THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 164 / 20

In the matter between:

DR SIBONGILE VILAKAZI **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

MADELEINE LOYSON *N.O.* (AS COMMISSIONER) **Second Respondent**

UNIVERSITY OF WITWATERSRAND **Third Respondent**

Heard: **24 October 2023**

Delivered: **3 November 2023**

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 3 November 2023

Summary: **Review application – time limit in terms of section 145(1) considered – review application brought out of time without proper condonation application – material delay in serving of review application – legal principles considered – condonation nonetheless granted**

Inconsistency – principles considered – applicant failing to make out any case of inconsistency – finding by arbitrator that no inconsistency proven reasonable and upheld

Misconduct – conflict of interest (moonlighting) – principles considered – terms of policy considered – arbitrator rationally and reasonably determining misconduct of employee – arbitration award not only reasonable but correct – review application dismissed

Costs – review application actually hopeless, ill-conceived and never had merit – costs award justified

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JUDGMENT

SNYMAN, AJ

Introduction

[1] The applicant has brought an application to review and set aside an arbitration award of an arbitrator appointed by the Commission for Conciliation, Mediation and Arbitration (CCMA) to arbitrate an unfair dismissal dispute between the applicant and the third respondent. As will be discussed later in this judgment, it is a review application that never had merit and should never have been brought. In terms of the arbitration award sought to be reviewed by the applicant, the second respondent, as the duly appointed arbitrator, determined that the dismissal of the applicant by the third respondent was substantively and procedurally fair. The application has been brought by the applicant in terms of section 145 of the Labour Relations Act (LRA)[1].

[2] The review application came before me on 24 October 2023. After considering the pleadings, the arbitration record, and the arguments presented by both parties, I made the following order:

> '1. The applicant's review application is dismissed.
>
> 2. The applicant is ordered to pay the third respondent's costs.

[1] Act 66 of 1995 (as amended).

3. Written reasons for this order will be provided on 3 November 2023.'

[3] This judgment constitutes the written reasons as contemplated by paragraph 3 of my order, above.

Condonation

[4] The arbitration award of the second respondent, dated 14 November 2019, was served on the applicant's attorneys on 18 November 2019, the applicant being legally represented in the arbitration. In terms of section 145(1) of the LRA, any review application must be brought within six weeks from date the party seeking to challenge the award on review, having become aware of the award. Using the applicable civil method of calculation, this means that the applicant's review application had to be brought on or before 30 December 2019.

[5] But when was the applicant's review application actually brought? This is not a straightforward question to answer, because of the conduct of the applicant. It is true that the applicant filed her review application in the Labour Court on 27 January 2020, which is just short of a month out of time.

[6] It is however where it comes to the service of the application on the respondents that matters go awry. When the applicant sought to serve the review application on the third respondent, she sent it by e-mail to an individual employee at the third respondent, identified in the service affidavit as being one Zibusiso Manzini-Moyo, allegedly employed in the HR department, on 27 January 2020. There was no confirmation that this person received the review application.[2] The covering e-mail to the review application, which was provided as the proof of service attached to the service affidavit, was not even directly addressed to this person, as he was reflected as a '*CC*' recipient.

[7] The third respondent has explained, in the answering affidavit, that Zibusiso Manzini-Moyo is not employed in the HR department, but is actually employed in the School of Governance. and would never be authorised to accept service on behalf of the third respondent The applicant has thus attempted to mislead the Court as to proper service on the third respondent. In addition, the third

[2] Compare clause 14.1.5 of the Practice Manual.

respondent has pointed out that the e-mail address used by the applicant for Zibusiso Manzini-Moyo is not even correct.

[8] Service on the first and second respondents faced similar difficulties. Service was also purportedly effected by e-mail on 27 January 2020, but once again it was never confirmed that the pleading was actually received. It appears that service was then later affected by hand on the first and second respondents on 11 March 2020, by virtue of receipt confirmations stamps contained in the original notice of motion in the Court file. Similar remedying conduct was not extended to the third respondent.

[9] In terms of Rule 7A(1), a party seeking to bring a review application must '*deliver*' a notice of motion and founding affidavit to all affected parties. As to what constitutes '*deliver*', this is dealt with in the definitions in Rule 1, where it is recorded that '*'deliver' means serve on other parties and file with the registrar*'. In turn, '*serve*' is defined as meaning service in terms of Rule 4(1). Rule 4(1) does not make provision for service by e-mail but does provide for service by hand. In terms of Rule 4(3), if the court is not satisfied that service has taken place in accordance with Rule 4(1), it may make any order as to service that it deems fit.

[10] It follows from the above that a referral to this Court of a review application in terms of Rule 7A only exists when a notice of motion and founding affidavit is validly served on the respondent parties, and then filed in Court. There is no delivery of the review application until such time as both the service and the filing requirements have been fulfilled.

[11] There is an important reason why service on the respondent parties must always be effected in compliance with the requirements stipulated by law. It is this service that places the respondent parties on notice that there exist legal proceedings against them, and then calls on such respondent parties to engage. That being so, precision is the watch word. This was recognized in *National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd*[3] where the Court said:

[3] (2015) 36 ILJ 363 (CC) at para 53.

> '… The objectives of service are both substantial and formal. Formal service puts the recipient on notice that it is liable to the consequences of enmeshment in the ensuing legal process. This demands the directness of an arrow. One cannot receive notice of liability to legal process through oblique or informal acquaintance with it …'

[12] Added to this, it is common cause that the purported initial service on 27 January 2020 was done by e-mail, which in itself also makes the service invalid, as e-mail service is not permitted by Rule 4(1). The applicant never applied to allow an alternative form of service in terms of Rule 4(3). The parties only agreed to the e-mail service of documents between them, on 21 September 2021. Therefore, and for this simple reason as well, there was no valid service of the review application on the third respondent on 27 January 2020.

[13] How the third respondent became aware of the existence of the review application is when, after the applicant again changed attorneys to her current attorneys of record, these current attorneys of record served a notice of appointment as attorneys of record on the third respondent, on or about 10 September 2021, which notice was served along with the review application and founding affidavit. The third respondent then immediately appointed its current attorneys of record, who filed a notice to oppose and accessed the Court file for perusal. It was ascertained from the Court file that the matter had in fact been set down on the unopposed roll on 18 August 2021 for hearing, of which the third respondent was not even aware.

[14] It also appeared that the review application came before Prinsloo J on 18 August 2021, and the learned Judge was unwilling to entertain the application, because she was not satisfied that there was proper service of the review application in compliance with the Court Rules and Practice Manual. The learned Judge removed the matter from the roll for this reason. According to the third respondent, this had to be the reason why the review application was then served again *in toto*, by the applicant's new attorneys, on the third respondent in September 2021.

[15] In this instance therefore, there was only valid service on the first and second respondents on 11 March 2020, and finally on the third respondent on 10

September 2021. It follows that this latter date would be the date when the review application was actually brought.[4] Overall considered, it makes the review application 21(twenty one) months' late.

[16] Therefore, and prior to dealing with the merits of the applicant's review application, it is necessary to first deal with the application for condonation, as without a successful application for condonation to regularize the late filing of a review application, this Court would have no jurisdiction to deal with the applicant's review application.[5]

[17] The requirements that must be addressed by an applicant seeking condonation are trite. In the well-known judgment of *Melane v Santam Insurance Co Ltd*[6] the Court held that these requirements for consideration are the length of the delay, the explanation for the delay, the importance of the case (prejudice) and the prospects of success. These requirements are interrelated, and must be holistically considered. In dealing with an application for condonation specifically where it came to the late filing of a review application, the Labour Appeal Court (LAC) in *A Hardrodt (SA) (Pty) Ltd v Behardien and Others*[7] referred with approval to the judgment in *Queenstown Fuel Distributors CC v Labuschagne NO and Others*[8] and said:

> 'The principles laid down in that case included, firstly that there must be good cause for condonation in the sense that the reasons tendered for the delay had to be convincing. In other words the excuse for non-compliance with the six-week time period had to be compelling. Secondly, the court held that the prospects of success of the appellant in the proceedings would need to be strong. The court qualified this by stipulating that the exclusion of the appellant's case had to be very serious, ie of the kind that resulted in a miscarriage of justice.'

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[4] In *Kock v Commission for Conciliation, Mediation and Arbitration and Others* (JR764/18) [2021] ZALCJHB 101 (31 May 2021) at para 26 it was held: '*… the review application can only be considered to have been properly brought once it was both served on the respondent parties and filed in Court. …*'.
[5] In *SA Transport and Allied Workers Union and Another v Tokiso Dispute Settlement and Others* (2015) 36 ILJ 1841 (LAC) at para 8 the Court said: *'… The onus, generally speaking, was upon the appellants to show that the review application had been launched timeously because this is a fact or element which goes to establishing the jurisdiction of the Labour Court to hear the application for review. …*'.
[6] 1962 (4) SA 531 (A) at 532C-E.
[7] (2002) 23 ILJ 1229 (LAC) at para 4.
[8] (2000) 21 ILJ 166 (LAC).

It follows that the condonation requirements in the case of the late filing of a review application are applied more stringently than normally would be the case in other legal proceedings.

[18] Where it comes to the length of the delay, the longer it is, the worse it gets. An excessive delay could in itself be seen to be fatal to the issue of good cause, in the absence of a truly exceptional explanation. This holds even more true in a review application, which is generally considered to have an inherent requirement of being urgent. As a general benchmark, delays in excess of two months after the expiry of the time limit in the case of a late review application could generally be described to start becoming excessive.[9]

[19] The next element to considering any condonation application is that of the explanation provided for the delay. This must be a proper explanation supported by sufficient particularity, dealing with the entire period of the delay.[10] In my view, the issue of a proper explanation for the entire period of the delay would be the most critical component to any condonation application.[11] This is even more so in a review application, considering the words of '*convincing*' and '*compelling*' used by the LAC in *A Hardrodt supra* in describing what the explanation needs to be. Any explanation in the application for condonation must be considered in the context of the imperative of the expeditious resolution of employment disputes.[12]

[20] As to the requirement of dealing with the issue of prejudice, the applicant must set out in what manner the applicant would be prejudiced if condonation is refused, again with sufficient particularity. The prejudice the applicant would suffer should be compared to the possible prejudice the other party would suffer

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[9] Compare *Plastics Convertors Association of SA and Another v Metal and Engineering Industries Bargaining Council and Others* (2017) 38 ILJ 2081 (LC) at para 15; *Silplat (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 1739 (LC) at para 24.

[10] See *Seatlolo and others v Entertainment Logistics Service* (*a division of Gallo Africa Ltd*) (2011) 32 ILJ 2206 (LC) at para 11.

[11] *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others* (2010) 31 *ILJ* 1413 (LC) para 13 it was held that: '*… it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay …*'.

[12] See *Food and Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd* (2018) 39 ILJ 1213 (CC) at para 187. See also *National Education Health and Allied Workers Union v University of Cape Town and Others* (2003) 24 *ILJ* 95 (CC) at para 31.

if condonation were granted, so as to enable the Court to make a balanced decision on this.

[21] The prospects of success of the applicant on the merits of the case must also be considered. However, and where it comes to considering the issue of prospects of success, there is a proviso, which proviso in fact illustrates the critical importance of the explanation for the delay. Where an applicant fails to provide an explanation for the delay or material parts of the delay, the issue of prospects of success in fact becomes an irrelevant consideration.[13]

[22] And finally, regard must be had to the interests of justice.[14] What this entails is that in a particular case, there may be some very unique or exceptional circumstance that necessitates the Court to consider the case on the merits, because it is in the interest of justice to do so, even where the other condonation elements may be lacking.[15]

[23] Applying all the above principles and considerations to the applicant's condonation application *in casu*, the original delay in filing the review application itself in Court is about a month. This is not a material delay. Considering this period of delay separately, I must confess that I find the explanation for the period from 18 November to 23 December 2019 to be somewhat thin. The applicant explains that she only received the arbitration award from her attorneys on 23 December 2019. But this does not change the fact that her attorneys already received the arbitration award on 18 November 2019, and her attorneys' address was the appointed address for service. This part of the delay is therefore in reality not properly explained.

[24] It is of course true that the review application was only brought when proper service was finally effected on the third respondent, some 21 months later. This delay is not explained at all, as the third respondent correctly pointed out. I

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[13] See *Mziya v Putco Ltd* (1999) 3 BLLR 103 (LAC) at para 9; *Moila v Shai NO and Others* (2007) 28 ILJ 1028 (LAC) at para 34; *Universal Product Network (Pty) Ltd v Mabaso and Others* (2006) 27 ILJ 991 (LAC) at para 20; *Colett v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 *ILJ* 1948 (LAC) at para 38; *Mgobhozi v Naidoo NO and Others* (2006) 27 *ILJ* 786 (LAC) at para 34.

[14] See *MJRM Transport Services CC v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 414 (LC) at para 22; *Sasol Infrachem v Sefafe and Others* (2015) 36 ILJ 655 (LAC) at para 29; *Thiso and Others v Moodley NO and Others* (2015) 36 ILJ 1628 (LC) at para 7; *SA Post Office Ltd v CCMA and Others* (2011) 32 *ILJ* 2442 (LAC) at para 17.

[15] Compare the example found in *National Education Health and Allied Workers Union on behalf of Mofokeng and Others v Charlotte Theron Children's Home* (2004) 25 ILJ 2195 (LAC) at paras 24 – 26.

accept that this kind of unexplained delay may well serve to non-suit an applicant for condonation without even looking at the merits of the case. The applicant has come close in having this consequence visited on her. However, I cannot ignore that at least she did attempt to serve the application on the respondents on 27 January 2020, showing that she did intend to pursue the matter further at the outset. That delay, as stated above, is less than a month, and is not a material delay. Considering the December / January holiday season, and the fact that the applicant did brief new attorneys in this time that had to become fully familiar with the matter, I do not believe this delay is an undue delay in the circumstances. I also cannot turn a blind eye to the fact that the applicant did further prosecute the review application with due diligence, to finality, even if it was off the back of irregular service. Even though I am of the view that the applicant's failures should not serve to non-suit her where it comes to condonation, her conduct in this regard will have implications where it comes to the issue of costs, which I will address later in this judgment.

[25] Accordingly, and even though the applicant's explanation for the delay in this case is somewhat deficient, I do believe that at least there is some explanation that covers the entire period of the delay, making it necessary to consider the issue of prospects of success. I consider the issue of prejudice to be a neutral factor.

[26] For all the above reasons, I will exercise my discretion and grant the application for condonation, so that the issue of prospects of success can be fully considered, as this is not a case where the explanation for the delay is so lacking as to render the issue of prospects of success immaterial. I will therefore now turn to deciding the substance of the applicant's review application, starting with setting out the test for review.

The test for review

[27] The test for review is trite. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[16] the Court held that '*the reasonableness standard should now suffuse s 145 of the LRA*', and that the threshold test for the reasonableness of an award was: *'… Is the decision reached by the commissioner one that a*

[16] (2007) 28 ILJ 2405 (CC).

reasonable decision-maker could not reach?...'[17]*.* This means that the award in question is tested against the facts before the arbitrator to ascertain if it meets the requirement of reasonableness.[18] In conducting this test it is necessary for the Court to enquire into and consider the merits of the matter and the entire evidence on record in deciding what is reasonable.[19] In *Herholdt v Nedbank Ltd and Another*[20] the Court said:

> A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable …

[28] In sum, applying the correct review test has a logical chronology. First, it is ascertained whether there is a failure or error on the part of the arbitrator. Second, and only where there is such a failure or error, it must be shown that the outcome arrived at by the arbitrator was unreasonable, based on all the evidence and issues before the arbitrator, even if it may be for different reasons or on different grounds as those referred to by the arbitrator.[21] It would only be if the consideration of the evidence and issues before the arbitrator shows that the outcome arrived at by the arbitrator cannot be sustained on any grounds, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, that the review application would succeed.[22]

Analysis

[29] Proper regard to the evidence in this case, as contained in the record, shows that the essential facts that must be considered in order to fairly and reasonably

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[17] Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96.
[18] See *Duncanmec (Pty) Ltd v Gaylard NO and Others* (2018) 39 ILJ 2633 (CC) at paras 43.
[19] Id at para 41.
[20] (2013) 34 *ILJ* 2795 (SCA) at para 25. See also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC) at para 14; *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.
[21] *Fidelity Cash Management Service (supra)* at para 102.
[22] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others* (2015) 36 ILJ 1453 (LAC) at para 12.

decide this case, were mostly either undisputed, or common cause. I do not intend to set out the facts in this case in substantial detail, and what will now follow is the core exposition of the essential facts.

[30] But before I depart on the journey of deciding the review application, something must be said about the arbitration award of the second respondent. In my view, it is an exemplary award. It contains a succinct summary of all the core facts, which fully corresponds with the evidence as it is contained in the record. The second respondent then properly and correctly identified all the legal questions she was required to decide, and then applied the facts to each of these questions. She gave proper and detailed reasoning for all her findings, which leaves any reader with little doubt as to why she found as she did and that these findings made sense. In my view, had the applicant given the award the proper attention it deserved, and applied her mind to the same, she would have realised that this review application should never have been brought.

[31] The above being said, and turning to the facts of the case *in casu*, the applicant was employed by the third respondent in its Wits Business School section. Initially, she was employed as a part time lecturer, commencing employment on 1 August 2017, in terms of what was called a 50% contract. The applicant was also employed at Alexander Forbes during her tenure as part time lecturer with the third respondent. In terms of this 50% contract, the applicant was only required to work for the third respondent for 20 hours per week, and her remuneration package was R360 000.00 per annum.

[32] However, and in May 2018, the applicant resigned from Alexander Forbes, opting to take up full time employment with the third respondent as a lecturer in the Wits Business School. This full-time employment became effective on 1 July 2018, and is for all intents and purposes full time employment like any other full-time employee elsewhere. In terms of a written contract of employment signed on 25 May 2018, she would receive an annual salary package of R787 520.00. In this employment contract (clause 8.1) the applicant agreed and undertook to familiarize herself with all policies, rules and regulations applicable to all permanent academic staff of the third respondent. Her duties included teaching, examining, researching / scholarly work, as well as general administrative duties.

[33] In terms of the general conditions of service of the third respondent, the hours of work of employees are either set out in the individual employment contracts of staff members concerned, or if not, it would be as prescribed by the Basic Conditions of Employment Act (BCEA)[23]. The hours of work of the applicant were not regulated in her contract of employment, and thus the BCEA would apply.[24] The applicant was required to become member of the retirement / provident fund and the staff medical aid fund.

[34] Specifically applicable *in casu* is the third respondent's Policy on the Declaration of Interests (the Policy). In the preamble of the Policy, it is recorded that the adoption of the Policy was essential, as it became apparent that there were regular occurrences of academic staff taking up outside interests which could conflict with the interests of the third respondent and / or detrimentally affect the performance and / or professional duties of such academic staff at the third respondent. A '*conflict of interest*' in terms of the Policy is defined as a conflict between the private interests (financial, personal or other) and the official responsibilities of a staff member. '*Financial interest*' is defined as *inter alia* the payment for services rendered, directorships and intellectual property rights. There is also a specific definition for '*moonlighting*', which reads: '*taking up additional employment, which may require time investment that may impede a staff member in meeting his or her contractual obligation to the University*'.

[35] There are two particular provisions of the Policy that lies at the heart of this matter. In clause 7 of the Policy, staff members are required to declare their interests as contemplated by the Policy. In terms of clause 7.1, such interests must be declared by completing and submitting a prescribed form to the relevant human resources manager on the 28th of February of every year. Where is comes to new appointments, clause 7.2.2 provides that the declaration of interest form must immediately be submitted to the human resources department, who in turn would submit the form to the Vice Chancellor's office for consideration, The Vice Chancellor would then have the discretion to allow or not to allow any such conflict of interest so disclosed. However, and in terms of clause 5.4.1, any involvement in any external institutional affairs, including moonlighting, must be approved by the Vice-Chancelor's office.

[23] Act 75 of 1997 (as amended)
[24] This meant the working hours was 45 hours per week – see section 9(1)(a) of the BCEA.

[36] It was common cause that with the ink barely dry on her permanent employment contract with the third respondent, the third respondent also took up full time employment with Kantar South Africa (Pty) Ltd (Kantar). She signed an employment contract with Kantar on 4 July 2018. In terms of this employment contract, she was appointed as accounts director, on a full-time employment basis. Her working hours were office hours from Monday to Friday, and she had to work at least 37.5 hours per week. She earned a monthly salary package of R91 667.00, which is some R36 000.00 per month more than what she was earning at the third respondent. She would also be obliged to join the medical ais scheme and retirement fund at Kantar. In clause 10.2.8 of her employment contract with Kantar, the applicant agreed not to be directly or indirectly interested in any business of any kind whatsoever, without prior written permission of Kantar. She even agreed to a restraint of trade.

[37] What all the above meant, on the facts, is that the applicant first took up full-time employment with the third respondent and committed herself to the third respondent. She then turned around, virtually immediately, and took up full-time employment with Kantar, and equally committed herself to Kantar. This is an untenable proposition, as a matter of common sense and logic, and how the applicant, as a highly qualified and academic person could not see this, is beyond comprehension.

[38] Added to above, the applicant never even took the trouble or disclosing her intention to take up such employment with Kantar to the office of Vice-Chancellor, and obtain prior written approval as required by the Policy. This was apparent on the common cause facts.

[39] The applicant's department head, Professor Paul Alagidede (Alagidede), came to know of the applicant's employment Kantar about one month after she took up such employment, when someone had anonymously placed a copy of her employment contract with Kantar in his pigeonhole at the third respondent. Needless to say, and when this state of affairs was discovered, the applicant was reported to the third respondent's HR department for further action. There was some evidence about the interaction between the applicant and Professor Alagidede after he became aware of the contract, but none of this is relevant in deciding this case, as Professor Alagidede was simply not in the position to condone or approve her employment at Kantar.

[40] On 30 January 2019, the applicant was notified to attend a disciplinary enquiry which was scheduled to take place on 4 February 2019. In that disciplinary enquiry, she would face the following charge: '*Gross misconduct in that you took up full time employment at Kantar South Africa (Pty) Ltd whilst still in the full-time employment of the University without the knowledge or authority of the University. Your conduct was to the prejudice or potential prejudice of the University*'.[25]

[41] The disciplinary hearing was twice postponed and ultimately took place on 19 February 2019, and was presided over by an independent chairperson. The applicant was found guilty of the charge against her, and the chairperson recommended the dismissal of the applicant. The applicant was then dismissed by the third respondent on 6 March 2019.

[42] On 19 March 2019, the applicant referred an unfair dismissal dispute to the CCMA. The matter remained unresolved at conciliation held on 15 April 2019, and proceeded to arbitration, where it came before the second respondent. Both parties were legally represented in the arbitration, which took place on 18 September and 28 October 2019.

[43] Prior to the commencement of the arbitration, the parties held a pre-arbitration conference and concluded a pre-arbitration minute on 22 July 2019. In this pe-arbitration minute, a number of common cause facts were agreed to. In particular, it was agreed that the applicant took up employment at Kantar. It was also agreed that the applicant did not notify, nor request, approval from anyone at the third respondent in order to sign a full-time employment contract or take up employment with Kantar on a full-time basis.

[44] As stated above, and in an arbitration award dated 14 November 2019, the second respondent concluded that the dismissal of the applicant by the third respondent was both substantively and procedurally fair. The reasons why the second respondent came to such conclusion will be dealt with below. Suffice it to say at this stage that it is this award that led to the current review application.

[45] In her award, the second respondent started by assessing the credibility of the witnesses that testified before her. She considered the testimony of the two

[25] There was another charge that was not pursued and will not be dealt with in this judgment.

witnesses for the third respondent, being Fleming and Winter, and found their evidence '*compelling*'. She pointed out that they testified in a '*straightforward, frank and honest*' manner, and that their intent to testify truthfully was self evident. She accepted this evidence as '*credible and reliable*'. These kinds of findings are the second respondent's very task to fulfil, and this Court should not readily interfere with such findings. As held in *Standerton Mills (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*:[26]

> '… Credibility issues are indeed difficult to determine in motion proceedings such as these. The commissioner is undoubtedly in a better position to make a finding on this issue. …'

[46] It is my view that this Court should only interfere with credibility findings made by CCMA arbitrators, if the evidence on the record before the Court shows that the credibility findings of the arbitrator are entirely at odds with or completely out of kilter with the probabilities and all the evidence actually found in the record considered as a whole.[27] In considering the transcript of the testimony presented by Fleming and Winter in the arbitration, as found in the transcript, I simply can find no reason to interfere with the credibility findings made by the second respondent. These credibility findings are in conformity to what is contained in the record. There is simply no case that the second respondent's preferring of the evidence of these witnesses and finding them to be honest and credible is out of kilter with the evidence, or otherwise unsustainable, once the record is properly considered. The credibility findings of the second respondent must therefore stand. And once that is so, the applicant's case already faces a significant obstacle.

[47] Fleming testified that the work of a full time academic at the third respondent, such as the position the applicant had been employed in, required full time focus and carried with it a substantial workload. According to Fleming, full-time employment of the applicant with Kantar would have the risk of directly impacting on the applicant's duties at the third respondent. Fleming explained that is why, before such a position is even taken up, it must be declared to the

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[26] (2012) 33 ILJ 485 (LC) at para 18.

[27] See *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 945 (LC) at para 31; *Truworths Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2009) 30 ILJ 677 (LC) at para 25; *Moodley v Illovo Gledhow and Others* (2004) 25 *ILJ* 1462 (LC) at para 22; *Kgoadi v Commission for Conciliation, Mediation and Arbitration and Others* [2014] JOL 31908 (LC) at paras 51 – 52.

third respondent who could then evaluate the situation and make an informed decision of whether to allow it or not. Fleming added that it was immaterial whether the applicant was able to '*manage*' both sets of employment, as it still had to be declared beforehand to the third respondent and permission had to be obtained.

[48] Winter testified mostly about the applicant's procedural unfairness complaints. The applicant raised a complaint that she wanted to call the Director of Transformation and Equity to testify on her behalf in the disciplinary hearing, but Winter refused to allow this. Winter explained why she believed this testimony was not relevant and explained why she declined the request to call this witness. This will be dealt with later in this judgment. Winter also dealt with the applicant's complaint that the applicant did not have enough time to prepare for the disciplinary hearing, equally dealt with later in this judgment. But what Winter was also asked about, and ironically under cross examination, is her view on the interpretation of the Policy. According to Winter, and under the policy, the applicant was required to immediately declare her employment with Kantar, and obtain the necessary authority to enter into such an employment contract.

[49] On the undeniable facts, the applicant elected to change her part time employment with the third respondent, in the course of which she had employment with another employer (which she actually declared), to full-time employment only with the third respondent. That was her own and deliberate choice. What is expected of her as a full-time employee of the third respondent has been set out above, and these obligations do not contemplate and would be incompatible with full-time employment with another third-party employer. However, and immediately after taking up full-time employment at the third respondent, the applicant takes up full-time employment at Kantar. Again, a consideration of the terms of her employment with Kantar equally reveals that it does not contemplate, nor is it compatible with, full time employment anywhere else. The second respondent had proper regard to these contractual considerations. In her award, she conducted a detailed analysis of the pertinent contractual provisions of both contracts, and indicated why the two contractual relationships were mutually incompatible and could not practicably exist together. This reasoning is unassailable on review, and rationally and reasonably arrived at.

[50] Just as a simple example, taking the working hours in the two sets of contracts, the applicant would be expected to render a total of some 80 hours of service per month, which translates in the applicant having to work at least 11 hours per day for 7 days per week. The second respondent was alive to this very example, and in her award mentioned that the applicant had to show '*superhuman abilities*' to discharge her obligations under both contracts, which was not '*humanly possible*', and simply not sustainable. The second respondent certainly got it right. It should also be considered that the applicant was paid far more at Kantar than she is paid at the third respondent, which in itself puts her loyalties towards the third respondent in question should there be a case where both employers require specific work to be performed by her at the same time. All this undeniably constitutes prohibited moonlighting, and would certainly place the interests of the third respondent at risk.

[51] Against the backdrop of this accepted / undisputed evidence, some legal principles bear reference.[28] In *Sappi Novoboard (Pty) Ltd v Bolleurs*[29] it was held as follows:

> '… It is an implied term of the contract of employment that the employee will act with good faith towards his employer and that he will serve his employer honestly and faithfully … The relationship between employer and employee has been described as a confidential one … The duty which an employee owes his employer is a fiduciary one 'which involves an obligation not to work against his master's interests' …'

[52] Applying these principles specifically to the employment relationship, the Court in *Ganes and Another v Telecom Namibia Ltd*[30] held as follows:

> 'As an employee of the respondent and in the absence of an agreement to the contrary the first appellant owed the respondent a duty of good faith. This duty entailed that he was obliged not to work against the respondent's interests; not to place himself in a position where his interests conflicted with those of the respondent … '

[28] It may be added that the second respondent was very much aware of these legal principles, and specifically referred to some of these authorities in her award.
[29] (1998) 19 ILJ 784 (LAC) at para 7.
[30] (2004) 25 ILJ 995 (SCA) at para 25. See also *Volvo (Southern Africa) (Pty) Ltd v Yssel* (2009) 30 ILJ 2333 (SCA) at paras 16 – 17; *Stoop and Another v Rand Water* (2014) 35 ILJ 1391 (LC) at para 99.

[53] The LAC in *Bonfiglioli SA (Pty) Ltd v Panaino*[31] applied the above *ratio* in *Ganes* as follows:

> '… at common law, the employee owes the employer a duty of good faith. In *Ganes & another v Telecom Namibia Ltd*, it was said that the duty of good faith entails that an employee is obliged not to work against the interests of his/her employer and not to place himself/herself in a position where his/her interests conflict with those of the employer. In *Council for Scientific & Industrial Research v Fijen*, it was stated that:
>
> 'It is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitled the "innocent party" to cancel the agreement. …'

[54] But even if it is considered whether the applicant's employment at Kantar would actually place the interests of the third respondent at risk, this in my view would be undeniable. Considering the simple fact that the applicant earns much more at Kantar, I have little doubt which employer will get preference if both require work to be done at the same time. The availability of the applicant to do what the third respondent expects of her as full time academic is severely compromised by her full-time job at Kantar. It is a realistic proposition to accept that the proper lecturing of students by the applicant, as well as her required administrative duties and research, would suffer as a result of this state of affairs. It cannot be expected of the third respondent to hope the applicant will give it the attention and duties it has contracted with her for, by somehow '*managing*' her relationship between the two employers. Thus, and objectively, there exists a conflict of interest, or at least a very real risk of conflict of interest, to the prejudice or potential prejudice of the third respondent.

[55] Considering the accepted / undisputed testimony as set out above, and applying the legal obligations of the applicant under her contract of employment, there can be no doubt about proper the interpretation and application of the Policy in this case. It was always beyond any contestation that what the applicant did in this case was '*moonlighting*' as defined in the Policy. That being so, the core provision in the Policy is simple. The external employment must be declared to the office of the Vice-Chancellor up front, and permission had to be obtained. The failure to have done so constitutes breach of the Policy by the applicant, as

[31] (2015) 36 ILJ 947 (LAC) at para 26.

well as a violation of her duty of good faith (fiduciary duty) towards the third respondent under her contract of employment. It is really as simple as that. It is a common sense and businesslike interpretation and application of the Policy. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[32] it was held as follows:

> 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document …'

[56] The second respondent, in considering the terms of the Policy, held that the objective of the Policy was to regulate actual and potential conflicts of interests of a variety of types, and then to manage the adverse impacts of any such conflicts of interests. This reasoning is correct. It follows that point of departure of the second respondent in interpreting the terms of the Policy is sound.

[57] Next, the second respondent referred to the fact that the Policy actually appreciated that staff members at a university may have 'special relationships' with third parties, and / or have other business interests, which could be seen to conflict with the interests of the university, but recognised that such relationships needed to be managed. Core to this management is a proper declaration of any such potentially conflicting interests. The second respondent then specifically referred to individual terms of the Policy I have already set out above, and in particular, to the provision that 'moonlighting' must be approved

[32] 2012 (4) SA 593 (SCA) at para 18. See also *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12; *Association of Mineworkers and Construction Union and Others v Chamber of Mines of SA and Others* (2017) 38 ILJ 831 (CC) at fn 28; *Democratic Nursing Organisation of SA on behalf of Du Toit and Another v Western Cape Department of Health and Others* (2016) 37 ILJ 1819 (LAC) at para 33.

by the office of the Vice-Chancellor. Again, the second respondent's reasoning in this regard cannot be faulted.

[58] An important part of the reasoning of the second respondent is where she found that the subjective assessment of the applicant as to what would be regarded by her to be a conflict of interest is of no moment or relevance, as it is for the third respondent (in particular the Vice-Chancellor's office) to consider whether or not to grant approval, and it is the third respondent that must decide of there is a conflict of interest. It is the declaration of interest and seeking of approval that enables the third respondent to do this. In my view, this reasoning of the second respondent is faultless, and can be endorsed without hesitation. If it is left up to an individual employee to decide, subjectively, what may constitute a conflict of interest in the case of moonlighting, the entire objective of the Policy will be negated. Only the third respondent can assess and determine what may be a conflict of interest that places its own interests at risk, having due regard of all the interests of the entire university, and not just the particular section in which an individual employee may work.

[59] In simple terms, moonlighting as a matter of principle is unacceptable, and a breach of an employee's fiduciary duties towards the employer. It must always be the sole prerogative of an employer to decide whether to allow this to take place, and also on what terms it may be allowed. Nothing can be assumed by the employee. That is why it has to be critical that full disclosure be made by the employee to the employer beforehand, so the employer can exercise its prerogative in an informed manner. To make disclosure to an employer after the fact effectively confronts the employer with a *fait accompli*, and cannot undo the breach of the duty of good faith that has already taken place. The principle was enunciated in *Phillips v Fieldstone Africa (Pty) Ltd and Another*[33] as follows:

> '… The fullest exposition in our law remains that of Innes CJ in Robinson v Randfontein Estates Gold Mining Co Ltd at 177-80. It is, no doubt, a tribute to its adequacy and a reflection of the importance of the principles which it sets out that it has stood unchallenged for 80 years and undergone so little refinement:

[33] (2004) 25 ILJ 1005 (SCA) at para 36.

'Where one man stands to another in a position of confidence involving a duty to protect the interests of that order, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position. As was pointed out in The Aberdeen Railway Company v Blaikie Bros (1 Macq 461 at 474), the doctrine is to be found in the civil law (Digest 18.1.34.7), and must of necessity form part of every civilised system of jurisprudence. It prevents an agent from properly entering into any transaction which would cause his interests and his duty to clash. If employed to buy, he cannot sell his own property; if employed to sell, he cannot buy his own property; nor can he make any profit from his agency save the agreed remuneration; all such profit belongs not to him, but to his principal. There is only one way by which such transactions can be validated, and that is by the free consent of the principal following upon a full disclosure by the agent …'

[60] In *Bakenrug Meat (Pty) Ltd t/a Joostenberg Meat v Commission for Conciliation, Mediation and Arbitration and Others*[34] the LAC considered a case where the employee was conducting her own 'side business' of selling meat products, different to the meat products sold by her employer, and where the employee contended that this business did not compromise her ability to properly discharge her duties towards her employer. The comparisons to the case *in casu* are apparent. The Court in *Bakenrug Meat* had the following to say in this regard:[35]

'The evidence clearly indicates however that the third respondent failed to disclose an essential and important fact that she was running 'a side-line business' in the market for the sale of meat products, albeit that they might not have been identical to the meat products which were sold by appellant. That she was able to discharge her duties to the appellant does not take her case any further. She was employed as a sales representative in a business that was involved in the sale of meat products. As a side-line business, she conducted a business which involved the sale of biltong, namely a meat product. She failed to disclose these obviously material activities to her employer and was therefore manifestly acting in violation of her duty of good faith to her employer …'

[34] (2022) 43 ILJ 1272 (LAC).
[35] Id at para 15.

[61] A similar approach was followed in *Bootes v Eagle Ink Systems KwaZulu-Natal (Pty) Ltd*[36]. In that case, the employee was selling blankets to the employer's customers for his own account, which was a business activity not related to the employer's business. However, the employee did not disclose this to the employer or seek its approval for it. The Court had the following to say about this:[37]

> '… Good faith requires employees to work honestly and faithfully, to work in and not against the employer's interest, to avoid conflicts between their own interests and those of their employer and not to derive a secret profit for themselves.
>
> The court accepts as a general proposition that a breach of good faith could impair the relationship of trust between an employee and the employer. In this case the employee acted against Eagle's interests by selling blankets to its customers. Eagle's interests would have been better served if the blankets had been given free of charge to its customers. By entering into the deal with Naidoo, the employee created an avenue for Naidoo to dispose of Divpac's waste at a profit. The employee could have resisted the deal and avoided becoming a ready outlet for an underhand deal. That would have served Eagle's interest better, provided the supply of blankets continued. As sourcing the blankets was becoming increasingly difficult, the employee claimed that the deal facilitated his access to the blankets. He would have served Eagle's interests better if he had disclosed to Eagle the opportunity that the deal presented for its business. Eagle's relationship with Nampak could only have improved if it tendered for its blankets at a mutual profit. Thus if the employee had elected not to deal with Naidoo but to formalize the deal as between Divpac/Nampak and Eagle, he would have better served Eagle's interests. There is no evidence that he considered either of these two options. The option he exercised is one that favoured him personally. By exercising this option he acted in conflict with the interests of Eagle and, consequently, in bad faith …'

[62] Finally, and in *Martin & East (Pty) Ltd v Bulbring NO and Others*[38] the Court was faced with a situation where the employee was doing external training for his

[36] (2008) 29 ILJ 139 (LC).
[37] Id at para 27 – 28.
[38] [2016] 5 BLLR 475 (LC).

own account for and on behalf of a third party, despite being employed full time by his employer. The Court described this conduct as follows:[39]

> '… Du Toit held a position of trust. He abused it. He acted against his fiduciary duty to his employer, acted in his own interests, and to the prejudice of his employer. That in itself destroyed the employment relationship. …'

[63] Based on the aforesaid considerations alone, the applicant would have earned her dismissal. She took up employment at a third party on a full-time basis, despite being employed by the third respondent as a full-time employee. She did not disclose this intention or employment to the office of the Vice-Chancellor, and seek approval for it. When it was discovered, she sought to justify her position based on her own subjective assessment that she could manage the two positions, that she did not think it would prejudice the third respondent, and she saw no conflict of interest. Her own subjective views, as the second respondent correctly appreciated, cannot exonerate her. She was obliged, despite even the Policy, and in terms of the fiduciary duty she owed to the third respondent as her employer under her contract of employment, to report her intentions and seek approval from the office of the Vice-Chancellor before even taking up employment with Kantar. By acting as she did, the applicant violated her duty of good faith towards the third respondent and this constitutes gross misconduct, which the second respondent rationally and reasonably appreciated.

[64] The next issue to consider is how the applicant chose to justify her conduct, once it became apparent that she violated her duty of good faith and the specific moonlighting provisions of the Policy. According to the applicant, she had no obligation to report her employment with Kantar to the third respondent until end of February 2019, by virtue of the provisions of clause 7.1.2 of the Policy. The applicant contended that by virtue of this clause, she had until 28 February 2019 to declare her employment at Kantar, and until that date, she had no obligation to declare it. In my view, this contention never had any substance, which the second respondent not only reasonably, but actually correctly appreciated.

[65] The second respondent, correctly in my view, was critical of the fact that the applicant in making these contentions ignored clause 7.2.6 of the Policy, which

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[39] Id at para 30. At para 33, the Court also described this as '*gross misconduct*'.

provided that in the case of a material change in association of a staff member, a revised declaration must be submitted within 30 days. The reliance by the second respondent on this clause makes perfect sense. For a staff member to take up full time employment at another employer is certainly a material change in association that would require such an immediate amended declaration. To argue that such a material change in interest need not even be reported until the next round of updated declaration forms, which could be as much as a year, makes a mockery of the primary objective of the Policy. An intervention by the third respondent at the point of such a belated declaration may well too late to prevent the very prejudice / harm the Policy is designed to avoid.

[66] In my view, the provisions of clause 7.1 of the Policy simply contemplates an annual update of all external interests, for the want of a better description, by staff members, so as to keep all disclosures as current as practicably possible. It must also be remembered that clause 7.1 relates to all kinds of interests, other than those relating to moonlighting. It would include the kind of external interests that the third respondent may consider tolerable or what one would ordinarily find in the academic world, and which can be dealt with at the time of updated disclosure. But to take up a full-time job somewhere else is in my view certainly not one of these. That is something that necessitates up front disclosure and prior permission. That is why it is reflected as a separate interest in the Policy, specifically tied to approval by the Vice-Chancellor's office.

[67] The second respondent also had regard to the fact that even in the course of her part-time employment with the third respondent, the applicant had declared her other employment with Alexander Forbes at the time, and that she resigned from this position when taking up full-time employment with the third respondent. According to the second respondent, this meant that she was well aware of the terms of the Policy and what she was required to do in terms thereof. The second respondent cannot be faulted in reaching this conclusion, which in my view is not only reasonable, but actually correct.

[68] In the end, the second respondent rejected the applicant's contentions that she was under no obligation to declare her employment with Kantar prior to 28 February 2019, and concluded that the applicant was obliged to have declared such employment. These exists no justifiable basis to upset this conclusion on review. It must follow that the applicant indeed committed the misconduct for

which she was charged. The second respondent also considered this misconduct to be extremely serious, which conclusion, considering all that has been discussed above, is justified and reasonable.

[69] So how did the applicant own up to this misconduct, once established to exist, especially considering that she is a highly educated person occupying a senior position of trust and responsibility? The answer unfortunately is in no way at all. This is another factor that weighed on the second respondent in making her finding against the applicant. What the second respondent considered, and once again in my view correctly so, is the complete lack of remorse or any kind of contrition on the part of the applicant. The second respondent was critical of the fact that that the applicant seemed incapable of appreciating that she did anything wrong, and despite all that had come to pass, even in the course of the arbitration, maintained the view that she did nothing wrong in not declaring her employment at Kantar. I may add that the applicant even persisted with this view when the review application was argued before me. She even suggested that what was happening to her was a design to stifle her progression as an academic black female. This kind of attitude and approach on the part of the second respondent does the maintenance of the employment relationship no favours, and effectively destroys it. As the second respondent correctly said, the applicant appears incapable of appreciating the fiduciary duty she has towards the third respondent by virtue of her contract of employment, and never sought to remedy that which she has compromised. In *De Beers Consolidated Mines Ltd v Commission for Conciliation*, *Mediation and Arbitration and Others*[40], the Court held as follows:

> 'This brings me to remorse. It would in my view be difficult for an employer to re-employ an employee who has shown no remorse. Acknowledgment of wrongdoing is the first step towards rehabilitation. In the absence of a recommitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he himself has broken. Where, as in this case, an employee, over and above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly where a high degree of trust is reposed in an employee, be legitimately entitled to say to itself that the risk of continuing to employ the offender is unacceptably great. …'

[40] (2000) 21 ILJ 1051 (LAC) at para 25

[70] The persistent denial of the applicant, in the face of all else, that she had not done anything wrong, has another consequence. It leaves the third respondent with no other choice but to manage its risks by ending the employment relationship with the applicant. If the applicant cannot comprehend what her fiduciary duties towards the third respondent entails, and fails to show even some modicum of appreciation that for her to take up permanent employment with another employer is wrong and may cause the proper discharge of her duties and the interests of the third respondent harm, then risk management necessitates a termination of the employment of the applicant. As said in *De Beers supra*:[41] *'… Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise …*'. The following *dictum* in *National Union of Metalworkers of SA and Another v Commission for Conciliation, Mediation and Arbitration and Others*[42] is an apt illustration of the point:

> '… an employee is obliged to act to protect the interests of the employer and where an employee fails to do so and the failure constitutes serious misconduct, the sanction of dismissal will be fair, as an employer is entitled, as an operational imperative, to rely on its employees to act in good faith and to protect the interests (which include property) of the employer. In such a case, dismissal becomes an operational imperative and way of managing risk …'

[71] I now turn the applicant's inconsistency case. Despite failing to properly make out a case for inconsistency in the arbitration, as the second respondent correctly appreciated in her award, the applicant still persists in challenging inconsistency on review. Her case in this regard was that Professor Alagidede had similarly transgressed, but had not been disciplined by the third respondent. The second respondent rejected this inconsistency claim of the applicant because of a lack of evidence led by the applicant relating to any like for like comparator between her conduct and that of Professor Alagidede.[43] The second

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[41] Id at para 22. See also *Burton and Others v Member of Executive Council, Department of Health, Eastern Cape Province and Others* (2022) 43 ILJ 2284 (LAC) at para 75; *Absa Bank Ltd v Naidu and Others* (2015) 36 ILJ 602 (LAC) at paras 50 –51.

[42] (2023) 44 ILJ 1575 (LC) at para 54.

[43] In *Comed Health CC v National Bargaining Council for the Chemical Industry and Others* (2012) 33 ILJ 623 (LC) at para 10, the Court said: '*… It is trite that the employee who seeks to rely on the parity principle as an aspect of challenging the fairness of his or her dismissal has the duty to put sufficient information before the employer to afford it (the employer) the opportunity to respond effectively to the allegation that it applied discipline in an inconsistent manner. …*'.

respondent further referred to the fact that Professor Alagidede had completed declaration forms relating to his outside interests, and this had been approved by the third respondent. These findings of the second respondent are fully supported by the evidence on record and the testimony of Winter.

[72] I find it inexplicable that the applicant would persist with this inconsistency case on review. I must confess that I also consider this inconsistency issue with a sense of irony. Inconsistency should in reality only be a live issue where an employee owns up to the misconduct, and then offers the defence that another employee committed the same misconduct but was not dismissed. In this case, the applicant was insistent that she did nothing wrong. In my view, it is rather opportunistic for an employee to deny misconduct, and then in the alternative, so to speak, rely on inconsistency. In any event, as said in *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[44]:

> '… Inconsistency is a factor to be taken into account in the determination of the fairness of the dismissal but by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss. …'

[73] The Code of Good Practice in the LRA provides for consistency as a consideration in deciding the issue of the fairness of the sanction of dismissal.[45] This consideration applies where the employee was charged with misconduct, and was properly found guilty of same, but in deciding whether dismissal for this would be appropriate, the issue would be that dismissing the employee for such misconduct would be inconsistent with the sanction imposed by the employer for similar and related misconduct, in the past, in respect of other employees.[46] Where instances of inconsistency are raised as a defence to dismissal as an appropriate sanction, this would form part of the value judgment that must be exercised in deciding whether dismissal is fair.[47] The well-known judgment of

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[44] (2017) 38 ILJ 860 (LAC) at para 31. See also *Absa Bank Ltd v Naidu and Others* (2015) 36 ILJ 602 (LAC) at para 36.
[45] See Schedule 8 Item 3(6) which reads: '*The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration*.'
[46] See *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 452 (LC) at para 10.
[47] *SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd* (1999) 20 ILJ 2302 (LAC) at para 29; *Absa Bank* (*supra*) at paras 36 – 37; *Consani Engineering (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 1707 (LC) at para 19.

SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd,[48] aptly determined the principles applicable to deciding inconsistency, as being: (1) Employees must be measured against the same standards (like for like comparison); (2) Did the chairperson of the disciplinary enquiry conscientiously and honestly determine the misconduct; (3) The decision by the employer not to dismiss other employees involved in the same misconduct must not be capricious, or induced by improper motives or by a discriminating management policy (in other words this conduct must be bona fide); and (4) A value judgment must always be exercised[49].

[74] In general, inconsistency as a consideration is intended to protect employees against arbitrary conduct by the employer. Objective difference in circumstances is thus an important consideration. In *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[50] it was said:

> '… An inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of inter alia differences in personal circumstances, the severity of the misconduct or on the basis of other material factors …'

[75] *In casu*, there was simply no like for like comparison between Professor Alagidede and the applicant. The most critical difference in their cases is that Professor Alagidede declared his interests, and this was approved, which was never the case with the applicant. There is no indication that the chairperson of the disciplinary enquiry did not conscientiously and honestly determine the misconduct of the applicant, and that any decision by the third respondent not to take action against Professor Alagidede was capricious, or induced by improper motives or by a discriminating management policy. And when exercising the required value judgment, considering the applicant's persistent denial of misconduct in the face of all else, the applicant should not be exonerated even if it is accepted for the purposes of argument that the third respondent was mistaken in not disciplining Professor Alagidede. In summary, the inconsistency case of the applicant never had substance, was rightly and

[48] (1999) 20 ILJ 2302 (LAC) at para 29.
[49] See *SRV Mill Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 135 (LC) at para 23.
[50] (2010) 31 ILJ 452 (LC) at para 10.

reasonably rejected by the third respondent, and it should not have been pursued on review.

[76] The applicant even persists with her case of procedural unfairness on review. This case was that she was afforded insufficient time to prepare for the disciplinary hearing, and that the chairperson refused to allow her to call a witness she wanted. The second respondent dealt with these procedural complaints, and correctly found they had no substance. In particular, the applicant's allegation that she did not have enough time to prepare for the hearing is nothing but spurious. As the second respondent correctly pointed out, the applicant was given five days prior notice of the hearing and thereafter the hearing was twice postponed before it ultimately commenced. There can be no substance in any allegation by the applicant that she did not have enough time to prepare.

[77] It is true that the chairperson of the disciplinary hearing (Winter) refused to allow the applicant to call the Director of Transformation and Equity to testify, on the basis that this witness could offer no relevant testimony. There is nothing to indicate that Winter did not properly exercise her discretion in this regard, in particular because the applicant has simply not made out a case why the testimony of this witness would be essential to her case. The second respondent further reasoned that if the evidence of this witness was so important to the applicant's case, considering that arbitration proceedings is a hearing *de novo*, then why did the applicant not call this witness at the arbitration. This reasoning of the second respondent makes perfect sense. The second respondent's ultimate conclusion that the applicant suffered no prejudice because this witness was not called in the disciplinary proceedings is unassailable on review.

[78] In sum, it is clear that the applicant's review application never had any prospects of succeeding. Considering the attention given to the case in the well reasoned and cogent award of the second respondent, the applicant should have taken her medicine, as bitter as it may have tasted, learnt the life lesson that came from it, and moved on. It is my view that the conclusions arrived at by the second respondent in her award to the effect that the applicant committed serious misconduct for which her dismissal was justified not only resorts well within the bands of what may be considered to be a reasonable outcome, in terms of the

review test as set out above, but is actually correct. This arbitration award of the second respondent is simply unassailable on review, and must be upheld.

Conclusion

[79] Therefore, based on all the reasons set out above, I conclude that the second respondent's arbitration award is simply not reviewable. I am satisfied that the second respondent's findings of facts are properly supported by the evidence before her, in particular the common cause facts and uncontested documentary evidence. Her views concerning the applicant and her misconduct are justified, and her conclusion that dismissal was a fair sanction, in the circumstances, is unassailable. Her rejection of all the applicant's complaints of procedural unfairness is similarly unassailable. Insofar as the issue of the outcome arrived at by the second respondent is considered on the basis of it being reasonable or unreasonable, there is in my view no doubt that it would comfortably resort within the bands of reasonableness as required, in order to be sustainable on review. The applicant's review application thus falls to be dismissed.

Costs

[80] The third respondent has asked for an award of costs. In terms of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. The Constitutional Court has provided some guidance as to how this discretion is to be exercised. In *Union for Police Security and Corrections Organisation v SA Custodial Management (Pty) Ltd and Others*[51] that Court said:

> 'In the labour context, the judicial exercise of a court's discretion to award costs requires, at the very least, that the court must do two things. First, it must give reasons for doing so and must account for its departure from the ordinary rule that costs should not be ordered. Second, it must apply its mind to the dictates of the fairness standard in s 162, and the constitutional and statutory imperatives that underpin it …'

[81] It is however clear from the above that it is not true that costs can never be awarded in employment law disputes before this Court. What is required is a proper consideration of the dictates of fairness to both parties, followed by an exposition of reasoning why, despite the general principle in employment law

[51] (2021) 42 ILJ 2371 (CC) at para 35.

disputes that costs do not follow the result, it was nonetheless decided to award costs.[52] As held in *Booi v Amathole District Municipality and Others*[53]:

> 'However, this is a labour matter and this court's jurisprudence is settled: the ordinary rule that costs follow the result does not apply in labour matters. Rather, what emerges from the provisions of the LRA and the jurisprudence is that courts, when awarding costs in labour disputes, must consider what fairness demands and err on the side of not discouraging parties from approaching the courts for the peaceful resolution of labour disputes. [54] Further, if costs are to be awarded in labour matters, there must be reasons that justify a court's decision to depart from the position that a losing party should not be mulcted in costs in labour disputes…'

[82] In my view, the case *in casu* is unfortunately one which I believe justifies a departure from the ordinary principle that costs do not follow the result. The applicant's case was, truthfully described, always hopeless. In *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others*[54]:

> 'Whether a case is hopeless has two aspects. It is hopeless if it is advanced on a basis that is legally untenable. It is also hopeless if it is advanced in the absence of any credible evidence to support it. These are categories that have long been recognised in our law and practice. A case is legally hopeless if it could be the subject of a successful exception. It is factually hopeless if the evidence available and potentially available after discovery and other steps directed at procuring evidence will not sustain the cause of action on which the claim is based. …'

[83] The applicant's case ticks all the boxes of hopelessness in terms of the *dictum* in *Pioneer Foods supra*. The applicant persisted with a case of inconsistency and procedural unfairness when it was abundantly clear that these cases had not been made out at arbitration and there was simply no way the applicant could have succeeded on review. Had the applicant given proper consideration to the comprehensive and well-reasoned award of the third respondent, she

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[52] As said in *SA Custodial Management* (*supra*) at para 34: '*Do the principles I have enunciated dictate that costs can never be ordered against a party in labour matters? I think it is clear from this court's jurisprudence that the answer to this question is a resounding 'no'. This court has previously affirmed the principle that costs are discretionary to the court adjudicating a matter. That applies no differently to labour matters …'.*

[53] (2022) 43 ILJ 91 (CC) at para 60.

[54] 2013 (2) SA 213 (SCA) at para 35.

would have appreciated that pursuing a review was not justified. The applicant is highly educated person and should have known better. In fact, it is common knowledge that moonlighting during the course of permanent employment with an employer is not acceptable behaviour. The applicant's failure to even grasp that she did something wrong, and then persisting with such a case on review, is telling and worthy of censure. The applicant had the opportunity to properly ventilate her case in the CCMA before an experienced arbitrator. I finally also consider the manner in which the applicant prosecuted her review application, in particular the manner in which she chose to serve it on the third respondent, as counting against her where it comes to costs.

[84] In bringing the application the applicant took up the valuable time and already stretched resources of this Court. In doing so, the applicant compelled the third respondent, which is public institution funded to a large extent out of the taxpayers pocket, to defend the case using these already limited and stretched public funds, which is not acceptable.[55] What in reality happened in this instance as abuse of process.[56] This Court has consistently said that this kind of unfounded litigation is deserving of costs orders.[57] The applicant must be told, in no uncertain terms, hopefully also serving as an example to others, that exercising her right of access to the Courts must be done in a responsible manner and always in compliance with the rules and processes of the Court.[58]

[85] For all the reasons as set out above, I exercise my discretion by deciding that a costs award against the applicant is justified, and the applicant should be ordered to pay the third respondent's costs.

[86] It is for all the reasons as set out above that I made the order that I did, as set out in paragraph 2 of this judgment, *supra*.

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[55] See *Moses v Commission for Conciliation, Mediation and Arbitration and Others* (2019) 40 ILJ 2371 (LC) para 21.
[56] Compare *Pillay v Santam Ltd and Another* (2020) 41 ILJ 2695 (LC) at para 19.
[57] See for example *Democratic Nursing Organisation of SA on behalf of Ramaroane v Member of the Executive Council for Health, Gauteng Province and Others* (2019) 40 ILJ 2533 (LC) at para 20; *Sihlali and Others v City of Tshwane Metropolitan Municipality and Another* (2017) 38 *ILJ* 1692 (LC) at para 29; *Ngubane v Safety and Security Sectoral Bargaining Council and Others* (2022) 43 ILJ 2543 (LC) at para 50.
[58] See *Ntombela and Others v United National Transport Union and Others* (2019) 40 ILJ 874 (LC) at para 70; *Mashishi v Mdladla NO and Others* (2018) 39 ILJ 1607 (LC) at para 14; *Ngobeni v Passenger Rail Agency of SA Corporate Real Estate Solutions and Others* (2016) 37 ILJ 1704 (LC) at para 14.

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S. Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

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For the Third Respondent:	Advocate M Van As
Instructed by:	Eversheds Sutherland (SA) Inc Attorneys