recommended disciplinary steps. On 7 February 2011, Professor Mbati called the applicant and informed her of the intention to proceed with misconduct charges. On 15 February 2011, the applicant received the charges.

[61] It ought to be remembered that the forensic investigation conducted by Deloitte arises out of an agreement between the respondent and NEHAWU. It must follow axiomatically that up until a report is produced, the respondent could not have taken disciplinary steps. The applicant's evidence as to when she terminated the sexual relationship is in itself not satisfactory. In her statement of case, she alleged that at the end of December 2010, which will be 31 December 2010, she terminated the relationship between Professor Mbati and herself. In her testimony she ambivalently referred to October or November of 2010. On her version in the statement of case, at the time she terminated, the Deloitte report was out with its recommendations.

[62] The two incidents of rape leave much to be desired. According to her the first incident happened in May 2008 at the study room of Professor

[26] A document generated by the parties and handed up by agreement.

Mbati. At the very first opportunity at the disciplinary hearing she does not mention this incident. Instead, she testified that Professor Mbati was requesting sexual favours. When she made her first complain[27] to the Commission she leaves the rape out of account. Only in her second complaint[28] to the Commission did she mention the May and February rapes. In her statement of case before this Court, she alleged that she was first raped in February 2009.

[63] How the February 2009 rape happened on her own version, could have been avoided. To start with he is on a call attempting to convince her to come to the place where she would be violated. She shares a room with a colleague and does not tell. She agrees to come with the person to violate her in a car to his bungalow. This being the person who violated her in 2008. She gets violated there, she cries uncontrollably, yet when she is taken back to the room she does not tell the roommate. As if that was not enough. The very following day she travels with the person who violated her. All of this does not add up, particularly in the face of the evidence of Singo, whom I have no doubt, gave an honest account of what happened the night in question.

[64] Therefore, I conclude that the applicant did not produce credible evidence that shows that an automatically unfair dismissal has taken place. Accordingly, the applicant was not automatically unfairly dismissed. The applicant's claim for automatically unfair dismissal is bound to fail.

<u>Was the applicant's dismissal substantively and procedurally unfair?</u>

[65] In this part of the judgment I am acting as an arbitrator. The parties have consented and I believe that it is expedient to consider the claim. A dismissal is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to amongst others the conduct of the employee.

[27] 11 May 2012 complaint

[28] 15 June 2012 complaint.

[66] An arbitrator dealing with a dispute of misconduct must establish whether the employee was indeed guilty of the misconduct that led to his or her dismissal. In addition, he or she must establish whether dismissal was an appropriate sanction for the misconduct. The charge that led to the dismissal of the applicant has been set out in the applicant's heads of argument. It can be summarized to be improper meeting with the potential service provider, accepting gratification, breach of policies and non-disclosures.

[67] It is common cause that in 2006, the applicant met with one Mulaudzi of Clean Shop. It is also common cause that the meeting was about the cleaning contract. What the applicant disputes is the fact that she received any money to facilitate the appointment of Clean Shop. According to Mulaudzi after he got the feeling that his company might be awarded the tender to clean the respondent he thought of benchmarking. At the time the cleanest campus was the University of Pretoria. He prepared himself to go there. A friend of his directed him to the applicant.

[68] He and Moloto met the applicant in her office; he showed her documents including pictures and a short presentation. Whereafter she took them around and later walked them to the parking and bid them good-bye. This version differs from the evidence of the applicant before me. According to her it was more of a social call. Moloto relegated his duties on the day of the meeting to taking pictures and did not participate in the discussions between Mulaudzi and the applicant. Again the applicant did not testify about any excursion of taking pictures of the toilets.

[69] According to Mulaudzi, the benchmarking meeting was crucial as he had a feeling that his company was about to be awarded a tender. He shared the relevant documents including a short presentation with the applicant. Clearly this was not a social call. It was a meeting with the potential service provider who harboured feelings that he was about to be awarded a cleaning tender. The question is if the applicant could not help one way or another and does not deal with issues of cleanliness of toilets or procurement, why did she agree to meet with the representatives of

Clean Shop? Why did she even engage them? On Mulaudzi's version she took them around. On the balance of probabilities, the applicant must have received gratification. It is clear on Mulaudzi's version that the visit was aimed at enhancing the chances of Clean Shop to be appointed as he already had a feeling that his company will be awarded the cleaning tender.

[70] On the probabilities, the applicant knew of this meeting and intended to use her influence as a Council member to ensure that Clean Shop is awarded the cleaning tender. Mr. Mokoena makes a point that at that time, 2006, the applicant was not an employee of the respondent and could not have breached any rule. This argument is oblivious of the fact that the applicant at that time was linked with the respondent as a Councilor. She had the ability as it were, to influence non-compliance with the procurement procedures. In fact, on Mulaudzi's version, she was approached in order to enhance the chances of Clean Shop to be awarded the tender.

[71] I am unable to agree with Mr. Mokoena when he submits that the only witness in support of charge 1 was Mutavhasindi. Another leg of charge 1 was the non-disclosure upon employment. On the applicant's own version, this charge is sustained. She did not disclose the meeting.

[72] It is common cause that upon being employed, the applicant did not disclose the approach by Clean Shop. The question is did she have a duty to do so? I am of a view that the applicant as a senior employee of the respondent had a fiduciary duty to disclose the meeting. There was nothing untoward; it was a social call on her evidence; why not disclose it upon employment. The fact that she failed to disclose the meeting seeks to support a view that she had something to hide. It was not just a social call as she described it. There was more to it. I have no reason to disbelieve Mutshavandini. It is indeed so that money exchanged hands. If Mulaudzi took him with to the respondent given his expertise in deep cleaning why would he leave him behind when he is on course to enhance the feeling to be awarded a cleaning tender. Moloto on his own

version was a photographer on the day. On the probabilities Mutshavandini was present on the day. The fact that he does not recall the layout of the office does not make his evidence doubtful. I therefore conclude that the applicant was indeed guilty of the charges that led to her dismissal.

[73] Turning to the question of the appropriateness of the sanction of dismissal, I conclude that the misconduct with which the applicant was found guilty and dismissed, is a serious one. The principle that the punishment must fit the crime finds application here. It is clear that the employment relationship has broken down. Professor Mbati testified that corruption is a big problem within the institution and would not have a person such as the applicant in employment. Further he testified that it would be impossible to continue employment with a person who makes unsupported allegations of sexual harassment.

[74] Non-disclosure has an element of dishonesty in it. Any misconduct that has an element of dishonesty is bound to destroy continuation of employment. Further where an employee breaches his or her fiduciary duty such an employee is not to be trusted by the employer. In the circumstances, I am of a view that dismissal was an appropriate sanction. The sanction is fair and cannot be interfered with.

[75] Turning to procedural fairness. The applicant has not raised any specific ground relating to why the dismissal was procedurally unfair. In argument though, Mr. Mokoena raised the issue of the timing of the disciplinary hearing. In other words, the fact that the respondent delayed in taking disciplinary steps, taking of such steps late is unfair. This ground has not been pleaded at all. Where an employee complains about procedural unfairness, such an employee must state the basis of the unfairness to enable the employer to address it in evidence. To simply raise the basis in argument is inappropriate. However, it is common cause that prior to her dismissal the applicant was subjected to a disciplinary hearing. At no stage in her evidence did she complain about any unfairness arising from

the said disciplinary hearing. Accordingly, the dismissal of the applicant is procedurally fair.

[76] As to costs, I have no reason to gainsay any submission that costs should follow the results. Therefore, the applicant is to pay the costs.

[77] In the results, I make the following order:

Order

1 The dismissal of the applicant is not automatically unfair.

2 The dismissal of the applicant is both substantively and procedurally fair.

3 The applicant is to pay the costs.

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GN Moshoana,

Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Advocate P L Mokoena SC

Instructed by : Len Dekker and Associates Attorneys of Monument Park, Pretoria

For the Respondents : Advocate T J Bruinders SC and Advocate N Lewis

Instructed by : Bowman Gilfillan Inc, Sandton