IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D184/2022
Not Reportable

In the matter between:

JAYSON NAICKER — Applicant

and

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION — First Respondent

CHARLES OAKES N.O. — Second Respondent

VEOLIA WATER TECHNOLOGIES (PTY) LTD — Third Respondent

Heard: 9 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 15h00 on 12 December 2024.

JUDGMENT

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ALLEN-YAMAN J

Introduction

[1] The applicant sought to review and set aside an award issued by the second respondent under KNDB 15982-19 ('the award') in terms of the applicant's dismissal by the third respondent ('VWT') was found to have been substantively and procedurally fair.

[2] As there had been no opposition by VWT this court satisfied itself that the application could proceed on an unopposed basis, the Notice of Motion and Founding affidavit and the Notice in terms of Rule 7A(8) having physically been served on its at its offices, and neither a Notice of Opposition nor an answering affidavit having been delivered in response thereto.

Analysis

[3] On 29 September 2019 VWT notified the applicant of its intention to convene a disciplinary enquiry on 2 October 2019 to investigate allegations that he had committed various acts of misconduct, the particularity of which will be returned to hereunder.

[4] At the disciplinary enquiry which proceeded on 8 an 9 October 2019 the applicant pleaded not guilty to the commission of any infractions. He was, however, found to have done so and the conclusion arrived at by the chairperson was that the effect thereof had been the destruction of the relationship of trust. His recommendation that the sanction of summary dismissal be imposed was accepted by VWT, which terminated the applicant's services on 21 October 2019.

[5] Aggrieved by the outcome, the applicant referred a dispute to the first respondent in terms of s191 of the LRA. In the resultant award the second respondent upheld his dismissal as having been both substantively and procedurally fair.

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[6] The review application was not linked to a specific, listed ground in terms of s145 of the LRA.

[7] In relation to the substantive fairness of his dismissal the applicant contended at the outset that he would demonstrate that the allegations of misconduct were *'baseless and factually incorrect'* and, further, that he would establish that the second respondent's findings were incorrect. In amplification of his assertion that the findings of both the chairperson of the disciplinary enquiry and the second respondent in relation to the commission by him of misconduct had been incorrect, the applicant set out his defences to each of the charges. From this he asserted that the two decision makers ought to have found that *'the charges were without merit.'* It is trite that a review application is not an appeal. As such, it is not for this court to assess the minutiae of evidence presented at the arbitration to determine whether it concurs with the findings of the arbitrator, much less whether the arbitrator's findings were *'correct.'*

[8] Distinct from the applicant's restatement of his various defences to the charges he was called upon to answer, the applicant expressed certain specific concerns relating to certain of the second respondent's factual findings in relation to various of the charges. Although not articulated, this court understood the applicant's assertions to have implied his reliance upon s145(2)(a)(ii) of the LRA, being the alleged commission of a gross irregularity in the conduct of proceedings which, on the authority of Herholdt v Nedbank Ltd 2013 (6) SA 224 (SCA) may include the unreasonableness of the result arrived at,

'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for

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an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'[1]

[9] As it was not alleged that the second respondent had misconceived the nature of the enquiry before him, and examination of the award reveals that he applied the guidelines established in item 7 of Schedule 8 to the LRA in relation to each of the allegations of misconduct (with reference to whether a rule had been established, contravened, known, and the cumulative effect of the breaches on the trust relationship), the only issue to be considered in the present application is whether the second respondent's finding that the applicant's dismissal had been substantively and procedurally unfair was one that a reasonable decision maker could have arrived at, in consideration of the applicant's various challenges to certain of the second respondent's findings which informed his ultimate conclusion that his dismissal had been fair.

[10] It was VWT's case that the applicant had, by virtue of certain of his conduct, acted in conflict with its own interests. The allegations of misconduct were expressed as follows,

'<u>Conflict of interest</u>:

In that SBV Trading CC, a company which reflects Miss Charlene Naicker as the member, principal address 43 Sylhet Place, Merebank. Postal address as P O Box 16009, Bluff, 4036. Whereas Miss Naicker is your daughter.

It is acknowledged that SBV is the empowerment partner for the Tradeport Contract, however you have accepted goods, authorized invoices and accepted deliveries from SBV without securing additional quotes as required on the Material and Services Requisition Forms.

1. *That you, having an obvious conflict of interest, accepted delivery of goods and authorised invoices from SBV as attached. Annexures A1-A9*

a. *Invoices, upon investigation are inflated and overpriced.*

b. *Failure to ensure that two other quotes have been sourced as per requirements.*

[1] At paragraph 25

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2. *Conducting of alternative work, during working hours.*

a. *Tender issued in October 2018 and re-issued on the 25th of April 2019 you informed SBV Trading CC of a published tender for: Tender 8/2/1: Appointment of a service provider to supply, install and commission Bio Activator treatment process. Annexure B.*

b. *In that you, on the 19th October 2018, submitted a presentation and proposal for Bio Activator to Mr Amil Rajcoomar for SBV Trading CC using your Veolia email address. Annexure C.*

c. *That between the 3rd and the 16th May 2019 you actively participated in assisting SBV Trading CC with the Amendment: Tender 8/2/1: Appointment of a service provider to supply, install and commission Bio Activator treatment process. Annexure D.*

   i. *That you co-ordinated and participated in the proposed distribution of funds for the project, and projected "covers".*

   ii. *That you had direct conversations with Mr Amil Rajcoomar regarding said tender response.*

d. *That between the 15th and the 17th January 2019, you assisted SBV Trading CC, during working hours to quote on a tender for sand filters. Annexure E.*

e. *That for the period 9th June 2018 – 30 December 2018 you received multiple payments from SBV Trading CC. Annexure F.*

ADDITIONAL CHARGES as discussed with you on Monday, 23 September 2019.

3. *You conducted work/alternatively assisted/alternatively forwarded work on to Transcon Plant and Civils:*

a. *31st January 2018 Department of Health tender sent from Mthokozisi Buthelezi.*

b. *3rd March you facilitated a quote for SBV from Transcon in respect of quotation to demolish and cart to stockpile for crushing.*

c. *Between the 5th and 13th March 2018 you facilitated the quotation of tender RW 01056/14a for Transcon to quote in respect of Sudhier Singh from RSG Management. Tender for Construction of an Emergency Overflow Pipeline.*

d. *15th and 16th August 2018 – facilitated Transcon to price the BOQ,*

e. *4th July forwarded on a tender for Transnet Ports authority for Transcon to price.*

f. *On the 7th August 2018 – Perway tools.*

4. *You received payment from Transcon Plant and Civils and or Wesley Naidoo on a regular basis into your Nedbank and Standard bank account. See Attached.*

5. *That you failed to declare such payments to Veolia.*

6. *That you worked for / or assisted SBV and Transcon during working hours without declaring such to Veolia as required by your employment contract.'*

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[11] The starting point for the determination whether the applicant had been guilty of any misconduct necessitated a determination concerning the existence of a general obligation on the part of the applicant not to have acted in a manner in which his interests could be said to have been in conflict with that of his employer. In finding that such an obligation existed the second respondent referred to and relied on both the applicant's contract of employment and VWT's Ethics Guide. In respect of the former he referred to clause 16.2 which provided,

'You shall not, except with the prior consent of the board of directors, undertake any employment for remuneration outside the service of the company. Furthermore, you shall not be a director or officer or member of any other Company or corporation, nor carry on or be directly or indirectly associated or interested in any other business, whether competitive with the business of the Company or not, without obtaining the consent of the Company. Such consent will not be unreasonably withheld, but the Company will have to be satisfied that your duties as Operations Manager will not be affected in any way.'

As regards the latter, the obligation was expressed in the following terms,

'A conflict of interest arises when a personal interest may influence an employee's decisions and prevent him/her from impartially performing his/her professional duties and responsibilities.'

[12] The applicant did not challenge the second respondent's finding that,

'It was not disputed by the Applicant that he was aware of the rules regulating conflict of interest. It was also not disputed that he was aware that incidents of conflict of interest could result in discipline and possible dismissal. Lastly, he did not dispute that he understood the meaning of the offence of conflict of interest.'

[13] This being so, the further question to be addressed is the reasonableness of the second respondent's findings that the specific acts complained of by VWT had occurred and, consequent upon findings, that such conduct had constituted a breach of the rule relating to conflict of interest.

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[14] Insofar as the alleged conflict of interest concerned allegations pertaining to the entity SBV Trading CC ('SBV'), the applicant asserted that:

- The second respondent's finding at paragraph 67 of the award, that the applicant had obtained a benefit for his daughter and had thereby created a conflict of interest, was irrational for the reason that such conflict of interest would notionally have existed at the time when the partnership agreement between VWT and SBV had been concluded.
- Such conflict of interest could not have been found to have existed unless it had been established that the applicant himself had obtained a direct benefit from the contract.
- No evidence supported the conclusion reached at paragraph 68 of the award that he had created an emergency to benefit his daughter's company, and ignored the evidence that his superior, Mr Sagren Govender had directed him to deal with the matter (of the procurement of pipes) in the manner in which he had done.
- The second respondent's finding in respect of the third respondent's failure to have tendered for work for the Umhlathuze Municipality ignored Mr Govender's letters and correspondence which exonerated him from wrongdoing.
- The second respondent's conclusion that the applicant attended a site meeting in relation to a tender in respect of work which was to be performed for the Umhlathuze Municipality was alleged to have ignored the fact that he had no dealings with the compilation of the tender documentation, and that Mr Govender had provided written confirmation that he had instructed the applicant to attend the site meeting on behalf of the company.

[15] In relation to the third charge which pertained to his alleged involvement with an entity known as Transcon Plant and Civils ('Transcon'), the applicant took issue with the second respondent's finding at what was alleged to be paragraph 88 of the award (but was in fact paragraph 89) that he had been obliged to disclose the payments made to him by Mr Wesley Naidoo, the owner of Transcon. In this regard, the applicant contended that the Ethics Policy cast no obligation upon him to disclose loans or payments between himself, his family or any companies in which he may have had an interest.

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[16] Finally, it was the applicant's assertion that, aside from the sending of emails, none of which could have taken eight hours to draft, there was no evidence that he had been conducting his own business during working hours. In conclusion he alleged that,

'Substantively, there was no way for him to have arrived at a conclusion that I ought to be dismissed and if he found that there was a transgression of sending out personal emails during business hours that such conduct warranted a dismissible offense.'

[17] As to the second respondent's findings concerning procedural fairness, the applicant alleged that the second respondent had failed to consider the omission on the part of the chairperson of the disciplinary hearing to have considered his evidence, included that of the letter authored by Mr Govender, as well as VWT's failure to have afforded him the opportunity of an appeal.

[18] These grounds will be considered in relation to the relevant evidence introduced at the arbitration.

[19] VWT conducts its business in the field of water, waste management and energy. It appointed the applicant to the position of Maintenance Manager for KwaZulu-Natal with effect from 1 April 2001, in which position he was required to report to VWT's Operation Manager for KZN, Mr Govender. The requirement of fealty to VWT was embodied in his written contract of employment. In addition to the clause relied upon by the second respondent, referred to above, in terms of clause 16.1 the applicant warranted that he would faithfully, diligently and properly apply himself to the VWT.

[20] A report by a whistleblower led to VWT's French head office conducting an audit of the Durban branch arising out of which questions were raised regarding certain aspects of the manner in which its business was being conducted there. This resulted in an investigation being initiated locally. The conclusions reached led to the charges which the applicant was called to answer. Included were those which related to his involvement with SBV, a close corporation in respect of which his daughter, Ms Charlene Naicker, was the sole member.

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[21] The first of these issues related to payments made to SBV by VWT on invoices which were said to be overinflated.

[22] It was VWT's case that the applicant had procured piping from SBV in circumstances in which such piping could readily have been purchased at a greatly reduced price from two other businesses, KFC and Builders. In so doing, it was alleged that he had breached VWT's procurement policy by not having obtained competitive quotes, having disingenuously relied upon the exception provided for in situations of urgency, where any purported urgency which may have existed had been of his own making.

[23] The applicant did not, in these proceedings, challenge the second respondent's finding that it was common cause that the rule in question required that in the ordinary course of business three quotations should be obtained. He also did not dispute that the price paid to SBV of R1 350.00 plus VAT per unit exceeded the price which could have been paid for the same product at either of the other two businesses.

[24] The applicant's version, that the vendor KFC could not be utilised to provide the pipes needed as it had required immediate payment, which was not an impediment to the utilisation of SBV as that entity was an existing vendor which did not require urgent payment, was reasonably rejected by the second respondent. He found,

'This was however proven not to be true, as payment was made to his daughter on Friday afternoon.'

[25] That the situation of ostensible urgency was self-created by the applicant was unequivocally established by the applicant's own witness, Mr Christo Venter, the Manager of the DWR site at which the pipe work was to be performed. He testified that he had reported the breakdown of the system to the applicant more than a week before the pipes finally arrived, in conflict with the applicant's claim that he had only become aware of the breakdown two days before the repair was effected.

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[26] The applicant's assertion that he second respondent's finding,

'I agree in this regard with the Respondent's witness, Janet, that the Applicant created an emergency to benefit his daughter's company,'

was unsupported by the evidence cannot be sustained.

[27] As regards the second respondent's conclusions concerning the applicant's involvement in the tender submitted by SBV to the Umhlathuze Municipality in relation to a water treatment plant, such findings were equally supported by the evidence before him.

[28] On 9 October 2018 one Mr Amil Rajcoomar, an employee in the Water Quality department of the Umhlathuze Municipality addressed an email to the applicant[2] to which was attached the Scope of Work outlining certain work which was required to be undertaken at the municipality's waste treatment works. The applicant forwarded the document to Mr Govender who in turn forwarded it to Mr Thys Els, another of VWT's employees, with a request for his input. Mr Els sent the document to another employee, Mr Richard Jackson. His response to those who had previously been included in the chain of correspondence evinced his reservations concerning the scope of work to be undertaken, including that the project was seemingly too small to warrant VWT's involvement. His response of 15 October 2019 did not, however, constitute VWT's complete disinterest in the project.

[29] Notwithstanding that VWT had seemingly yet to decide on the issue of its own intentions, the applicant transmitted the documentation which had been sent to him by Mr Rajcoomar to his daughter at SBV the following morning. SBV, with the applicant's assistance, set about preparing a quotation for the completion of the work required by the municipality. From the chain of emails then exchanged between Ms Naicker, the applicant and Mr Rajcoomar, it is evident that both the applicant and his daughter had endeavoured to send him three documents relating to the Bio Activator that day: MSD Sheet for bio activator, a presentation,

[2] All emails transmitted to or from the applicant were transmitted from his work email address, jayson.naicker@veolia.com, unless otherwise specified.

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and a proposal. Whilst the applicant utilised his own work email, it appears that their first efforts to convey the documents in question were not to Mr Rajcoomar's work email address. The applicant's first attempt was to the email address rajcoomara@richemp.org.za, which was undeliverable, and the second was to amil.rajcoomar@gmail.com. Whether the gmail address was successful is unknown, however the applicant did ultimately transmit the documents to Mr Rajcoomar at his work email address. SBV's proposal entailed the installation and commissioning of five bio activator water processing plants at R385 900.00 excluding VAT per plant.

[30] It was common cause that the municipality did not proceed with the work in 2018, and instead reissued a call for tenders early the following year: under tender 8/2/1/UMH461-18/19 it called for tenders for the appointment of a service provider to supply, install and commission a bio activator water treatment process for a period of three years.

[31] The applicant's versions as to why VWT did not tender for the work differed. On his one version, his alleged assumption that VWT would not be interested in the work, notwithstanding that its scope and been considerably increased and would then have been valued at of approximately R40 000 000.00, led him not to have drawn the call for tenders to the attention of anyone in the employ of VWT. On another, Mr Govender had expressly advised him that VWT was not interested in participating. On 25 April 2019 at 10:26 he forward the relevant notice to SBV, a short time prior to the first compulsory site meeting which had been scheduled to take place at 12:00.

[32] The minute of the site briefing meeting of 2 May 2019 evinces that a representative of SBV was present. It was subsequently established that the applicant had attended the meeting, albeit that he alleged that he had attended only for the purposes of promoting VWT's installation capabilities to any of the other proposed tenderers, in the event that any of them were awarded the contract. He omitted to mention who, if not him, had been present at the meeting on behalf of SBV.

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[33] The applicant's assistance in the preparation of SBV's tender documents then began in earnest. Extraneous to any undocumented work which he may have done, his emails revealed his dedication to the task at hand. The day after the site meeting Ms Naicker forwarded an email to the applicant which had previously been received by her from Mr Rajcoomar which read,

'Hi Charlene
Please show this email to your dad. I spoke to him already.
Tell him to consider the daily inflows and not the design capacity of the plants.'

[34] On 7 May 2019 Mr Siduduzo Mhlongo, a Water Quality Officer from the municipality, provided the minutes of the site briefing that had taken place, together with other documentation relating to the tender, by way of email to various recipients, of which SBV was one. Ms Naicker forwarded the documents she had received to the applicant on 14 May 2019 who, that same day, forwarded the documents to one Mr Vassie Naidoo at Mr Naidoo's gmail address. Mr Naidoo replied,

'Thanks for the mail.
I will work on it and send you a spreadsheet.
Please let me know when it the closing date.'

[35] Two days later Mr Naidoo addressed a further email to the applicant,

'Thanks for the spreadsheet.
Please confirm distribution of funds. Does the local content cover all the parties locally?
How many other covers do we have?'

[36] On 17 May 2019 SBV, together with various other businesses which had attended the site meetings, received an email from Mr Mhlongo who then transmitted two further addendums to the Bio Activator Tender. Again Ms Naicker forwarded the email to the applicant who forwarded the addendums to three other individuals, Mr Naidoo, M J Mauriks, and magfronttrading@telkomsa.net on 20 May 2019.

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[37] A letter disclosed by the applicant from the Umhlathuze Municipality to SBV on 14 July 2020 revealed that SBV had submitted a tender for the work, but had been unsuccessful in its bid.

[38] The aforementioned evidence amply demonstrated that the applicant involved himself in the business of SBV beyond that which could have been construed as mere assistance rendered by a father to his child. His allegations in these proceedings that the second respondent ignored the fact that he had no dealings in the compilation of tender documents on behalf of SBV was not borne out by the documentary evidence to the contrary.

[39] The applicant was correct that the relationship between VWT and SBV pre-dated the over-payment for the pipes purchased as well as the tender by SBV for the municipality's water treatment plant. The contract itself evinced that Mr Govender, in his capacity as General Manager of VWT, and Ms Naicker, in her capacity as Director of SBV, had entered into a Joint Venture Agreement for the purpose of the operation and maintenance of the Agrizone Water Treatment Works in terms of the Bid issued by Dube Tradeport to this effect on 5 May 2017. It was expressly recorded in their agreement that the sole purpose of the agreement was to undertake the specific work so identified.

[40] The joint venture agreement which gave rise to the relationship between SBV and VWT was not, however, a license for the applicant to divest himself of his own obligations to VWT, and nor did it afford him the unfettered right to act in his dealings with VWT in a manner which disadvantaged it whilst advantaged the interests of his daughter's business.

[41] The applicant's further argument that no conflict of interest could be found to have existed in the absence of proof that he had benefitted personally is untenable and in conflict with the express provisions of VWT's Ethics Guide,

'An employee's personal interest includes any benefit obtained for himself/herself or for family members, friends, close relations or persons or organizations with whom he/she has, or has had, a business relationship or shared interests. A conflict of interest arises

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when a personal interest may influence an employee's decisions and prevent him/her from impartially performing his/her professional duties and responsibilities.'

[42] The applicant's further assertions that the second respondent disregarded Mr Govender's evidence also lacks merit. Mr Govender neither testified at the arbitration and nor was any application was made for the introduction of the documents which were included in the applicant's bundle of documents which, on the face thereof, bore the name Segaran Govender as their author. The applicant had been legally represented at the outset of the arbitration, and remained legally represented until the conclusion of his evidence in chief. His legal representative made no mention of any intention to apply to introduce the documents in question as hearsay, and no such application was made. As such, there was no basis upon which the second respondent ought to have referred to or relied on the documents in question in his assessment of the evidence before him.

[43] As regards the applicant's assertion that it could not have been found that VWT's Ethics Policy had placed any obligation on him to disclose payments made to him by friends and family members in settlement of loans made by him, this overlooked the fact that the second respondent expressly rejected the applicant's assertion that the payments he had received from Mr Wesley Naidoo had been in respect of a loan agreement between them. The second respondent's rejection of such a proposition was premised on the evidence before him, articulated in the award,

'89. … The Applicant is required to disclose payments made to him. There is no evidence that there were any loans given to Transcon by the Applicant. If there was indeed loans given to Transcon or Wesley, this evidence should have been presented by the Applicant. This is critical to his case. In the absence thereof an inference can be drawn from the facts presented, that work was done by the Applicant on behalf of Transcon an such payments were more likely payments for work done on behalf of Transcon and not loans made by the Applicant to Transcon.

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90. The Applicant could have called Wesley as a witness to confirm that the payments made to the Applicant were for loans made to him (Wesley). He however did not call Wesley as a witness.

91. The tone of the emails requesting payment are more aligned to payment for work done. None of the emails are a demand for payment for loans made. If this was indeed the case, the Applicant would have mentioned this fact in his emails when demanding payment.

92. One particular email stands out where the Applicant demands payment. In the email to Transcon he states: 'Is it done please sort it out today f… Charlene Vernon Siva Pooven.'

[44] The pre-condition necessary to support the applicant's argument that he bore no obligation to disclose the payments to VWT was the existence of a loan. The second respondent's rejection of his argument that the moneys paid to him by Mr Naidoo were repayments made of a loan were not challenged in the present proceedings. Absent challenge, the finding must stand and, with it, the second respondent's reliance on VWT's Ethics Policy which established the existence of an obligation on the part of the applicant to have disclosed to VWT the payments made to him by Mr Naidoo.

[45] His final challenge to the second respondent's finding that his dismissal had been substantively fair was his allegation that, aside from the emails, there had been no evidence that he had conducted work for his own interest during working hours. In amplification of this argument, he asserted that for the emails themselves to have sustained the charge that he had done so, VWT would have been required to have established that each email took an entire working day to create.

[46] Whilst the applicant is correct that the evidence introduced to establish that he had not devoted his time and attention to the interests of his employer during working hours consisted, in the main, emails sent by him to various other individuals during that time, VWT was not required to establish that his entire working day had been spent in the pursuit of interests other than those of its own.

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[47] The emails previously mentioned in relation to SBV and the tender for the water treatment works at the Umhlathuze Municipality were all sent from the applicant's work email address during working hours. Added to this were the numerous emails transmitted to the entity Transcon, which were unrelated to the applicant's work for VWT. The time taken by the applicant to write those emails, however long they took, was during the hours that the applicant had been paid to work for VWT. Moreover, distinct from the time taken to author them, each evinced the applicant applying his efforts to businesses belonging to others. Moreover, the second respondent's finding that the applicant had been performing services for both SBV and Trencon had been fortified by the payments made by both entities to him was not challenged by the applicant in the present proceedings.

[48] Save to have disputed that he had been guilty of the infractions complained of, the applicant did not challenge the evidence of Mr Stanley Steenkamp, VWT's CEO, that the trust relationship between them had been destroyed. Mr Steenkamp testified,

'Okay so, so the Applicant, well Jayson in terms of, he's in a senior position of trust and responsibility in the organisation as the Maintenance Manager for that region so what that entails is obviously that we have to instil, or we have to have as I said trust that he would fulfil his duties on behalf of the company and in the best interests of the company. So where we are and what, how we progress further based on the outcome and the outcome of the external Chairperson was that we continued with a summary dismissal and the reason for that is actually our trust relationship, he has broken that trust relationship irretrievably and this is, it's evident in the consistent misconduct that he did carry out. It makes the working relationship intolerably in terms of and it's impossible for me to be able to trust him in that working environment. So based on that, he has shown that, that he did not take the best interests of the company at heart and our relationship between the employer and the employee has broken down completely.'

[49] Accordingly, in consideration of the applicant's grounds of review, the evidence led at the arbitration, and the second respondent's findings which informed his conclusion that the applicant's dismissal had been substantively fair, this court finds that the second respondent's conclusion was not one which no reasonable decision maker could have arrived at.

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[50] The applicant alleged in his founding affidavit that his dismissal had been procedurally unfair for the reasons that,

> *'Procedural Unfairness*
>
> *84. During the disciplinary proceedings, I was not afforded a proper appeal. Nor was I given a copy of the investigation report. This is required in terms of the Third Respondent's disciplinary procedure.*
>
> *85. Neither in the disciplinary hearing nor in the arbitration was the evidence of Sagren which exonerated me considered or even permitted to be tendered.*
>
> *86. I consider this to be procedurally unfair and it deprived me of what is a concrete defence in these proceedings.'*

[51] His challenge to the second respondent's finding to the contrary was premised on the following grounds,

> *'118. Further, in respect of procedural unfairness, the Second Respondent failed to consider the failure at the disciplinary hearing to consider any of the evidence I had given, failure to apply an appeal mechanism and further failure by the chairperson to consider the letters of Sagren Govender.'*

[52] The second respondent's conclusion that the applicant's dismissal had been procedurally fair was predicated on his findings that the delay in the prosecution of the applicant had not amounted to an abandonment of VWT's case against him, and his rejection of the applicant's complaint that Ms Van Notten's dual role as initiator and witness had not impacted the ability of the chairperson of the disciplinary enquiry to have made an impartial decision. In having assessed those issues and having arrived at his conclusion, he noted that there had been other allegations concerning the issue of procedural fairness which had not been pursued during the hearing and which were accordingly no longer at issue.

[53] As the applicant did not include either his LRA 7.11 or 7.13 as part of the record, this court is unable to ascertain what challenges were raised by him in regard to the procedural fairness of his dismissal when he initiated his dispute. Discernible from the opening statement given by his representative at the outset of the arbitration in relation to the issue of procedural fairness were the assertions that

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Ms Van Notten's evidence given at the disciplinary enquiry had constituted hearsay, and that VWT had refused to permit Mr Govender to testify at the hearing.

[54] Given that the applicant clearly testified at the disciplinary hearing and his evidence was recorded in the outcome thereof, it cannot be said that his evidence was physically excluded from consideration, which could potentially have given rise to a procedural irregularity. The chairperson of the disciplinary hearing, on the face of it, took his evidence into account and rejected it. The manner in which the chairperson dealt with his evidence was accordingly an issue relating to the substantive rather than the procedural fairness of his dismissal.

[55] The applicant did not draw this court's attention to any part of the transcript in which any evidence on the part of the applicant concerning either the alleged failure on the part of VWT to have afforded him an appeal, or relating to the exclusion of Mr Govender from the disciplinary proceedings was introduced. These issues were also not addressed in the applicant's oral closing argument at the conclusion of the hearing. If they were raised in any written closing argument which he may have elected to deliver, such written closing argument was not included as part of the record. This court having been unable to identify any such evidence from its own examination of the transcript, nor any other part of the record from which the raising of those issues may have been evident, this court must accept the correctness of the second respondent's statement that,

'There were other allegations relating to procedural fairness which were not pursued in the hearing and are therefore no longer at issue.'

[56] As the applicant did not challenge the second respondent's findings regarding either delay or Ms Van Notten's evidence, there is no basis upon which this court may interfere with the second respondent's conclusion that the applicant's dismissal had been procedurally fair.

[57] It is accordingly the finding of this court that the second respondent's award was that of a reasonable decision maker, and the application will be dismissed.

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Costs

[58] As the application was unopposed, the issue of costs does not arise.

Order

1. The application to review the award issued by the second respondent on 6 March 2022 under KNDB 15982-19 is dismissed.

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K Allen-Yaman

Judge of the Labour Court of South Africa

Appearances

Applicant:

Mr N Winfred, instructed by Kanhai-Moodley & Associates

Respondent:

No appearance

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