DISCIPLINARY APPEAL COMMITTEE OF
STELLENBOSCH UNIVERSITY

In the matter between:

THEUNS DU TOIT Appellant

and

THE UNIVERSITY OF STELLENBOSCH Respondent

DECISION ON APPEAL

TABLE OF CONTENTS

INTRODUCTION

1 Mr Theuns Du Toit (**Mr Du Toit**) was a first year LLB student at the University of Stellenbosch (**the University**). On 21 July 2022, the Central Disciplinary Committee of the University of Stellenbosch (**the CDC**) handed down its written judgment in which it found Mr Du Toit guilty of misconduct.[1] It ordered that Mr Du Toit be expelled with immediate effect from the University. It also made additional orders to the order of expulsion. The orders made read as follows:

> *"1. Mr Du Toit is hereby expelled with immediate effect from Stellenbosch University in terms of the Urination Charge and the Statement Charge.*
>
> *2. This judgment is to be made public by the Head of Student Discipline, with a copy being delivered to former Justice Khampepe, as a submission to the Independent Commission of Inquiry.*
>
> *a. In particular, it is strongly recommended that the attempt to transform Huis Marais be re-evaluated by means of the Independent Commission of Inquiry.*
>
> *b. This includes, but is not limited to, investigating the reasons as to why the initial transformative decisions were unceremoniously overturned.*
>
> *3. It is requested that Stellenbosch University endeavours to investigate the failures by Student Leaders in Huis Marais and actively works towards establishing meaningful Student Leadership development.*
>
> *4. It is strongly suggested that Stellenbosch University implement the necessary amendments to alcohol-related policy which includes a zero-tolerance policy for all alcohol/substance-induced transgressions which assail the rights of any individuals.*
>
> *5. It is strongly suggested that Huis Marais design and submit a suitable alcohol policy within 6 months which encourages responsible alcohol use and has a residential zero-tolerance*

[1] He had been suspended.

policy for alcohol-induced transgressions, including the unauthorised possession and consumption of alcohol in banned residential areas."

2 The allegations that were levelled against Mr Du Toit can be summarised as follows:

2.1 He entered the residence room of Mr Babalo Ndwayana (**Mr Ndwayana**), without his permission (Charge 1, referred to as the "*trespassing charge*").

2.2 He proceeded to urinate on Mr Ndwayana's study desk, damaging his laptop, a textbook titled "*The Core Economy*" and three notebooks (Charge 2, referred to as the "*urination charge*").

2.3 When Mr Ndwayana asked him what he was doing, he told him "*Waiting for someone, boy*". And when he was asked why he was urinating on his belongings, he told Mr Ndwayana "*It's a white boy thing*" (Charge 3, referred to as the "*statement charge*").

3 The CDC found that the alleged misconduct was proved. It found that the conduct was in breach of clauses 7.2.2 of the Amended Residence Rules (7 March 2022) (**Residence Rules**) and clauses 3.1, 9.1, 9.3, 13.1 and 13.2 of the Disciplinary Code for Students of Stellenbosch University 2021 (**the Code**). More specifically, the CDC found Mr Du Toit guilty of charge 1, the trespassing charge, because the conduct contravened clause 7.2.2. of the Residence Rules and clause 13.1 of the Code. In respect of charge 2 (the urination charge), the CDC found the conduct to contravene clauses 3.1, 9.1, 9.3 and 13.2 of the Code. In respect of charge 3 (the statement

charge), the CDC found Mr Du Toit's conduct to contravene clause 9.3 of the Code.

4 It is convenient to quote these provisions.

5 Clauses 3.1, 9.1, 9.2, 13.1 and 13.2 of the Code provide as follows:

> *"**3. <u>The Values of Stellenbosch University</u>***
>
> *3.1 Stellenbosch University operates on a set of basic values which every Student is expected to respect and promote, and which informs the application of this disciplinary code. The values are: Excellence, Accountability, Mutual Respect, and Compassion. In addition, thereto, current values adopted by Stellenbosch University and any variation thereof, shall be applicable to the application of this disciplinary code. ...*
>
> ***9. <u>General Rules</u>***
>
> *9.1 No Student shall, without good and lawful reason, willfully engage in any conduct which adversely affects the University, any member of the University Community or any person who is present on the University Campus at the invitation of the University. …*
>
> *9.3 A Student shall not act in a manner that is racist, unfairly discriminatory, violent, grossly insulting, abusive or intimidating against any other person. This prohibition extends but is not limited to conduct which causes either mental or physical harm, is intended to cause humiliation, or which assails the dignity of any other person. …*
>
> ***13. <u>Premises and property</u>***
>
> *13.1 A Student shall not make use of, occupy or enter any University Premises without permission to do so.*
>
> *13.2 A Student shall not remove, make use of, damage or destroy any physical property, including emergency equipment, which belongs to the University, any member of the University Committee, or for which the University is accountable, without permission to do so and other than as a consequence of the ordinary and intended use of that property. If a Student is found in possession of property which is known to have been stolen, such Student will be assumed to have committed misconduct under this rule*

unless the Student is able to show that the property was acquired innocently."

6 Clause 7.2.2 of the Residence Rules provides as follows:

"7.2.2 Students and residences should at all times act in such a manner that no discomfort or disturbance of peace is caused to the occupancy or other residences in the area."

7 Mr Du Toit noted an appeal against the judgment of the CDC. It is convenient to quote the grounds of appeal as stated in the notice of appeal, as follows:

*"**AD MERITS***

1. The Committee erred and/or misdirected themselves by finding that:

1.1 The Appellant's conducted amounted to the contravention of Clause 7.2.2 of the Amended Residence Rules of 7 March 2022;

1.2 The Appellant's conduct amounted to the contravention of Clause 13.1 of the Disciplinary Code for Students of Stellenbosch University 2021;

1.3 The Appellant's conduct amounted to the contravention of Clause 3.1, 9.1, 9.3 and 13.2 of the Disciplinary Code for Students of Stellenbosch University 2021;

1.4 The Appellant's conduct amounted to the contravention of Clause 9.3 of the Disciplinary Code for Students of Stellenbosch University 2021 in that he was found guilty of acting in a racist manner in saying "it's a white boy thing" or any variation thereof;

1.5 The Appellant uttered the words "it's a white boy thing" or any variation thereof;

1.6 The Appellant is a racist.

1.7 The written testimony of the victim carried evidential value without him testifying orally;

1.8 The Appellant acted willfully and unlawfully despite the copious amounts of alcohol that he consumed;

1.9 The Appellant continued to urinate after the light was switched by the victim. No evidence was led to this effect;

2. *The Committee erred and/or misdirected themselves by failing and or neglecting to:*

   2.1 *Draw a negative inference from the fact that the victim willfully refused to participate in the inquiry and thereby preventing his written evidence from being tested. This amounts to a maladministration of justice;*

   2.2 *Draw a negative inference from inconsistences in the two statements of the victim dated 17 May 2022 and 19 May 2022 respectively as well as his e-mail dated 15 May 2022 and the numerous television interviews;*

   2.3 *Attach sufficient weight to the evidence of Mr "X" who testified that the phrase "it's a white boy thing" (or any variation thereof) was not said by the Appellant when he walked out the room or at any other stage;*

   2.4 *Attach sufficient weight to the evidence of Mr "X" in respect of his observations of the Appellant to the effect that it was his view that the Appellant was "sleepwalking or drunk";*

   2.5 *Attach sufficient weight to the evidence of Mr "Z" with specific reference to the level of intoxication of the Appellant;*

   2.6 *Attach sufficient weight to the evidence Mr Chad Hamman with reference to the character of the Appellant;*

   2.7 *Attach sufficient weight to the evidence of Mr Chad Hamman with reference to the amount of time that they, including the Appellant, spent in the room of the victim;*

   2.8 *Attach sufficient weight to the evidence of Mr Neo Sello with reference to the character of the Appellant:*

3. *The Committee further erred and or misdirected themselves by failing to properly apply the basic rules of Evidence;*

4. *The Committee further erred and or misdirected themselves by failing to properly apply the cautionary rule relating to the evidence of a single witness being the victim;*

5. *The Committee further erred and or misdirected themselves by finding that the victim was a credible and reliable witness despite his written evidence not being substantially satisfactory relating to material aspects.*

6. *The Committee further erred and or misdirected themselves by failing to properly consider and evaluate the evidence tendered by the Appellant.*

AD SENTENCE

7. The Committee erred and/or misdirected themselves by:

7.1 Over emphasising the seriousness of the offence;

7.2 Failing to properly consider and attach sufficient weight to the personal circumstances of the Appellant;

7.3 Failing to individualise the sentence;

7.4 Imposing a sentence which is shockingly inappropriate and completely disproportioned to the offence, the offender and the interests of the community;

7.5 Failing to consider the principle of Ubuntu when it comes sentencing;

7.6 Failing to blend the sentence with an element of mercy;

7.7 Failing to consider the fact that the Appellant took responsibility for his actions;

7.8 Failing to consider alternative sanctions as provided for in the Disciplinary Code;

7.9 Failing to consider the principle of reformative justice during the sanctioning process;

7.10 Failing to attach sufficient weight to the true remorse shown by the Appellant."

8 Prior to the hearing of the appeal on 18 October 2022, we invited Mr Du Toit through his legal representatives to indicate whether he intended to submit any written or oral evidence in addition to that which he presented the CDC. He confirmed that he did not wish to present any further evidence. Mr Ndwayana was also invited to indicate whether he intended to participate in the appeal hearing. He indicated in writing that he would not be participating.

9 In the light of these developments, and because the appeal committee did not of its own accord require the presentation of any specific further oral or written evidence, we requested Mr Du Toit's legal representatives to

submit written argument a day before the hearing of the appeal. They complied with the request. In the written argument and in the oral argument presented before the appeal committee, the issues on appeal were significantly narrowed as compared to the grounds of appeal quoted above. We identify below the arguments that Mr Du Toit's legal representative, Mr Fullard, pursued in his written and oral submissions.

THE SUBMISSIONS MADE ON APPEAL

10 Mr Fullard confirmed in his oral submissions that Mr Du Toit does not challenge the findings of guilt in respect of charges 1 and 2. He also did not challenge any of the orders granted by the CDC except for the order of expulsion. But he also challenged the order of expulsion to the extent that it is based on charges 1 and 2.

11 Therefore, the challenge on the merits of the CDC judgment is limited to charge 3 (the statement charge).

12 The grounds for the challenge against the finding of guilt in respect of charge 3 can be placed in two main categories.

12.1 The first category relates to the failure of Mr Ndwayana to testify orally or by way of a sworn affidavit. Mr Fullard contended that the written evidence of Mr Ndwayana should not have been taken into account in determining the merits of charge 3 because Mr Ndwayana failed to testify either orally or by way of a sworn affidavit. This related to two written statements of Mr Ndwayana

and two emails by him. These documents are at pages 41, 42, 43, 48 and 49 of the bundle of documents that was presented to the appeal committee. Alternatively, if the written statements of Mr Ndwayana could be accepted, little or no evidential value or weight should have been placed on them.

12.2 The second category relates to how the CDC treated the evidence of Mr "X" in its findings. Mr Fullard contended that the CDC erred or misdirected itself in several respects in dealing with the evidence of Mr "X" in its findings.

13 In supporting the above two main contentions, Mr Fullard made the following submissions:

13.1 A student who wishes not to appear and testify orally before the CDC can only have his/her evidence admitted and considered pursuant to the procedure in clause 30.7 of the Code. That provision reads as follows:

> *"Any Student who is called to participate in an inquiry as a witness may apply to the relevant disciplinary committee to give evidence in writing, by way of closed-circuit television, or anonymously. Such application may be granted if the witness is able to show a reasonable fear for the Student's mental or physical well-being, or that the integrity of the inquiry will be undermined, should such witness be called to give evidence in the ordinary course."*

13.2 Mr Ndwayana did not make use of the procedure in clause 30.7 of the Code notwithstanding that he falls within the definition of Student. Absent permission being sought by Mr Ndwayana and

granted in terms of clause 30.7 of the Code, the CDC was not entitled to take into account any written statement or document containing Mr Ndwayana's version of events.

13.3 In any event, taking these written statements into account was contrary to the CDC's own directive dated 27 May 2022. The directive was made in terms of clause 37.4 of the Code, which provided inter alia that witnesses will be called to testify orally. Evidence by way of sworn statements was not envisaged. The CDC determined in terms of this directive that evidence would be led orally. The CDC was bound by this directive.

13.4 In consequence, the CDC erred and/or misdirected itself by accepting Mr Ndwayana's written documents as evidence for purposes of the CDC hearing. It should not have accepted the written documents as evidence for purposes of the hearing before it.

13.5 Should the appeal committee disagree with the submission and find that the CDC was correct in finding that the written documents constituted evidence, the evidential value of the written documents was next to none for the following reasons:

13.5.1 It was not possible to cross-question Mr Ndwayana to test his version of events;

13.5.2 It was not possible for the CDC to obtain valuable information and/or facts from him;

13.5.3 It was not possible for Mr Fullard to address the numerous inconsistencies in the written documents of Mr Ndwayana compared to the video footage presented, in cross questioning;

13.5.4 It was not possible for Mr Fullard to put the evidence of Mr "X" to Mr Ndwayana and enquire why Mr "X" did not hear the words "*it's a white boy thing*" or any variation thereof;

13.5.5 There were numerous inconsistencies in Mr Ndwayana's written documents with the effect that their content is substantially unsatisfactory in relation to material aspects.

13.6 The CDC erred and/or misdirected itself by failing and/or neglecting to:

13.6.1 draw a negative inference from the fact that Mr Ndwayana wilfully refused to participate in the inquiry. This amounts to a maladministration of justice;

13.6.2 draw a negative inference from inconsistencies in the two statements of Mr Ndwayana dated 17 May 2022

and 19 May 2022 respectively as well as his e-mail dated 15 May 2022 and the numerous television interviews.

13.7 The CDC failed to place sufficient weight on the evidence of Mr "X" who stated that he did not hear the phrase "*it's a white boy thing*" or any variation thereof.

13.8 The only deduction that could be made is that; on a balance of probabilities, it is highly improbable that the abovementioned phrase was ever uttered. The University accordingly did not prove its case.

13.9 The CDC failed and/or neglected to attach sufficient weight to the evidence of Mr "X" in respect of his observations of Mr "X" to the effect that it was his view that Mr Du Toit was "*sleepwalking or drunk*".

14 In respect of sanction, Mr Du Toit contended that the CDC failed and/or neglected to hand down a just and equitable sanction for the following reasons:

14.1 The CDC failed and/or neglected to consider the different sanctions as set out in clause 37.11 of the Code.

14.2 The CDC failed and/or neglected to take into account the considerations as set out in clause 37.12 of the Code.

14.3 The CDC failed and/or neglected to take into account the purpose of the Code as set out in clause 2 of the Code.

14.4 The CDC failed and/or neglected to place sufficient weight to the true remorse shown by Mr Du Toit.

14.5 The CDC over emphasised the seriousness of the offence.

14.6 The CDC failed to properly consider and attach sufficient weight to the personal circumstances of Mr Du Toit.

14.7 The CDC imposed a sentence that is shockingly inappropriate and completely disproportioned to the offence, the offender and the interests of the community.

14.8 The CDC failed to consider the principles of Ubuntu when it comes to sentencing.

14.9 The CDC failed to blend the sentence with an element of mercy.

14.10 The CDC failed to consider the principles of reformative justice during the sanctioning process.

15 Mr Fullard submitted that a lesser sanction, such as a suspension from University for a period of time would have been an appropriate sanction to impose.

THE FINDINGS OF THE CDC ON CHARGE 3

16 In order to properly assess the merits of the appeal in respect of charge 3, it is important to understand the reasoning of the CDC on this charge.

17 It is clear from the CDC judgment that it identified the key issue as being whether Mr Du Toit had uttered the phrase "*it's a white boy thing*" as alleged. The CDC also correctly indicated that Mr Ndwayana was the only person who is said to have heard the phrase being spoken by Mr Du Toit. Mr "X", the only person who happened to walk by Mr Ndwayana's room at the time of the incident and told Mr Ndwayana to record the events testified that he did not hear Mr Du Toit utter the phrase. However, he did hear a conversation taking place in the room between Mr Du Toit and Mr Ndwayana as Mr Du Toit left the room, i.e., once the video recording ended. Although he could hear what Mr Ndwayana was saying, he could not hear what Mr Du Toit was saying.

18 As for Mr Du Toit, he could not confirm or deny that he had uttered the phrase, due to his intoxication. His defence was focused on establishing his character as a non-racist individual, substantiated by the evidence of his black friends. The CDC found that this evidence by or of Mr Du Toit's black friends could not hold sway. Simply because no previous evidence of racist behaviour was presented did not mean that one could not be racist in a particular moment or incident. Racism could be an individual act. Furthermore, having black friends does not exonerate an individual from being racist. It is absolutely possible to have friends of multiple

races, but still act in a racist manner one or more times. Accordingly, the CDC said it was not convinced of the importance of the evidence of Mr Du Toit's black friends in determining what was said or not said between Mr Ndwayana and Mr Du Toit.

19 As such, the CDC reasoned that Mr Ndwayana's written testimony and immediate actions must carry vital importance. It recorded that immediately after the event, Mr Ndwayana sent messages to his mentor and Huis Marais leadership. In these messages, he expressly stated that he was insulted. On the morning of 15 May 2022 at around 9h00, Mr Ndwayana told Mr "L" about the incident. Mr "L" testified that at around 10h00 he was in Mr Ndwayana's room and Mr Du Toit, and three other males were there, inquiring as to what had happened. Mr Du Toit was cleaning the urine, albeit, as it would transpire, not sufficiently. Mr "L" confirmed that when the other men asked Mr Ndwayana what had happened, he again stated that Mr Du Toit had said the variation of the "*white boy*" phrase. Following this, Mr "L" recalled that the men laughed. The CDC commented on this laughter by noting that it could not comprehend that this was the reaction of the other men. It said this reaction spoke volumes of the culture in Huis Marais. The CDC further recorded that Mr Ndwayana also stated to the chairperson of the Students Representative Council, Ms Kobokana via e-mail at 12h13 that Mr Du Toit had uttered a variation of the "*white boy*" phrase. Mr Ndwayana conveyed the same recollection of the phrase to Mr "B" at around 19h20 in the evening of 15 May 2022.

20 We interpose that 15 May 2022 is the date on which the incident occurred.

21 The CDC recorded that as Mr Fullard, on behalf of Mr Du Toit, pointed out, Mr Ndwayana's recollection of what was said began to differ the further from the incident time went on. When the media became involved and Mr Ndwayana was thrusted into the country's – (briefly) international – spotlight, his testimony developed variations and, as such, more holes through which to question his reliability. However, these later revelations do not and should not detract from the initial statements made prior to Mr Ndwayana being shrouded by the external pressures. His testimony was clear and consistent in the immediate aftermath of the incident.

22 As Mr Du Toit could not testify that he did not say the phrase, i.e., the variation of the "*white boy*" phrase, and in light of Mr "X" testifying that he heard a conversation occurring at the time the alleged phrase was said, it was the CDC's belief that the balance of probabilities must fall in favour of Mr Ndwayana. To fail to do so would be to conclude that Mr Ndwayana was, and still is, lying. That is a conclusion that would be ill-established and would in many ways be demeaning.

23 The CDC went on to say that having concluded that it believed Mr Ndwayana's testimony, it had to determine whether the alleged statement was racist. This must be in line with what was said in *Bester*[2] - i.e., would a reasonable, objective and informed person, on hearing the words, perceive them to be racist or derogatory? In context, Mr Du Toit's

---

2 *Rustenburg Platinum Mine v SAEWA (obo) Bester* 2018 (5) SA 78 (CC) para 24

statement is essentially "[*peeing on other people's / people of colour's property] is a white boy thing*". This reading is in line with the Constitutional Court's opinion in *Bester*, as it takes into account that this is a white man perpetrating an offence against a black man. Accordingly, the CDC could not conclude that the statement was anything but racist. It is purely racist. It assumes such dominion over another person – effectively portraying Mr Ndwayana and "*people of colour*" as the toilet for white men. It is incredulously humiliating, hurtful and assails the dignity of Mr Ndwayana and all those affected by the statement. This cannot be acceptable behaviour in any way, shape or form.

24 Accordingly, the CDC concluded that on a balance of probabilities, Mr Du Toit is guilty of contravening clause 9.3 of the Code.

THE CDC'S FINDINGS ON SANCTION

25 It is clear from the judgment of the CDC that in deliberating on sanction, the CDC took into account certain mitigating factors. It found that Mr Du Toit was a first-time offender. That he showed true remorse and was always co-operative with the disciplinary proceedings.

26 However, due to the degrading nature of the incident and the impact it had, not only on the individual, but also on the University community, the CDC could not justify that these factors should detract from the ultimate order.

27 In addition, in its assessment of charge 2, the CDC concluded that the

actions of urinating on Mr Ndwayana's property could only be seen as a clear violation of clause 9.3 of the Code. It said under no circumstances should acts like this carry anything shy of the severest of punishments at Stellenbosch University in the future.

28 It is important to highlight that in the section of the CDC judgment dealing with "*the role of SU and Huis Marais in the Incident's Aftermath*", the CDC criticised the leadership and culture of Huis Marais which reflected a significantly delayed response to reports by Mr Ndwayana of the incident. It also highlighted problems associated with abuse of alcohol and racist attitudes. It observed that transformation initiatives seemed to have been adopted but abandoned for no clear reason. At the end of the discussion, the CDC observed the following:

> *"Evidently, there are unhealthy cultures in SU residences. This is no longer a contentious point – it is a fact. Incidents such as the one at hand – and the massive fallout after it – will continue to litter SU's future unless intentional and courageous actions are taken right through this institution. As the saying goes, the definition of insanity is doing the same thing over and over again and expecting different results. We hope SU takes note of this – for every year there seems to be a protest and an uproar, an inquiry or a commission. This university has become a jack-of-all-trades in damage control and grandiose promises, but ultimately, we question whether it has mastered what is actually expected of it. SU must detach itself from the constraints of its past – which unquestionably includes the influence of status quo-inclined staff and alumni – and focus on building itself to the institution which it decrees it aims to be. We cannot strive toward this envisioned future, with one arm clenching onto the past."*

OUR DECISION

On Charge 3

29 It is convenient to start the discussion on charge 3 by considering the grounds of appeal based on how the CDC treated the evidence of Mr "X". In our view, the evidence of Mr "X" does not assist Mr Du Toit.

30 Mr Hess, representing the University before the CDC, asked Mr "X" to explain in his own words what he had seen when he was outside Mr Ndwayana's room. What follows is what he said:

> *"MR X: Okay, so I came back to my res, I'm coming from the engineering building and on my way to my room, as I was on my way to my room, I just – actually I was on my way to my room and then I'm – the door was open on Babalo's room, actually. I was trying to pass by, by that time. And then he told me that someone was peeing in his room, as I was on my way to my room and then I just thought – and then I asked [indistinct] what – I actually like thought like the [indistinct] was crazy or something like that and then I'm – walked in the room, I stood by the door, and then as I stood by the door, and then I – I mean to say I watched Theuns, he was peeing on Babalo's belongings and Babalo, by that time, he was furious actually, he was furious, he was fuming. Actually, I tried to calm Babalo down as I asked him some questions. I just asked whether Theuns was drunk or he was sleepwalking and then Babalo said he [indistinct] and then I'm – that's when I said this really needs to be reported and then Babalo taking the video afterwards. And then Babalo started taking the video and then he started like interacting with Theuns and then after that I didn't hear the communication, the conversation between the two. I don't know if whether I was probably not – I didn't hear – actually I heard Babalo speaking but then I didn't hear Theuns speaking and then after that, after some while, Theuns was done peeing and then he went out of the room and then that's when I went back to my room, Chair."*[3]

---

3 Transcript (**T**) page 56-57

31 Mr Hess asked further questions to Mr "X", as follows:

> *"MR HESS:* *Okay, so just for us to understand, you were at the door in Babalo's room?*
>
> *MR X:* *Yes.*
>
> *MR HESS:* *Babalo was in front of you and Theuns was further into the room.*
>
> *MR X:* *Yep.*
>
> *MR HESS:* *Okay, so in that sequence, then you said to Babalo, we need to report this.*
>
> *MR X:* *True.*
>
> *MR HESS* *Ja and then Babalo started recording.*
>
> *MR X:* *The video, ja.*
>
> *MR HESS:* *Okay. In you statement you said there was – you could see there was a conversation but you couldn't hear anything.*
>
> *MR X:* *Unfortunately, I couldn't hear anything.*
>
> *MR HESS:* *You couldn't hear anything.*
>
> *MR X:* *Ja.*
>
> *MR HESS:* *You also observed the status in which Theuns was, his state, how he appeared.*
>
> *MR X:* *Ja.*
>
> *MR HESS:* *How he appeared. You said, was this – is this man drunk or sleepwalking?*
>
> *MR X:* *True.*
>
> *MR HESS:* *Is that what you observed? How was his state?*
>
> *MR "X":* *I don't think he was normal. That's all that I can say. Ja. I don't think he was himself, actually."*[4]

32 Mr Hess sought further clarity on whether Mr "X" had seen the video and heard what was on the video but that when he was standing in the door to Mr Ndwayana's room he could not hear what was being said. Mr "X"

---

[4] T page 57-58

confirmed as follows:

"MR HESS: Yes. Something was said on that video.

MR X: True.

MR HESS: Okay. But at the time that you were standing in the door you could not hear.

MR X: I couldn't hear anything, ja. …

MR HESS: Oh, from the video. Okay, that's on the video. Then Babalo says when he was done recording the video, he stopped the video, Theuns walked back to the door.

MR X: Back to the door. To where I was.

MR HESS: To where you were, yes.

MR X: Okay.

MR HESS: And he said, "This is a white boy thing".

MR X: Okay.

MR HESS: Did you hear that?

MR X: No, I didn't.

MR HESS: Was there a conversation like that? Did you see them having a conversation as Theuns was walking?

MR X: For sure, ja.

MR HESS: Sorry?

MR X: Ja.

MR HESS: Oh, there was a conversation but you couldn't hear what was said.

MR X: I could hear Babalo but then I could not hear Theuns.

MR HESS: Okay. Just to make sure, that's after he was done peeing.

MR X: True.

MR HESS: Nothing was said.

MR X: Okay, ja.

MR HESS: Is that correct?

MR X: I think so.

MR HESS: *Okay. So two things were said, while he was peeing something was said and when he was done, he walked back (?) and there was another thing said.*

MR X: *Okay*

MR HESS: *Is that how you understand it?*

MR X: *I don't know what to say now. Ja, I think that's how it is.*

MR HESS: *Yes. The reason why I am asking is, you said there was a conversation between them.*

MR X: *True, true.*

MR HESS: *I couldn't hear the comment there or that conversation.*

MR X: *I couldn't hear, yes. ...*

MR HESS: *Ja. It says:*

"After I ended the video."

MR X: *Okay.*

MR HESS: *"Theuns walked out".*

MR X: *Ja.*

MR HESS: *"And then that's where he said "it's a white boy thing".*

Okay. According to your statement you couldn't hear the conversation but you are sure there was a conversation.

MR "X": *You mean when he was walking out?*

MR HESS: *Ja.*

MR "X": *I can't really say, but, I mean, ja, I think so."*

33 Mr Hess' questioning continued in this line. Mr "X" continued to confirm that there was a conversation between Mr Du Toit and Mr Ndwayana on Mr Du Toit's way out after he had finished peeing and Mr Ndwayana had finished the video recording, but he (Mr "X") could not hear what Mr Du Toit was saying. The questioning went further as follows:

"MR HESS: *In the video you can see Theuns is busy urinating on the desk and there was a conversation and Theuns responded by saying something or to someone or – okay? That's the one incident. The second incident is, now he is done peeing, he's walking back to where you were standing and according to Babalo that's where he said, "It's a white boy thing".*

MR X: *Okay.*

MR HESS: *What's your comment to that? Was there ... [intervenes] …*

MR X: *I can't really comment on the thing that he said because I didn't hear anything.*

MR HESS: *But was there a conversation? …*

MR HESS: *Ja, as he was walking back.*

MR X: *What I know is that Babalo was trying to interact with him but then like coming from outside, I didn't hear anything.*

MR HESS: *Okay. You could hear what Babalo was saying but you could [not][5] hear response from … [intervenes]*

MR "X": *True, true, true, ja.*

MR HESS: *From Theuns.*

MR "X": *Ja. …*

MR HESS: *Okay, what did you see there, how was his appearance at that stage as he walked, did he say anything to you? Did he greet you, did he talk to you?*

MR "X": *He didn't say anything, he didn't greet me, his eyes were red."*[6]

34 The questioning of Mr "X" by Mr Fullard did not yield any version that is in any material respect different from what Mr "X" gave in response to Mr Hess' questioning. This is what Mr "X" said when questioned by Mr Fullard:

---

5 The word "*not*" inserted to make sense.

6 T page 62-64

"MR FULLARD: … *So Babalo is saying Theuns out of the room and while he was exiting, he said "it's a white boy thing". Did you hear it?*

MR X: *No, I didn't.*

MR FULLARD: *sorry?*

MR X: *No, I did not.*

MR FULLARD: *And as you already mentioned or testified or stated that you were also standing at the door.*

MR X: *By the door.*

MR FULLARD: *By the door. So when he walked past you, it was close nearby. You passed close to one another.*

MR X: *He passed, ja.*

MR FULLARD: *That's what I'm saying, it's not an exit – I mean it's not different exists so you walked past each other.*

MR X: *True, true.*

MR FULLARD: *Okey. Just one – you mentioned, and it was discussed, that when you – the first observation that you made was – and I just use – "I asked Babalo is this man drunk or sleepwalking? So was that then how you perceived how you viewed this incident, when you saw him? You said is he drunk, is he sleepwalking?*

MR X: *Ja, ja.*

MR FULLARD: *That's what you mentioned here, so I just want to – was that your first perception?*

MR X: *Ja.*

MR FULLARD: *Your first view when you saw it?*

MR X: *Ja."*"[7]

35 The evidence of Mr "X" quoted above confirms that Mr "X" did not hear Mr Du Toit say "*it's a white boy thing*". But he also confirmed that Mr Du Toit and Mr Ndwayana had a conversation when Mr Du Toit was on his way out after he had finished peeing and after Mr Ndwayana had finished the

---

7 T page 70-73

video recording. Although he could hear Mr Ndwayana, and could see that he was interacting with Mr Du Toit, he could not hear what Mr Du Toit was saying. Thus, the essence of Mr X's evidence in this regard is simply that if Mr Du Toit said anything to Mr Ndwayana in the conversation that he observed when Mr Du Toit was on his way out of Mr Ndwayana's room, Mr "X" did not hear it. This is not the same as saying that Mr Du Toit did not utter the statement – which the CDC characterised as of the "*white boy*" variation. On the contrary, the fact that Mr "X" observed a conversation between Mr Du Toit and Mr Ndwayana at the same time that Mr Ndwayana alleged was the time when Mr Du Toit uttered the "*white boy*" statement may tend to lend credence to Mr Ndwayana's version, or is at best neutral. In the circumstances, the CDC's assessment of the evidence of Mr "X" is not susceptible to interference by us on appeal.

36 Furthermore, contrary to Mr Du Toit's contentions, Mr "X" did not express a positive or firm view that Mr Du Toit was sleepwalking or drunk. The evidence quoted above shows clearly that he raised it as a question or query to Mr Ndwayana. He seems to have done so because Mr Du Toit did not appear to him to be normal or to be himself. In any event, the observation that Mr Du Toit may have been drunk takes the matter no further because the CDC accepted that he was intoxicated. The observation that he may have been sleepwalking is not one that a lay person, such as Mr "X" could have made at the time. In fact, he did not make such an observation. He merely raised it as a question or query. No one presented evidence before the CDC that Mr Du Toit was in fact sleepwalking at the time of the incident, i.e., during the trespassing,

urination and responding to Mr Ndwayana.

37 We turn to deal with the admission of Mr Ndwayana's written statements and emails.

38 It is common cause that at the hearing before the CDC, Mr Hess requested the Chairperson to permit him to use Mr Ndwayana's statements and emails in support of the University's case. He sought to premise his request on clause 30.7 of the Code. The record reflects that Mr Fullard stated that he would argue the weight to be attached to the content of the emails and statements of Mr Ndwayana that were to be used. He said they were not affidavits.

39 We quote what Mr Fullard submitted:

> *"MR FULLARD: Okay, so I will then, obviously, I will then just argue but I will argue that the weight of those two documents or statements … [indistinct] it is not affidavits. …*
>
> *MR FULLARD: He is not under oath but be that as it may, I will just argue the weight of it and of course I am familiar that the rules do provide for … [indistinct] It is part of the bundle. I cannot change (?) that."*[8]

40 We are prepared to consider the matter on the basis that, on its wording, clause 30.7 of the Code appears to be available only to a student wishing to present evidence before the CDC but not to do so orally but by way of a written statement. Mr Ndwayana did not utilise the clause at all.

41 Even if the matter is considered on that basis, it is not clear that Mr Du Toit

---

[8] T page 18-19

is correct in his contention that Mr Ndwayana's written statements and documents could not be considered by the CDC. In our view, this submission ignores two important things:

41.1 First, it ignores the general discretion of the CDC to consider written documents that form part of the preliminary investigation bundle presented to it,

41.2 Second, it ignores the fact that certain of the witnesses that presented evidence before the CDC gave evidence relevant to the contents of the documents and statements. In some cases, these witnesses were questioned by Mr Fullard on these statements and documents without any express objection or reservations regarding the admissibility of their evidence.

42 In relation to the provisions of the Code, the starting point is clause 7.11. This clause makes it clear that the CDC is not a court, and its inquiry does not mimic a criminal trial. It has a wide discretion regarding the admission of evidence. It provides as follows:

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

43 The Code also indicates clearly that the CDC embarks upon a fact-finding

inquiry based on the full record of the investigation, which may include sworn statements and other relevant written material. It provides as follows in clauses 37.5 to 37.10:

> *"37.5 The preliminary record, the results of the further investigation as well as any additional relevant material including sworn statements must be circulated among the members of the CDC in advance of the enquiry.*
>
> *37.6 CDC may require the attendance of any member of the University Community who has made submissions to the CDC regarding the matter and may question that person at the inquiry.*
>
> *37.7 The CDC shall embark on a fact-finding enquiry and ask questions of clarification to any party appearing before it. Any person with an interest in the matter shall be provided with a full opportunity to address the CDC.*
>
> *37.8 The Evidence Leader and Student/Student Representative shall be given an opportunity to ask further questions of clarification.*
>
> *37.9 Cross-examination of witnesses will only be allowed with permission of the chairperson of the CDC.*
>
> *37.10 The CDC's finding on guilt need to be established on a balance of probabilities i.e. which party's version is more probable. The criminal requirement of a finding beyond reasonable doubt shall not apply."*

44 As mentioned above, other witnesses who gave oral evidence referred to the statement that Mr Ndwayana said Mr Du Toit had uttered on the day of the incident, i.e., the *"white boy"* variation. Mr Boshoff confirmed a statement that he had sent to Mr Beresford on 18 May 2022. That statement states:

> *"This is my complete, truthful account for what happened on Sunday, 15 May:*
>
> - *A friend sent me the video at 19:17, asking if I was okay. I was unaware of the incident before this. After watching the video, I immediately sent on our House Committee group "We need to have an emergency meeting."*

- *I ran downstairs to go assess the situation, where I found Babalo, and briefly had a conversation with him about what happened.*
- *The desk had already been partially cleaned. There was a stack of notes (which were urinated on), as well as a laptop. The laptop on 57% battery – and according to Babalo, would not charge.*
- *The only prominent thing I can remember is Babalo telling me that the perpetrator said, "It's a white boy thing".*
- *The room smelled like urine, despite the perpetrator apparently cleaning it up earlier on in the day.*
- *I told Babalo that I would go fetch my toilet spray and then come back to help get rid of the smell.*
- *Hugo and Cole (Mentor and Head Mentor) accompanied me back to Babalo, and helped me carry the table outside and sanitise, as well as to spray the corner of the room of the incident.*
- *I have made no further contact with Babalo."*[9] (Emphasis added)

45 Mr Simeon Boshoff was a member of the House Committee, 2021/2022.

46 Mr Fullard cross-examined Mr Boshoff as to the veracity of his statement without raising any objection to the admissibility of his evidence regarding the statement that Mr Ndwayana had related to him. Instead, he asked him questions on whether his recollection as to what Mr Ndwayana had told him might have faded and that he might have told him about a different statement from what was recorded in his witness statement. Mr Boshoff was adamant that this was not the case. He said he was aware that the other statement that had been referred to was *"This is what white boys do"* or something like that, but that the latter statement was definitely not the statement that Mr Ndwayana had told him that Mr Du Toit had

[9] At page 45 of the documents bundle before this committee

uttered.[10]

47 During his testimony, Mr "X" was referred to the witness statements of Mr Ndwayana.[11]

48 During his questioning of Mr "X", Mr Fullard also referred him to the two witness statements of Mr Ndwayana. He quoted from the witness statements and proceeded to ask Mr "X" questions on whether he had heard Mr Du Toit utter the statement, *"It's a white boy thing"*. He did so without recording any express reservation or objection as to the admissibility of Mr Ndwayana's two witness statements.

49 The other documents that Mr Du Toit contends should not have been admitted by the CDC are emails in which Mr Ndwayana reported the incident to various people at the University. It was common cause before the CDC, and remained so before us, that Mr Ndwayana made these reports by email and that there was a delay on the part of officials of the University in reacting to the reporting of the incident and coming to Mr Ndwayana's assistance. One of the officials to whom the email reports were sent was Dr JH Groenewald, the resident head of Huis Marais. The emails sent to him contained Mr Ndwayana's description of the incident, including the alleged statement, i.e., the "*white boy*" variation. Dr Groenewald testified before the CDC.

50 In these circumstances, especially in the absence of any express objection

---

10 T page 40-41
11 T page 61

by Mr Fullard on behalf of Mr Du Toit that Mr Ndwayana's documentary evidence was not admissible, the CDC was entitled to take the documentary evidence into account.

51 The submission of Mr Fullard before the CDC that he would argue the weight to be attached to the documents and statements of Mr Ndwayana was correct and is in line with the provisions of the Code properly interpreted. It was also correct because certain of the witnesses testified on the documents and what Mr Ndwayana had reported to them regarding the alleged statement by Mr Du Toit. They did so without any objection by Mr Fullard regarding the admissibility of their evidence in that regard. Instead, Mr Fullard asked witnesses questions based on the statements and documents. In those circumstances, Mr Ndwayana's documents were properly before the CDC and could be considered despite the absence of an application by Mr Ndwayana in terms of clause 30.7 of the Code.

52 The CDC properly assessed the reliability of the documentary evidence in light of the video footage of media interviews that took place days after the incident. This video footage was introduced by Mr Fullard on behalf of Mr Du Toit in an attempt to undermine the credibility of Mr Ndwayana's documentary evidence. The CDC rightly observed that on the day of the incident Mr Ndwayana's report regarding the statement that Mr Du Toit allegedly made, i.e., the *"white boy"* variation, was consistent. It only appeared to change over time when he was exposed to public interviews. It is also important to note that in certain of the video footage of public interviews, the wrong statements as to what was said were sometimes

asserted by journalists without Mr Ndwayana intervening and placing the record straight. It is understandable that the pressure of such public exposure might have a role to play in him not intervening to correct misstatements. Everything considered, we are unable to fault the conclusion reached by the CDC that Mr Ndwayana's earlier documentary evidence of what happened was reliable.

53 The CDC was also correct to consider the essence of what was allegedly said, i.e., the "*white boy*" variation and not to focus singly on whether each reporting by Mr Ndwayana at the earlier stages used the exact same wording.

54 We are also not persuaded that a negative inference should be drawn against Mr Ndwayana because he declined to participate in the proceedings before the CDC. It is clear from the documents provided to us regarding the interaction between Mr Ndwayana's legal representatives and the CDC that Mr Ndwayana formed a perception, rightly or wrongly, that he would not receive a fair hearing before the CDC. This was connected to his request to the CDC for him to have his representatives present with him to give him support during the hearing, and how this was resolved, including by extending permission to Mr Du Toit to have similar support (by a parent) without having made a request for it. There was therefore an apparent reason why Mr Ndwayana decided not to participate in the hearing before the CDC. In light of that, it would be unfair and unjustified to conclude that he declined to participate because his version would be shown to be untrue.

55 It is correct that Mr Ndwayana's version could not be tested in cross-examination, but it must be borne in mind that the right to cross-examine a witness before the CDC is itself limited in the discretion of the CDC. Furthermore, there was no version that Mr Fullard could have put to Mr Ndwayana that showed that Mr Du Toit had not made the alleged statement. At best for Mr Fullard, he would only have probably put to Mr Ndwayana the fact that Mr "X" had not heard Mr Du Toit utter the alleged statement. But in fairness to Mr Ndwayana, Mr Fullard might have been expected to disclose to Mr Mr Ndwayana that Mr "X" confirmed in his evidence that he observed Mr Mr Ndwayana and Mr Du Toit having a conversation and while he could hear Mr Ndwayana, he could not hear Mr Du Toit's response. The possibility would still have remained that the alleged statement may have been uttered at the time when Mr "X" observed the conversation between Mr Du Toit and Mr Ndwayana but when he could not hear what Mr Du Toit was saying.

56 If the alleged statement was uttered as the CDC found, Mr Fullard readily conceded that it would qualify, in context, as a racist statement.

57 Given our findings above, we therefore conclude that there is no basis for us to interfere with the CDC's findings on appeal regarding guilt on charge 3.

58 We find that granting the clause 30.7 Application was unnecessary. Consequently, the CDC did not commit an irregularity in admitting and considering Mr Ndwayana's documentary evidence. Even if we may be

wrong and an irregularity was committed, it was not a material irregularity given (singly and cumulatively):

58.1 the discretion of the CDC to admit documentary evidence;

58.2 that the documentary evidence was before the CDC as part of the investigation bundle;

58.3 that Mr Fullard expressly limited himself to arguing only the weight to be attached to the documentary evidence; and

58.4 that Mr Fullard did not expressly object to the hearsay evidence of witnesses that testified on the documentary evidence and the alleged statement, but in fact questioned such witnesses on the very same documents and the alleged statement without any express objection or reservation.

59 We also find that the CDC's finding on the probabilities, taking account of Mr "X"'s evidence, is not open to interference by us on appeal.

On Sanction

60 The grounds of appeal in respect of sanction have no merit.

61 Firstly, it is clear from the findings of the CDC that it took into account the nature of the incident and the impact it had, not only on the individual, but also on the University Community in assessing the appropriate sanction. It also took into account mitigating factors, including that Mr Du Toit was a

first-time offender and that he had shown true remorse and was always co-operative with the disciplinary proceedings.

62 Secondly, it is prudent for us to reflect on the grounds of appeal regarding the seriousness of the offense, the role of ubuntu and the Institutional Values, as well as the appriopriateness of the sanction.

63 Clause 9.3 of the Code clearly intends to combat conduct that assails the human dignity, integrity and security of other persons. In *S v Makwanyana,*[12] at paragraph 328, O'Regan J explained that:

> *"Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern."*

64 She said further, at paragraph 329:

> *"Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new constitution."*

65 In that same judgment at paragraph 225, Langa J, as he then was, explained that an outstanding and integral feature of *ubuntu* is the value it puts on the respect for the human dignity of others.

66 In our view, a proper appreciation of these values of dignity and *ubuntu* must mean that *ubuntu* should not so readily be available as a shield from accountability for conduct that assails the dignity of another.

---

[12] *S v Makwanyane and Another* 1995 (3) SA 391 (CC)

67 The University's institutional values of mutual respect, compassion, accountability and excellence derive their thrust from the University's vision for where it wants to go and what it wants to be. As the CDC correctly noted; the University cannot strive toward its envisioned future if it does not take decisive action and adopt a zero tolerance approach to conduct that causes mental harm, is grossly insulting, hugely humiliating and demeans the human dignity of others.

68 Therefore, we are of the view, like the CDC, that the conduct of Mr Du Toit in charge 2 undoubtedly assailed the human dignity, integrity and security of Mr Ndwayana, it was deeply humiliating, degrading and also destructive of Mr Ndwayana's property. Accordingly, we conclude that a finding of guilt on charge 2 was on its own sufficient to justify the sanction of expulsion. It is not conduct that must be countenanced by any community, let alone a university community.

69 We, therefore, take the view that even if we are wrong on the outcome of charge 3, the sanction of expulsion was not shockingly inappropriate and completely disproportionate to the offence, the offender and the interests of the University Community. It is also not a sanction that fails to take into account the purposes of the Code in clause 2 and the considerations in clauses 37.11 and 37.12 of the Code. Expulsion is appropriate and permissible in an appropriate case under clauses 2, 37.11 and 37.12 of the Code. We agree with the CDC that this is an appropriate case for expulsion.

70 For these reasons, the appeal against the sanction of expulsion also falls to be dismissed.

CONCLUSION

71 For all of the reasons discussed above, the appeal is dismissed.

72 This DAC ruling is to be made public by the Head of Student Discipline.

_____

MR NH MAENETJE SC

Chairperson

_____

PROF WJ KRAAK

Academic Staff Member

_____

MR Y KEVA

Student Member

13 November 2022