THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: C 678 / 19

In the matter between:

UNTU obo DAVID MAHABE **Applicant**

and

D J G WOOLFREY *N.O.* **First Respondent**

TRANSNET BARGAINING COUNCIL **Second Respondent**

TRANSNET GROUP CAPITAL

(A DIVISION OF TRANSNET) **Third Respondent**

Heard: **31 October 2024**

Delivered: **25 February 2025**

This judgment was handed down electronically by circulation to the parties by email. The date and time for hand-down is deemed to be 25 February 2025

Summary: Bargaining Council arbitration proceedings – arbitration award by arbitrator – test for review – s 145 / 158(1)(g) of LRA 1995 considered – entails determination of conduct of arbitrator, irregularities and reasonable outcome

Condonation – late filing of review application – principles considered – applicant failing to provide proper / acceptable explanation for late filing – applicant failing to show good cause – condonation refused

Condonation – prospects of success – merits of review application considered – review application having no prospects of success – condonation refused

Conflict of interest – principles considered – conduct of employee constituting conflict of interest – constitutes misconduct relating to dishonesty

Evidence – evaluation and determination thereof – proper assessment of evidence by arbitrator – most essential facts undisputed / common cause – no basis to interfere with arbitrator's conclusions on the evidence

Dismissal – sanction – principles considered – nature of misconduct considered – position of employee considered – complete breakdown of trust relationship – no contrition / remorse shown – conclusion by arbitrator that dismissal justified reasonable – no basis for interference with award

Review of award – condonation refused – review application consequently dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] The current matter concerns a review application brought by the applicant to review and set aside an arbitration award by an arbitrator of the Transnet Bargaining Council. The review application has been brought in terms of section 158(1)(g) as read with section 145 the Labour Relations Act[1] (LRA).

[2] The review application was filed in Court on 22 October 2019. However, and having regard to the fact that the arbitration award in question was handed down on 3 August 2019, the review application has been filed just short of four weeks out of time.[2] Nonetheless, the review application was not accompanied by a condonation application. The applicant only brought a condonation application on 25 March 2020, which is some five months later. The third respondent has

[1] Act 66 of 1995 (as amended).
[2] In terms of section 145(1) of the LRA, a review application must be filed within six weeks after handing down of the arbitration award.

opposed the review application and the condonation application. The third respondent has also raised an issue with regard to the applicant's failure to comply with the Practice Manual of the Labour Court, as still applicable at the time.

[3] As to the substance of the matter itself, it concerns an unfair dismissal dispute pursued by the applicant to the Transnet Bargaining Council (the second respondent), as the individual applicant, David Mahabe, had been dismissed by the third respondent. This unfair dismissal dispute ultimately came before the first respondent, being the duly appointed arbitrator responsible to decide the dispute, for arbitration on 5, 25 and 26 June 2019. In an arbitration award dated 3 August 2019, the first respondent determined that the dismissal of the individual applicant was substantively fair.[3] This award forms the subject matter of the review application brought by the applicant.

[4] For ease of reference, I will refer to the individual applicant, David Mahabe, as '*Mahabe*' in this judgment.

Condonation

[5] Before dealing with condonation, it is so that the third respondent has also raised an issue that the matter has become archived by virtue of the provisions of clause 16.1 of the Practice Manual.[4] However, and considering the decision I have come to on the issue of condonation, which effectively non-suites the applicant from the outset, I do not deem it necessary to decide the point of whether the matter had become archived in terms of the Practice Manual, and accordingly I make no decision in this regard.

[6] In then dealing with the issue of condonation for the late filing of the review application, and as said, the arbitration award was received by the applicant on 3 August 2019. The applicant explained that having received such award, it was discussed at a management committee meeting on 2 September 2019 and in this meeting, it was resolved to pursue the matter on review to the Labour Court.

[3] Procedural fairness was not in dispute in the arbitration.
[4] Clause 16.1 reads: '*In spite of any other provision in this manual, the Registrar will archive a file in the following circumstances: in the case of an application in terms of Rule 7 or Rule 7A, when a period of six months has elapsed without any steps taken by the applicant from the date of filing the application, or the date of the last process filed …*'.

Consequently, attorneys were briefed to proceed with the review application on 4 September 2019. Why it took from 3 August 2019 to 2 September 2019 to first even consider and discuss the arbitration award remains unexplained.

[7] Having received the instruction, the applicant's attorneys then prepared the review application, and sent the founding affidavit to the applicant for signature on 27 September 2019. The deponent to founding affidavit signed it on 1 October 2019, however an error was discovered on 2 October 2019 pertaining to the address of the third respondent. The error was rectified on 2 October 2019, and the affidavit was sent back to the deponent only on 10 October 2019. The founding affidavit was then finally deposed to on 14 October 2019. The founding affidavit was sent to the applicant's attorneys on 18 October 2019, following which the review application was brought on 22 October 2019.

[8] The aforesaid constituted the sum total of the explanation provided by the applicant for the delay in this matter.

[9] But there is another difficulty facing the applicant. Despite the review application obviously being brought out of time, and despite the applicant being legally assisted and represented, the review application was not accompanied by a condonation application. In fact, the condonation application was only filed on 25 March 2020, some five months later. This delay in filing the condonation application is entirely unexplained.

[10] Deciding any application for condonation involves determining whether good cause has been shown to permit such late referral. Deciding whether good cause has been shown in turn involves the following principles as set out in *Melane v Santam Insurance Co Ltd*[5]:

> '… In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation.'

[5] 1962 (4) SA 531 (A) 532C-E.

[11] 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*[6] referred with approval to the judgment in *Queenstown Fuel Distributors CC v Labuschagne NO and Others*[7] 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.'

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

[12] As to the first requirement of the length of the delay, the longer the delay, the worse it is for the applicant seeking condonation. An excessive delay could in itself be seen to be highly prejudicial to the issue of good cause. Where it comes to the explanation for the delay, this must be a proper explanation supported by sufficient particularity, dealing with the entire period of the delay. In *Seatlolo and others v Entertainment Logistics Service* (*a division of Gallo Africa Ltd*)[8] the Court held:

> 'In order to exercise its discretion whether or not to grant condonation, this court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. See *NUMSA & another v Hillside Aluminium* [2005] 6 BLLR 601 (LC) where Murphy AJ held that an unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success.'

[6] (2002) 23 ILJ 1229 (LAC) at para 4.
[7] (2000) 21 ILJ 166 (LAC).
[8] (2011) 32 ILJ 2206 (LC) at para 11.

[13] I consider the issue of a proper explanation for the entire period of the delay to be the most critical component to any condonation application. As to how this explanation must be provided, the Court in *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others*[9] provided the following guidance:

> 'In explaining the reason for the delay 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. The mere listing of significant events which took place during the period in question without an explanation for the time that lapsed between these events does not place a court in a position properly to assess the explanation for the delay. This amounts to nothing more than a recordal of the dates relevant to the processing of a dispute or application, as the case may be.'

[14] Next, and on the issue of prejudice, the applicant for condonation 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 if condonation were to be refused should be compared to the possible prejudice the other party would suffer if condonation were to be granted, so as to enable the Court to make a balanced decision on this.

[15] Turning to prospects of success, determining whether it exists does not entail that it must be decided whether the applicant would be successful in proving its case or whether that case is true. All that is necessary to consider is whether, if the claim / case as advanced by the applicant is true, the applicant would succeed.[10] 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

[9] (2010) 31 *ILJ* 1413 (LC) para 13.
[10] See *Nature's Choice Products (Pty) Ltd v Food and Allied Workers Union and Others* (2014) 35 ILJ 1512 (LAC) at para 21*; National Union of Metalworkers of SA and Others v Crisburd (Pty) Ltd* (2008) 29 ILJ 694 (LC) at para 8; *Dial Tech CC v Hudson and Another* (2007) 28 ILJ 1237 (LC) at para 38; *Gaoshubelwe and Others v Pie Man's Pantry (Pty) Ltd* (2009) 30 ILJ 347 (LC) at para 27.

of success in fact becomes an irrelevant consideration.[11] In particular, in *NUM v Council for Mineral Technology*[12] the Court held:

> 'There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused …'

[16] Despite all the normal condonation considerations of length of the delay, explanation for the delay, prejudice, and prospects of success, and especially in employment law disputes, there is one final consideration. This is the consideration of the interests of justice.[13] What this entails is that in a particular case, there may be some 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. A prime example is the judgment in *National Education Health and Allied Workers Union on behalf of Mofokeng and Others v Charlotte Theron Children's Home*,[14] where the issue at stake was a case of a policy of an employer that only white house mothers were allowed to look after white children, with the policy being a continuous and ongoing practice. Even though the appellants in that case had not made out a proper case for condonation on the traditional condonation considerations referred to above, the Court nonetheless held:[15]

> 'It is clearly in the interests of justice that this kind of case be heard, particularly when appellants are able to support their submissions regarding the prospects of success with a statement of respondent's policy given on affidavit and which appears to confirm that the policy is saturated with a racist outlook.'

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[11] 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.

[12] (1999) 3 BLLR 209 (LAC) at para 10.

[13] 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.

[14] (2004) 25 ILJ 2195 (LAC) at paras 24 and 26.

[15] Id at para 25. The Court went on to say this was a dispute of an '*exceptional nature'* at para 26 of the judgment.

[17] And finally, where condonation is needed, it is essential that condonation must be applied for either immediately upon or at least as expeditiously as possible after, the applicant became aware or reasonably should have become aware, that condonation is needed.[16] The failure to expeditiously apply for condonation and the resulting delay would be considered to add to the length of the delay, and the failure to properly justify and explain this further delay may of its own also lead to the refusal of condonation.[17] In *Van Der Merwe v The Minister of Police*[18] it was said that: *'… However, the period of delay before the notices were delivered, is not the only aspect that has to be considered, because the delay of 6 months in filing the condonation application is of equal importance. If, for instance, it is found that there is no reasonable and acceptable explanation for the delay in filing the application, then it would follow that the application for condonation as a whole cannot succeed …*'. A similar approach was followed by this Court in *Seatlolo supra*[19], where it was said:

> '… It is incumbent on a party to apply for condonation as soon as possible upon becoming aware of the default. This point has been repeatedly emphasized by the Supreme Court of Appeal …, an approach strongly endorsed by the Labour Appeal Court. Indeed the LAC has held that an application for condonation ought to be launched on the same day that the default is discovered …'

[18] *In casu*, the review application is just short of four weeks late. Although this is not a minimal or short period, it also cannot be described as excessive. As a general proposition, and in the context of a late review application, delays in excess of two months can generally be considered to start becoming excessive.[20]

[19] But the difficulty for the applicant *in casu* is that when determining the length of the delay, it is not just about the period of delay in filing the review application.

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[16] See *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449G; *Darries v Sheriff, Magistrate's Court, Wynberg, and Another* 1998 (3) SA 34 (SCA) at 40I-41B; *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* 2010 (4) SA 109 (SCA) at para 39; *A Hardrodt (SA) (Pty) Ltd v Behardien and Others* (2002) 23 ILJ 1229 (LAC) at para 18.

[17] See *De Beer en 'n Ander v Western Bank Ltd* 1981 (4) SA 255 (A) at 257*; Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 129G*; Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281C-F.

[18] 2019 JDR 1263 (FB) at para 8.

[19] (2011) 32 ILJ 410 (LC) at para 12.

[20] 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.

It is also about the delay in the filing of the condonation application. In this respect, as set out above, this delay was some five months. This would qualify as an excessive delay. Overall, it gives a delay of some six months, which is an excessive delay, mitigating against the granting of condonation, absent an excellent explanation.

[20] How does the applicant then explain the delay? The most obvious first – the applicant has offered no explanation at all for the delay of five months in filing the condonation application. This already presents a substantial difficulty for the applicant, as it leaves the applicant without any explanation for a material part of the total delay. Turning then to the explanation provided for the delay in filing the review application, it equally faces some considerable difficulties. Overall considered, it is not a proper explanation at all, merely giving dates when certain actions took place, with no explanation as to what happened in between and why the action that was taken took the time that it did.

[21] In my view, there are two critical considerations that remains unexplained. First, the arbitration award was handed down no 3 August 2019. Why does it take a month until 2 September 2019 to place this arbitration award before a management committee meeting in order to discuss whether to proceed with a review application. Surely the applicant must be aware that time is of the essence where it comes to deciding whether to pursue a review of arbitration awards. The applicant has simply set out no exposition at all for this initial delay.

[22] Second, and on the applicant's own version, its attorneys were instructed to proceed with the review application on 4 September 2019. Considering the review application was due by 18 September 2019, which should have been immediately apparent to any attorney, then why could such attorneys not have taken the necessary effort, with the co-operation of the applicant of course, to ensure it was filed it time. It was entirely within their ability to do so. Yet the founding affidavit is only sent to the applicant for the first time on 27 September 2019, which is after the allowed time period had already expired, with no explanation why it took so long and why it could not have been completed in time. This is especially concerning if regard is had to the applicant's founding affidavit, which only consists of nine pages and is quite

lacking in specificity. In essence, the time taken from 4 September to 27 September 2019 is not acceptably explained.

[23] The explanation for the period after 27 September 2019 is equally unacceptable. It took until 1 October 2019 for the affidavit to reach the deponent for signature. There was a minimal error in the affidavit (the address of the third respondent) which ultimately took until 10 October 2019 to be remedied and the affidavit to be returned to the deponent. Why this amount of time was taken for such simple administrative tasks is unexplained. In short, how can it take four days just to place the affidavit before the deponent and a further ten days to fix a minor error, which surely could have been fixed right there and then. To add insult to injury, it takes to deponent until 14 October 2019, another four days, to sign the founding affidavit, with no explanation why this took so long, especially considering the review was already late.

[24] And the final part of this tale of woe is that it takes the applicant a further four days until 18 October 2019 just to send the affidavit to its attorneys, and those attorneys then take a further four days to file the application, again with no explanation why this length time was taken. Surely these simple actions cannot take so long.

[25] In my view, what the aforesaid indicates is that was a case where the applicant and its attorneys simply applied a lackadaisical and indifferent approach in bringing this review application. They exhibited a complete disregard for the Rules of this Court and the provisions of the LRA. There was nothing standing their way where it came to being able to file the review application in time. They however simply took their own good time in doing so, dealing with the matter when it was convenient to do so. Overall, the following *dictum* in *National Education Health and Allied Workers Union on behalf of Leduka v National Research Foundation*[21] aptly describes the conduct of the applicant *in casu*:

> 'Overall, the conduct of the applicants in casu is indicative of a litigant that remains inactive for lengthy periods, acts when it chooses and how it chooses,

[21] (2017) 38 ILJ 430 (LC) at para 44.

> and acts with complete impunity where it comes to the rules of court and the interests of the other party. …'

And in *Moraka v National Bargaining Council for the Chemical Industry and Others*[22] the Court expressed the following apposite sentiments:

> 'A significant consideration in deciding whether or not to dismiss this review application is the casual approach adopted to the litigation by the applicant which indicates that he viewed it as a matter that could be returned to from time to time when he or his representatives chose to do so. Such long periods of inactivity cannot be reconciled with the conduct of a party that has a consistent interest in pursuing a case and takes the necessary steps to do so without undue delay.'

[26] In summary, the applicant has not explained the initial period of the delay from receipt of the award to instructing attorneys, nor has it explained the excessive delay in bringing the condonation application. Where it came to the explanation purportedly offered by the applicant for the period between 4 September and 22 October 2019, this is an explanation that cannot be accepted, for the reasons summarized above. The explanation is, as described in *Mtshwene v Glencore Operations SA (Pty) Ltd (Lion Ferrochrome)*[23], a '… *nonchalant threadbare explanation for the delay*'. In this regard, and in *National Union of Metalworkers of SA on behalf of Nkuna and Others v Wilson Drills-Bore (Pty) Ltd t/a A and G Electrical,*[24] the Court said the following:

> 'In *Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd* 1975 (1) SA 612 (D), the court held that good cause is shown by the applicant giving an explanation that shows how and why the default occurred. It was further held in this case that the court could decline the granting of condonation if it appears that the default was wilful or was due to gross negligence on the part of the applicant. In fact, the court could on this ground alone decline to grant an indulgence to the applicant.'

[27] The applicant has also advanced no compelling case of prejudice. Other than a general reference to prejudice, the applicant in effect does not deal with this

[22] (2011) 32 ILJ 667 (LC) at para 20.
[23] (2019) 40 ILJ 507 (LAC) at para 15.
[24] (2007) 28 ILJ 2030 (LC) at para 16.

requirement at all. This is entirely inadequate where it comes to making out a proper case of prejudice in the context of a condonation application. As opposed to this, it is now close on six years after Mahabe's dismissal, which the applicant now seeks to undo, with all its prejudicial consequences to the third respondent. This kind of delay is in itself prejudicial, not only to the conduct of the litigation, but to the interests of the third respondent in finality. Apposite, in my view, is the following *dictum* in *Chemical Energy Paper Printing Wood and Allied Workers Union and Others v Metal Box t/a MB Glass*[25]:

> 'I accept that they may suffer prejudice upon refusal of condonation. It seems, however, that the grant thereof would equally expose the respondent, whose interest in the finality of the matter is one of the important factors which I have to take into consideration, to a not inconsiderable degree of prejudice. This is particularly so if due regard is had to the relevant time lapse and the practical implications thereof.'

[28] For all the above reasons, the applicant's condonation application is doomed to fail. The complete absence of a proper explanation for all the delays in this matter effectively renders the issue of prospects of success irrelevant. The matter is not exceptional and there is no particular injustice that compels intervention. There is simply no basis to depart from the normal and accepted principle that in such circumstances, the matter must now be brought to an end, once and for all, by way of the refusal of condonation. It is my view that the following *dictum* in *Ferreira v Die Burger*[26] aptly describes what should equally apply *in casu*:

> 'I am sympathetic to the fact that the applicant may have a case but, were we to grant this application, this court would subvert a crucial principle in matters which deal with personal relationships, namely labour relations, that these disputes have to be dealt with expeditiously and finalized as quickly as possible. Where in a case such as this, there has been so flagrant of violation of the rules, then, as Myburgh JP correctly decided, a lack of any explanation at all shrugs off other considerations.'

[25] (2005) 26 ILJ 92 (LC) at para 12. See also *Seatlolo* (*supra*) at paras 25 – 26.
[26] (2008) 29 *ILJ* 1704 (LAC) at para 8. See also *P.E. Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799 D-E.

[29] But despite the issue of prospects of success actually being irrelevant, I will nonetheless deal with the issue of prospects of success, because in my view, the applicant's review application in any event enjoys zero prospects of success. I will now do so by first setting out the background facts.

The relevant background

[30] The third respondent in this matter is a division of Transnet, which is a State owned enterprise. This division is known as Transnet Group Capital, and would *inter alia* be responsible for capital projects in the Transnet Group. Mahabe was employed as a procurement officer in the third respondent's procurement department in Belville, Cape Town. As a procurement officer, Mahabe was responsible for the third respondent's procurement in particularly the construction environment, but also in general procurement. It was common cause that Mahabe had been dismissed by the third respondent on 30 November 2018, after being found guilty of four counts of misconduct in a disciplinary hearing.

[31] The third respondent has a prescribed procurement process, which Mahabe was required to adhere to in discharging his duties. The process is in essence determined by the sum of the budget allocated for a particular project. If this budget is below R250 000.00 a '*Request for Proposal*' (RFP) issued by the procurement officer followed by three quotes from bidders for evaluation is THE applicable process, whilst for budgets in excess of R250 000.00, there is an RFP followed by a fairly involved open market tender process, which need not be repeated herein.

[32] Where it comes to procurement in what can be called the 'non-construction' environment, there is a different process that applies. This kind of procurement would relate to what is commonly known as day to day purchasing not linked to specific projects. Importantly, all such purchasing can only be placed at vendors that are registered with the Central Supplier Database (CSD) at National Treasury. This process is regulated by the '*Transnet Procurement Procedures Manual for General Buying*' (PPM). How this works is that the procurement department receives an SAP requisition with an '*Advice to Procurement*'. An RFP is compiled and sent out via email by the procurement officer to the

vendors on the CSD database. The PPM prescribes that the person who issues the bid cannot be the same person who receives it, the purpose being to ensure the independence of the person receiving the bid. The vendors that express an interest would then submit a bid to supply what is sought to be procured. All employees must at all times comply with the PPM and deviations were only permissible if, on application, the Acquisition and Disposal Committee gave approval beforehand.

[33] Certain particular clauses of the PPM bear specific reference. In terms of clause 14.3.9 (c), '*The bids must be received in a controlled environment. eg a dedicated email address, dedicated fax number or tender box*'. This relates to bids where the procurement officer requests bids in terms of the three quote system. Of particular relevance *in casu*, bids may only be received at a specific dedicated e-mail address, known as '*TCPquotes*'.

[34] Considering the nature of the duties of a procurement officer, there is a risk that a conflict of interest may arise where it comes to procurement activities. In this context, the PPM contains a section dealing with a '*Code of Ethics*'. Clause 5.1.2 compels all employees dealing with procurement to act with the utmost honesty and integrity, and to protect the interests of the third respondent. Further, it is prescribed all employees (including procurement officers) must declare any indirect conflict of interest (clause 5.6.9). If there is a conflict of interest, the Executive Manager of Procurement must consider the nature of such conflict, and decide whether the employee concerned will be recused from performing any further functions on the bid. In particular, if employees have a family or personal relationship with a bidder, they must register and declare such relationship. The PPM defines the activities of a Procurement Officer that are subject to conflict of interest declarations, and reads (clause 5.6.8):

> 'An indirect interest may include, but is not limited to being involved in:
> (a) the drafting of the specification or bid documents;
> (b) the issuing / advertising of the bid;
> (c) the evaluation, and subsequently being involved in the adjudication of the bid (applicable to members and / or alternatives serving on the relevant AC).'

[35] Employees are also required to declare conflicts of interest in terms of the '*Declaration of Interest and Related Party Disclosures Policy for Employees*' (the Disclosure Policy). The declaration of interest process is automated and employees in the procurement department are required complete the conflicts checklist on a 3-month basis.[27] It terms of clause 5.2 of the Disclosure Policy, it is compulsory to declare an interest where '*any employee who has an interest, either directly or indirectly or knows that a related person has interest in: 5.2.1 any new or existing contract with an entity external to Transnet which may conduct, or does conduct business with Transnet; 5.2.4 tendering for the supply of goods of services to Transnet or tendering for advisory or other professional services related to the transactions referred to above …*'. The word '*related*' in the context of '*related person*' in clause 5.2 is in turn defined in clause 4.16 as follows:

> '"Related" When used in respect of two persons, means persons who are connected to one another in any manner contemplated in subsection 4.15.1 below:
> 4.16.1 an individual is related to another individual if they –
> 4.16.1.1 are married, or live together in a relationship similar to a marriage; or
> 4.16.1.2 are separated by no more than two degrees of natural or adopted consanguinity or affinity. …'

[36] Where it comes to how bids are received, the evidence was that for tenders over R2 million, the vendors must submit their bids in a physical tender box, whist for tenders under R2 million vendors could submit their bids via the Transnet Electronic Tender Box / Mail Box. As touched on above, the address of this dedicated Electronic Tender Box is TCPquotes@transnet.net (TCPquotes). The compliance manager is exclusively responsible to manage TCPquotes, with one other employee, and they are the only employees who have access to TCPquotes. It was explained that if bidders respond directly to the procurement officer concerned, rather than to TCPquotes, the ordinary process would be for the procurement officer to inform the bidder to instead forward the bid to TCPquotes. The procurement officer would however not access or deal with the

[27] Clause 5.2 (ad hoc declarations of conflict) and Clause 5.3 (annual declarations of conflict).

bid himself or herself. The only exception to this is where the procurement officer obtains prior permission from the senior manager for Procurement.

[37] The actual events giving rise to this matter were not really in contention. In and during July 2018, Mahabe issued a RFQ for cleaning services to be provided. The RFQ was issued to three service providers, namely Isambuleni Group, Amiga Clenaing, and the Kganyang Leruna Group. The RFQ did not go into the open market, because the budget was for R231 000.00 (thus below R250 000.00) and thus the three-quote system applied.

[38] At the beginning of August 2018, a quotation dated 31 July 2018 was sent by Kganyang Le Rona Group (Kganyang) directly to Mahabe's personal e-mail address, in the amount of R210 189.36, for such cleaning services. It was common cause that Mahabe never informed Kganyang to submit the quotation to TCPquotes, but instead accepted receipt of the quotation and proceeded to process the same for approval. In this respect, Mahabe proceeded to prepare the vendor registration documents for Kganyang, so as to onboard it as a vendor at the third respondent.

[39] On 3 September 2018, the third respondent's compliance manager, Sufaya Adam (Adam) received a report that Mahabe was submitting the quotation from Kganyang for approval, however one of the directors of this vendor, namely Hornbisa Mtabane (Mtabane). was the wife of Mahabe. This possible conflict of interest was discovered when the vendor onboarding documents were evaluated. The issue was further investigated, and it was found that Mtabane was indeed the wife of Mahabe, they had two children, and they resided at the same address. Adam also expressed his concern that on 31 August 2018, Mahabe was persistent in following up with regard to the approval of Kganyang as vendor, which was unusual, and this made him suspicious.

[40] The third respondent considered the aforesaid conduct by Mahabe to constitute a breach of its policies and a conflict of interest, and thus misconduct on his part. In particular, clause 3.3.5 of the PPM read:

> 'Failure to comply with the Supply Chain Policy and material provisions of the PPM will lead to disciplinary action and depending on the severity of the non-compliance, possible dismissal and / or legal action. As a general rule,

condonation of non-compliance with procurement policies and procedures will only be granted in exceptional circumstances.'

[41] There was however a further instance of alleged misconduct on the part of Mahabe. This related to him using one of the third respondent's vehicles for personal purposes and in contravention of the Transnet Fleet Policy. In this regard, Mahabe used a pool vehicle with registration CY192128 in the course of June 2018 for personal travel to Kraaifontein, and used the fleet card of the vehicle to fill it with fuel. This was done without the third respondent's knowledge or permission. He also did not complete the vehicle logbooks to reflect his use of the vehicle.

[42] As a result of all of the aforesaid, Mahabe was given notice on 15 November 2018 to attend a disciplinary hearing to be held on 29 and 30 November 2018, in terms of which notice four charges under the heading '*Gross misconduct'* were presented, which read:

'1.1 On or about 3 September 2018 you submitted a request to Vendor Management for appointment consideration of Kganyang Leruna Group (Pty) Ltd (service provider), without declaring the conflict of interest as provided by the procurement processes (Contravention of Procurement Procedures Manual and Declaration of Interest Policy).

1.2 On or about 3 September 2018 you submitted a quotation for Kganyang Leruna Group (Pty) Ltd without considering clause 17.1.11 of the Procurement Procedures Manual which state that "Bids must be received in a controlled environment and may only be accessed / downloaded from the dedicated "Electronic Tender Box" after the closing date and time" (Contravention of Procurement Procedures Manual}.

1.3 On or about 22 June 2018, 25 June 2018 and 13 June 2018 you utilized the compan fuel card to fill up petrol on pool vehicle (CY192128) for unofficial trips between Kraaifontein and Company Offices at Belcon Road Building in Belville (Contravention of Transnet Fleet Policies).

Charge 1.4 On or about 22 June 2018, 25 June 2018 and 13 June 2910 you used the company vehicle (Toyota Corolla, CY192128) to travel to Kraaifontein without your manager's knowledge/ authority (Contravention of Transnet Fleet Policy).'

[43] The disciplinary hearing on the aforesaid four charges then indeed took place on 29 and 30 November 2018. At the disciplinary hearing, Mahabe in fact pleaded guilty to all four charges against him, and the disciplinary hearing chairperson only needed to decide the issue of an appropriate sanction. The chairperson decided on 30 November 2018 that Mahabe be dismissed, and he was then dismissed on the same day, with immediate effect.

[44] On 10 December 2018, the applicant referred an unfair dismissal dispute to the second respondent for conciliation. The dispute was unsuccessfully conciliated on 25 January 2019, and then referred to arbitration by the applicant. The dispute ultimately came before the first respondent over several days in the course of June 2019, commencing on 5 June 2019.

[45] Despite having pleaded guilty to all charges in the disciplinary hearing, when the dispute came before the first respondent for arbitration, the applicant sought to disavow Mahabe's guilty plea to charges 1.1 and 1.2. The applicant however confirmed the guilty plea where it came to charges 1.3 and 1.4, and in this context, the parties in fact agreed to a statement of facts for the first respondent to rely on when considering these two charges, recorded as follows:

> 'Applicant is employed as a Procurement Officer in the Procurement Department. The Department has a Pool Vehicle ("the vehicle") which is available for officials to use strictly for official business. Users are required to fill in the logbook at the completion of a trip. They must fill in the final mileage (the previous users' entry being the starting mileage), the time of the trip, the purpose of the trip, and the destination. Users may fill up the car with petrol as and when required, and use the company petrol card to do so. The card is kept in the vehicle. The petrol receipts must be left in the car with the logbook.
>
> On three separate occasions the applicant took the vehicle home outside of working hours and used the vehicle for non-work-related purposes. On each occasion the applicant travelled in the vehicle for about 30km. On each of the three occasions he put approximately R600.00 petrol in the vehicle. And on each of the three occasions he did not record the usage in the log-book.'

[46] As stated above, the first respondent ultimately found against Mahabe, deciding his dismissal by the third respondent was substantively fair, leading to the current review application.

The test for review

[47] The test for review is trite. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[28] 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 reasonable decision-maker could not reach?...'*[29]*.* This means that the award in question is tested against the facts before the arbitrator to ascertain if it meets the requirement of reasonableness.[30] In conducting this test it is always necessary and important for the Court to enquire into and consider the merits of the matter and the entire evidence on record in deciding what is reasonable.[31] In *Herholdt v Nedbank Ltd and Another*[32] 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.'

[48] In sum, applying the correct review test has a logical chronology. First, is there a failure or error on the part of the arbitrator. Second, and 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

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[28] (2007) 28 ILJ 2405 (CC).
[29] 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.
[30] See *Duncanmec (Pty) Ltd v Gaylard NO and Others* (2018) 39 ILJ 2633 (CC) at paras 43.
[31] Id at para 41.
[32] (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.

to by the arbitrator.[33] Third, 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.[34]

Analysis

[49] At the outset of the arbitration, the first respondent engaged with the parties to narrow the issues in dispute. This has been touched on above. Effectively, the parties agreed to the factual matrix forming the basis for charges 1.3 and 1.4 against Mahabe, and he admitted guilt on those two charges. That effectively meant that on the common cause facts, the charges were proven. All that remained was deciding whether dismissal as a sanction was appropriate, where it came to these charges. As held in *Windscreen Distributors (Pty) Ltd v Motor Industry Bargaining Council (Dispute Resolution Centre) and Others*[35]:

> '… Now it is true that if the third respondent indeed pleaded guilty to this charge, the second respondent would have to accept that the misconduct in this regard was not disputed by the third respondent and the only issue that would need determination was the appropriate sanction for such misconduct. …'

[50] But the issue of the recanting of the guilty pleas by Mahabe in respect of charges 1.1 and 1.2 cannot happen without any consequences. It was undisputed that Mahabe pleaded guilty to all the charges in the disciplinary hearing, including these two charges. A proper guilty plea in a disciplinary hearing could serve as proof of the existence of misconduct in itself, provided certain safeguards are applied by the chairperson of the disciplinary hearing before the plea is

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[33] *Fidelity Cash Management Service (supra)* at para 102.
[34] 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.
[35] (JR1767/2012) [2014] ZALCJHB 114 (4 March 2014) at para 41. See also *SA Fibre Yarn Rugs Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2005) 26 ILJ 921 (LC) at para 12; *SA Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 1238 (LC) at para 20.

accepted.[36] This Court has in fact specifically found that a guilty plea with an implausible explanation for it, may also in itself competently lead to a conclusion that the misconduct was committed.[37] As succinctly said in *Mphaphuli v Ramotshela NO and Others*[38]:

> 'In my view, when the applicant tendered a plea of guilty at the commencement of the disciplinary enquiry it meant that there was no fact placed in issue and as such there was no further evidence necessary. …'

[51] It is of course true that because arbitration is a hearing *de novo*, it will be possible for an employee party to recant a guilty plea at arbitration. But that recanting cannot be without consequence. Such a recanting could lead to an adverse inference to be drawn against the employee when deciding whether the employee committed the misconduct, especially where the reason why the guilty plea was made in the first place is not fully and properly explained, or falsely explained.[39] In short, and in the absence of a proper and acceptable explanation that justifies the recanting of the guilty plea, such guilty plea may still legitimately serve as evidence to prove the misconduct of the employee, even in a *de novo* arbitration.[40]

[52] In recanting the guilty plea by Mahabe, the applicant's representative offered no explanation why Mahabe pleaded guilty to these two charges in the disciplinary hearing, and why he now sought to recant the plea. There was no indication or evidence that the original guilty plea was somehow ill-advised or erroneously made. It would appear to me that the applicant simply had a change of heart, with Mahabe having been dismissed following the disciplinary hearing. I therefore believe that the original guilty plea simply cannot be ignored, and

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[36] These safeguards are explained in *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at paras 72 – 73, as being that the presiding officer may have to question the accused person with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty. Furthermore, the presiding officer must be convinced that an accused not only admits an allegation in the charge, but that the accused appreciates what that admission entails.

[37] See *National Union of Metalworkers of SA and Others v Atlantis Forge (Pty) Ltd* (2005) 26 ILJ 1984 (LC) at para 101; *Delta Motor Corporation (Pty) Ltd v Finnemore NO and Others* (1999) 4 LLD 96 (LC).

[38] (2020) 41 ILJ 242 (LC) at para 36.

[39] Compare *Intellectual Democratic Workers Union obo Linda and others v Super Group and others* [2017] 10 BLLR 969 (LAC) at para 25.

[40] See *Ratsibvumo and Another v Commission for Conciliation, Mediation and Arbitration and Others* (JR239/16) [2017] ZALCJHB 397 (27 October 2017) at para 6.

would still go a long way in proving this misconduct as having been committed by Mahabe.

[53] I next turn to the evidence relating to the misconduct contemplated by charges 1.1 and 1.2, as it emerged for the first time in arbitration.[41] A conspectus of the arbitration award of the first respondent shows that he comprehensively dealt with and determined that evidence, and made properly motivated findings with reference to such evidence. I will deal with these findings hereunder.

[54] In his arbitration award, the first respondent referred to a number of important concessions made by Mahabe in his own evidence. I have considered the transcript of the arbitration proceedings, and am satisfied that these concessions were indeed made, and the first respondent's reliance on the same cannot be faulted. These concessions included that the email address used for quotations was TCPquotes and that if Mahabe received quotations directly, he was supposed to send them to TCPquotes. He also conceded that he received the Kganyang quote directly to his own e-mail address, accessed and attended to process the quote without it being sent to TCPquotes, and he never informed his manager of this. Even though Mahabe was adamant they had separated by the time the quote was submitted by Kganyang, he did concede that he and Mtabane were married and had two children together. It was also in the end conceded that Mtabane was a director of Kganyang.

[55] Considering the above concessions, as well as the undisputed terms of the third respondent's policies, what Mahabe did would, at the very least on a *prima facie* basis, constitute the misconduct with which he has been charged. That being said, the duty then squarely shifted onto Mahabe to provide a plausible and acceptable explanation that would dispel this *prima facie* position.[42]

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[41] No evidence on the misconduct was presented in the disciplinary hearing, because of the guilty plea.
[42] In *Federal Cold Storage Co Ltd v Angehrn and Piel* 1910 TS 1347 at 1352 the Court held that: '*… the burden of proving to be honest what admittedly on its face looked dishonest rested upon the respondents themselves, not upon the appellants. Once the appellants had proved a prima facie case of misconduct on the part of the respondents in taking, in violation of their duty, a secret profit of the kind described, the dismissal stood prima facie justified, the burden of proof was shifted, and it lay upon the respondents, as it does upon all agents in a fiduciary position who deal with their principals, to prove the righteousness of the transaction. If they failed to discharge that burden satisfactorily, then the prima facie case against them must prevail and their guilt, justifying dismissal, must be taken to be established. …*'. See also *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 2455 (LAC) at para 34; *Aluminium City (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others* (2006) 27 ILJ 2567 (LC) at para 20.

[56] In seeking to disavow the misconduct, Mahabe relied on a number of explanations, all dealt with by the first respondent in his award. First, and according to Mahabe, there was nothing wrong in receiving and processing the quote at his personal e-mail address, because there was no specific rule requiring the quote to only be sent to TCPquotes. In dealing with this explanation, the first respondent conducted a comprehensive and detailed analysis of the evidence, which in my view is not only rational and reasonable considering what was before him, but would actually be a correct conclusion based on the facts and probabilities. The first respondent accepted that the PPM does not '*explicitly'* provide that quotes must be received via TCPquotes, but only stipulated that it should be received in a '*controlled environment*', and cited an example of such an environment as being a dedicated email address. The first respondent however further accepted that the absence of an explicit rule in the PPM did not compromise the third respondent's case, as the evidence showed that there was a common / shared understanding that the '*dedicated email address*' contemplated by the PPM was exclusively TCPquotes, and that procurement officers were prohibited from accessing quotes directly by way of their personal emails. The first respondent also had regard to earlier examples presented in evidence where Mahabe had received quotes directly from bidders, and had not dealt with such quotes, but instead informed the bidders to submit the quotes to TCPquotes. And finally, there is Mahabe's own concession that he would ordinarily not deal with quotes sent to him directly and would require they be sent to TCPquotes, unless the issue was urgent. So, it must follow from the evidence, properly considered, that ordinarily and as a general rule under the PPM, Mahabe was well aware of the fact that the PPM required him not to access or deal with quotes sent directly to his personal e-mail, and to instead require that the bidder send the quote to TCPquotes. This is what the first respondent rationally and reasonably found to be the case.

[57] This leaves the contention by Mahabe that he could access and deal with the quote directly in the case where it was urgent, and the quote *in casu* did concern such an urgent situation. Mahabe explained this case was urgent because the original contract was about to expire. He further said that in the cases of such urgency, he had the discretion to decide whether to access and process the quote sent to his personal e-mail, or to insist that it be sent to TCPquotes. The

first respondent dealt with this contention, and held that '*… I find it difficult to accept that the employee could really have believed that whilst TCPquotes was the generally required email address for bids, he had a discretion to apply an urgency criterion of his own and to make the call, based on his own assessment of the urgency, as to whether he accessed the bid from his personal email address, or sent it on to TCPquotes …*'. The first respondent also considered that on the evidence, no one else had such an understanding of the rule. These conclusions of the first respondent cannot be faulted. It is in any event my view that affording procurement officers such a kind of discretion would make little sense, considering the controlled environment requirement in the PPM, as it effectively would then be up to the various procurement officers to simply deal with quotes on their own based on their own respective personal assessments of what may be urgent. This kind of situation would run contrary to what is logically a controlled environment. The first respondent therefore rightly rejected this so-called urgency discretion alluded to by Mahabe.[43]

[58] It followed from the above conclusions by the first respondent that Mahabe had committed the misconduct as contemplated by the second charge (charge 1.2), in that he submitted the quotation for Kganyang for approval outside of the prescribed controlled environment prescribed by the PPM. I am satisfied that this conclusion is in proper conformity with the evidence before the first respondent as a whole, and would certainly be in line with what may be said to be a reasonable outcome.

[59] The first respondent then specifically dealt with the first charge (charge 1.1). He referred to the common cause facts that Mahabe received and processed the Kganyang quote, at a time when Mtabane was a director of Kganyang. The first respondent also considered the nature of the relationship between Mahabe and Mtabane, and that it was undisputed that procurement officers are obliged to declare a conflict of interest if they are aware of such a kind of relationship. The first respondent then properly identified the defence of Mahabe to these undeniable facts, being that he was not aware that Mtabane was a director of

[43] It may be added that on the evidence, the only exception to a quote being accessed and dealt with directly with an employee is if specific permission was first sought for this, and then obtained, from senior management. This kind of exception certainly makes sense, as it gives senior management the opportunity to safeguard the interests of the third respondent.

Kganyang, and that in any event, his relationship with Mtabane was not the kind of relationship contemplated in the PPM as requiring a disclosure.

[60] Starting with the contention that Mahabe's relationship with Mtabane, at the time when the quote was submitted, was not one that required disclosure, the first respondent did consider the relevant definition of '*related*' in the Disclosure policy. According to the first respondent, the definition contemplated cohabitation. In this context, Mahabe did contend that when the quote was submitted, he had separated from Mtabane and they were no longer residing together. The first respondent however rejected this testimony for a number of reasons, and in particular, on the basis that Mahabe could have done a lot more to prove this contention,[44] which was his duty to prove. Added to above, and on Mahabe's own version, he had been cohabiting with Mtabane at least to early 2018, and although separated, they were still married. The first respondent actually concluded on the facts that despite Mahabe's contention of separation, Mahabe and Mtabane were still cohabiting when the quote was submitted. As far as the first respondent was concerned, all this fell within the parameters of '*related*' as contemplated by the third respondent's policies. I am compelled to agree with the first respondent.

[61] I may also add that in my view, it simply does not matter when Mahabe and Mtabane may have stopped cohabiting in 2018 or if they separated. This is because they were still married. Clause 14.6.1.1 of the Disclosure policy specifically provides that parties that are married are related for the purposes of having to make disclosure. Added to this, the undeniable fact is that they had a current history of a personal relationship, shared two children, and still communicated with each other. This is the kind of relationship that susceptible to being leveraged, and thus required disclosure.

[62] Next, could it legitimately be said that Mahabe was unaware that Mtabane was a director of Kganyang? According to Mahabe, he did not know what Mtabane's business affairs were and he did not notice anything on the quote

[44] The first respondent referred to evidence being obtained and presented such as a utility bill, proof of ownership, or proof of a lease agreement, indicating that Mtabane was residing at other premises in Nyanga. The first respondent also recorded that one would also expect that Mahabe could have called an independent witness to testify as to Mtabane's residence.

that would point to her. As far as the first respondent was concerned, there was no substance in this contention by Mahabe, and in my view, this conclusion was rightly arrived at. In this regard, two facts pertinently stand out. First, the quote came to Mahabe's personal e-mail with his name already reflected on the quote itself. Second, the quote itself actually reflected Mtabane's name on the quote. Mahabe sought to overcome this obvious difficulty by stating that he did not fully read the quote, but only looked at the company name and the price, and did not notice anything else. As the first respondent correctly decided, this contention was implausible, considering Mtabane's name was quite clear on the quote. And further, how would an independent bidder know to send the quote directly to Mahabe already marked for his attention at his personal e-mail. I share the view that the explanation of not noticing what was on the quote, as proffered by Mahabe, was unlikely to the extent that it readily fell to be rejected,

[63] The first respondent however also considered another probability. He reasoned that it was improbable that Mtabane, considering her relationship with Mahabe, would not once mention submitting a bid to him or enquiring on its progress, especially considering the manner in which the quote was addressed and submitted. He further considered that Mahabe did not present evidence to the effect that he and Mtabane were no longer in contact or on speaking terms, and considering they had two children it was likely that they remained in contact, even if Mahabe's version that they were separated was true, and that in this context the quote would have arisen. He also attached what he called 'some' significance to Adam's suspicions with Mahabe's persistence about finalising the transaction, which was uncommon and unusual. All this pointed to the fact that Mahabe had knowledge that the quote emanated from Mtabane.

[64] Based on the aforesaid reasoning, the first respondent concluded that on the probabilities, Mahabe knew that Mtabane was involved Kganyang when he received the quote of 31 July 2018. Considering that this relationship required being declared as a possible conflict of interest, the first respondent decided that the third respondent had proven on a balance of probabilities that Mahabe failed to declare a conflict of interest of which he was aware, and thus committed the misconduct as contemplated by charge 1.1. In my view, this conclusion was

properly arrived at, on the probabilities, considering the evidence as a whole, and simply cannot be faulted.

[65] It follows that Mahabe committed the misconduct as contemplated by all four the charges against him. This then only leaves the issue of dismissal as an appropriate sanction. Against the backdrop of what is set out above, some legal principles bear reference. In *Sappi Novoboard (Pty) Ltd v Bolleurs*[45] 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' …'

[66] Applying these principles specifically to the employment relationship, the Court in *Ganes and Another v Telecom Namibia Ltd*[46] 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 … '

[67] The LAC in *Bonfiglioli SA (Pty) Ltd v Panaino*[47] 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:

[45] (1998) 19 ILJ 784 (LAC) at para 7.
[46] (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.
[47] (2015) 36 ILJ 947 (LAC) at para 26.

> '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. …'

[68] A final apposite reference would be to the judgment in *National Union of Metalworkers of SA on Behalf of Nganezi and Others v Dunlop Mixing & Technical Services (Pty) Ltd and Others (Casual Workers Advice Office as Amicus Curiae)*[48], where the Court held as follows:

> 'Fiduciary duties are duties that apply to persons who have access to, or power in relation to, the affairs of a beneficiary. These duties must be exercised for the sole purpose of promoting the beneficiary's interests. The two core fiduciary duties are the no-conflict duty to avoid all potential conflict of interest situations and the no-profit duty which prohibits fiduciaries from obtaining any unauthorised profit for themselves that has not been properly disclosed or consented to by the beneficiary …'

Applying these principles to the employment relationship, the Court then concluded:[49]

> 'So despite the possibly confusing references to trust, confidence, loyalty and good faith in our case law it is clear that where contracting parties 'are bound to promote the interest entrusted to their keeping ... [t]hey cannot take any advantage to themselves out of the business for which they have been appointed, nor derive any benefit therefrom, beyond such commission and charges as the law allows in the particular instance'. This essentially amounts to the duties that Idensohn identifies as distinctive of fiduciary duties: *(a)* that fiduciary duties require a unilateral obligation to act in the beneficiaries' interest; *(b)* the primary fiduciary obligations are only two — no profit and no conflict of interest; and *(c)* fiduciary remedies are strict, with no intent required …'

[69] The point can perhaps be best illustrated by reference to comparable examples to the case *in casu*, as found in the case law. In *Bootes v Eagle Ink Systems KwaZulu-Natal (Pty) Ltd*[50], the employee was selling blankets to the employer's customers for his own account, which was a business activity not even related

[48] (2019) 40 ILJ 1957 (CC) at para 55.
[49] Id at para 61.
[50] (2008) 29 ILJ 139 (LC).

to the employer's business. However, the employee did not disclose this to the employer or seek approval for it. The Court had the following to say about this:[51]

> '… 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.

[70] In *Head of Department: Sport, Arts, Recreation and Culture, Free State v National Education Health and Allied Workers Union on Behalf of Masekoa and Others*[52] the Court considered the provisions of the SMS Handbook in the Public Service which provided that senior managers '*must exhibit the highest ethical standards in carrying out their duties*', that senior managers have the duty to alert their employer of any actual or potential conflict of interest, be it financial or otherwise, and no employee is to engage in any action or transaction that is in conflict with or infringes upon the execution of his or her official duties.[53] In that case, the employee had been charged with securing an accommodation contract with a business she had an interest in, which the employer contended contravened the above summarized provisions of the SMS handbook.[54] Even though there was no specific provision in the SMS handbook prohibiting the employee from securing such a contract for her private business, the Court nonetheless accepted this was a material conflict of interest, and held that *'… Employees have a duty of good faith towards their employers. They are required to advance the employer's interest and not their own in situations where their interests and those of the employer may clash …*'.[55] The Court accepted that: '*The transgression was serious enough to justify Ms Masekoa's dismissal. She was in a position of trust and breached that trust*'.[56] The comparisons to the case *in casu* are in my view clear, in that the third respondent's various policy stipulations contained similar provisions, and what Mahabe did undoubtedly violated those provisions in a similar manner.

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[51] Id at para 27 – 28.
[52] (2023) 44 ILJ 147 (LAC)
[53] See para 6 of the judgment.
[54] See para 25 of the judgment.
[55] Id at para 27.
[56] Id at para 35

[71] In *Coega Development Corporation (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[57] the issue concerned an alleged conflict of interest on the part of an employee, in that the employee submitted the CV of prospective employees to the employer's interview panel for appointment, where the employee had a personal relationship with those prospective employees. The employee then also participated in the interview process to ensure the appointment of those prospective employees. In this context, the Court held:[58]

> 'I agree with Mr *Gauntlett* that, given the seniority of her position and the role that she played on the selection panel, Ms Fort was required to be ice cold, and that it amounts to serious misconduct for someone in her position to treat a candidate with any degree of favouritism, without making full disclosure to the selection panel. Put differently, it amounts to serious misconduct to become involved in the recruitment process of people to whom you feel favourable, in circumstances where you do not make full disclosure. It goes without saying that such conduct is to be deprecated, particularly where public funds are involved.
>
> Where a senior manager is entrusted with the appointment of personnel in a largely state funded entity and breaches that trust in the circumstances which occurred herein (which included an element of deception), the sanction of dismissal is more than warranted. Indeed, the commissioner herself recognised in her award that a finding of guilty on the charges brought against Ms Fort, which included a charge of a conflict of interest, 'would clearly result in a sanction of dismissal'. To put the issue beyond doubt, not only was Ms Fort guilty of serious misconduct, but she went on to present a disingenuous defence at both her disciplinary enquiry and at the arbitration, and showed no remorse.'

Again, the comparisons to what happened in the case *in casu* is quite apparent.

[72] A final apposite example is the judgment in *Impala Platinum Ltd v Jansen and Others*.[59] That case concerned conduct by an employee in promoting the business of his wife as a supplier to the employer. The Court had the following to say about this conduct:[60]

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[57] (2016) 37 ILJ 923 (LC).
[58] Id at paras 93 - 94.
[59] (2017) 38 ILJ 896 (LAC)
[60] Id at para 20.

> 'The commissioner rightly found that Jansen's conduct went to the root of the employment relationship deserving of the severest sanction. This cannot be faulted. In fact, it would be unfair to expect the appellant to retain Jansen in its employ where Jansen had not only displayed gross misconduct in failing to comply with statutory regulations but also contravened the duty to act in good faith by promoting his wife's business to appellant's service providers thereby compromising fairness and honesty within the appellant's business relationships. In the circumstances, there was no need to lead any evidence of a breakdown in the relationship, as it was obviously the case. …'

[73] What was actually required of Mahabe, and in respect of which he failed, is neatly articulated in *ABSA Bank Ltd v Naidu*[61] as follows:

> '… it followed that she owed a fiduciary responsibility *vis-à-vis* the appellant towards ensuring that, at all times, she acted and performed her duties in a manner that was in the best interests of both the appellant and its clients. …'

[74] The above legal position considered, I believe one can do little better than to quote what the first respondent actually found in this regard, which in my view is obviously an unassailable point of view to adopt:

> 'The employee occupies a position, and works in an environment (Procurement), that demands a higher level of trust than the average. The tender environment is almost uniquely open to abuse and manipulation. At almost every stage of the procurement process there is the opportunity (for those who want it) to be able to manipulate the system for own or other's undue benefit. Employers therefore need to be able to place a high level of trust in the custodians of the Procurement Policies …'

[75] It is my view that the failure to disclose a conflict of interest, as took place *in casu*, as coupled with an attempted false justification for the behaviour, is nothing else but misconduct relating to dishonesty. The fact of the matter is that as a general proposition, dishonesty is the kind of misconduct that justifies the sanction of dismissal as an appropriate and fair sanction.[62] In *SA Society of*

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[61] [2015] 1 BLLR 1 (LAC) at paras 54.

[62] *Toyota SA Motors (Pty) Ltd v Radebe and Others* (2000) 21 *ILJ* 340 (LAC) at para 15; *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO and Others* (2010) 31 *ILJ* 901 (LAC) at paras 35 and 37; *Absa Bank Ltd v Naidu and Others* (2015) 36 ILJ 602 (LAC) at para 52.

Bank Officials and Another v Standard Bank of SA and Others[63] it was held as follows:

> 'Dishonesty as an aspect of misconduct is a generic term embracing all forms of conduct involving deception. This court in *Nedcor Bank Ltd v Frank & others* defined dishonesty as a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently. Deceitfulness can manifest itself in various forms, which include providing false information, non-disclosure of information, pilfering, theft and fraud. The fiduciary duty owed by an employee to the employer generally renders any dishonest conduct a material breach of the employment relationship, thereby justifying summary dismissal. …'

[76] It was suggested on behalf of Mahabe that the quotation was never executed, and as such, the third respondent suffered no harm or loss, which should have mitigate against dismissal. This contention is simply wrong. It is not about actual harm or loss in this instance, but the risk of it. A proper answer was provided in *Phillips v Fieldstone Africa (Pty) Ltd*[64] where the Court held that the defences open to a fiduciary who breaches trust are very limited, and these defences would not include that the employer has suffered no loss or damage or that the fiduciary acted honestly and reasonably.

[77] In the end, it was simply too risky for the third respondent to continue with employing Mahabe, considering all that transpired in this case. It was appropriate, in the context of risk management, to bring the employment relationship to an end. As said in *De Beers Consolidated Mines Ltd v Commission for Conciliation*, *Mediation and Arbitration and Others*[65]:

> 'A 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. …'

[78] Where it came to the misconduct in respect of charges 1.3 and 1.4, the first respondent concluded that viewed in isolation, he would not have decided that

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[63] (2022) 43 ILJ 1794 (LAC) at para 17. See also *Continental Oil Mills (Pty) Ltd v Singh NO and Others* (2013) 34 ILJ 2573 (LC) 29 – 34; *Consani Engineering (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 1707 (LC) at para 23.
[64] (2004) 25 *ILJ* 1005 (SCA) at para 31.
[65] (2000) 21 ILJ 1051 (LAC) at para 22.

dismissal was warranted[66], but considered together with charges 1.1 and 1.2, dismissal was warranted. Whilst there can be no fault with the ultimate conclusion that dismissal was warranted, I must confess that I believe the first respondent was being rather generous to Mahabe where it came to charges 1.3 and 1.4. In my view, using the property of an employer for personal purposes where no authority is obtained to do so, which is actually what happened *in casu*, is comparable to theft. As said in *Chetty v Italtile Ceramics Ltd*[67]: *'… at common law 'theft' has a wider meaning and includes furtum usus, or the appropriation of the use of another's thing …*'. A comparable example to the misconduct of the applicant in this instance can be found in *Greater Letaba Local Municipality v Mankgabe NO and Others*[68]. In that case, the employee took and used the employer's motor vehicle without permission, knowing that it was impermissible to do so. The Court held that: '*His knowledge notwithstanding, he went ahead, deliberately broke the municipal rules, removed the vehicle at the ungodly hour of 02h22 on a Sunday without permission and used it for a private purpose.*'[69] The comparison to the matter *in casu* is clear. In this context, the Court in *Greater Letaba Local Municipality* then concluded that dismissal was justified.[70]

[79] This kind of situation also received the attention of the LAC in *Malaka v General Public Service Sectoral Bargaining Council and Others*[71]. In that case, the employee has falsified documents to justify the use of a motor vehicle, and this resulted in excessive kilometres being travelled by the employee with the motor vehicle.[72] The Court held as follows in this regard:[73]

> 'In an employment relationship, it is an implied term of the contract of employment that the employee will act in good faith towards, and serve, her employer with honesty. As a deputy director in the Department of Justice, the appellant occupied a position of trust which enjoined her to conduct herself honestly towards the department, which has a zero-tolerance policy to cases of

[66] According to the first respondent, he would have issued a final written warning for this misconduct only.
[67] 2013 (3) SA 374 (SCA) at para 10. See also *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 2698 (LC) at para 1.
[68] (2008) 29 ILJ 1167 (LC).
[69] Id at para 30.
[70] Id at para 34.
[71] (2020) 41 ILJ 2783 (LAC).
[72] Id at para 32.
[73] Id at para 33.

dishonesty. The deliberate falsification of documents to secure a vehicle for her own personal use is a serious offence that implicated the appellant's honesty. That the value of the loss suffered by the employer was negligible is not a mitigating factor. This court has taken a strict approach to dishonest conduct, even where the loss to the employer has been relatively small …'

[80] It is my thus view that even where it came to charges 1.3 and 1.4, the nature of misconduct was such that Mahabe would have earned his dismissal. He used the third respondent's vehicle on several occasions for personal purposes, without even attempting to obtain authority. Then he also in essence falsified the third respondent's records, by failing to complete the logbook to reflect his personal travels.[74] But considering that the ultimate conclusion by the first respondent was that dismissal was an appropriate sanction, there is no need to make a definitive finding on whether he earned his dismissal just for this.

[81] What however finally substantiates dismissal as a fair sanction is the fact that Mahabe never showed any remorse or contrition for what he did.[75] Instead, he refused to acknowledge wrongdoing, and relied on what can only be said to be unacceptable and even false explanations. These false explanations exacerbated what was in the end nothing more than dishonesty in this case, and compounded the misconduct. In *De Beers supra*[76], 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. …'

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[74] As held in *Malaka* (*supra*) at para 34: '*… The evidence reveals that the appellant's dishonest conduct rendered continued employment intolerable and incapable of restitution. Conduct, such as we have here, is incompatible with the trust and confidence necessary for the continuation of the employment relationship. The Department of Justice was entitled, in the circumstances, to end the employment relationship …*'.

[75] As to what constitutes true or proper remorse, see *Naidu* (*supra*) at para 46.

[76] Id at para 25.

[82] In sum, and even should the merits of the applicant's review application be considered, the application has no merit. The conclusions arrived at by the first respondent in his award to the effect that Mahabe committed serious misconduct for which his 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 in my view would be actually correct. The arbitration award of the first respondent is simply unassailable on review.

Conclusion

[83] Therefore, based on all the reasons set out above, I conclude that the applicant's condonation application must fail. The applicant has failed to provide an acceptable explanation (or no explanation at all) for what is in the end, all considered, a material delay. The issue of prejudice has not been properly addressed, and this consideration, in the circumstances, favours the third respondent. Even if prospects of success are considered, and having regard to the reasoning set out above, the applicant has zero prospects of success. As such, the applicant's condonation application thus falls to be dismissed, and along with it, the review application.

Costs

[84] This then leaves only the issue of costs. In terms of the provisions of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. Reference is made to what the Constitutional Court said with regard to costs in employment disputes as expressed in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[77]. In exercising this judicial discretion, the same Court re-affirmed the principle set in *Zungu supra* and stated that '*when making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties.*'[78]

[85] In exercising my discretion, I do believe the current state of affairs resulting in the applicant being non-suited was caused by the applicant's own unacceptable failures. But overall considered, I do not believe the applicant conducted itself in an entirely unacceptable manner worthy of the kind of censure a costs order

[77] (2018) 39 ILJ 523 (CC) at para 25.
[78] *Long v South African Breweries (Pty) Ltd and Others* (2019) 40 ILJ 965 (CC) at para 30.

would provide. I have also considered the personal circumstances of Mahabe. In my view, the scales where it comes to costs are equally balanced, and as such, the ordinary principle as set out in *Zungu supra* should carry the day. Overall considered, my sense of fairness in this case leaves me convinced that no order as to costs is appropriate.

[86] In the premises, I make the following order:

Order

1. The applicant's condonation application is dismissed.
2. The applicant's review application is consequently dismissed.
3. There is no order as to costs.

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S. Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr J Duba of Legal Aid SA

For the Third Respondent: Mr G Cassells of Maserumule Inc Attorneys