REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 3273/2009

In the matter between:

RESTIN PASKA BANDA **Applicant**

and

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL **First Respondent**

THULANI AKIM N.O. **Second Respondent**

DEPARTMENT OF HOME AFFAIRS **Third Respondent**

Heard: **15 August 2013**

Delivered: **26 February 2014**

Summary: **Bargaining Council arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – Test for review – application of review test set out – determinations of arbitrator compared with evidence on record – arbitrator's award regular and sustainable – award upheld**

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Bargaining Council arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – assessment of evidence and legal principles by arbitrator – assessment and determination reasonable – award upheld

Misconduct – dishonesty – principles applicable to dishonest conduct – conduct of the employee constituting an offence of dishonesty – dismissal justified

Inconsistency – allegations of inconsistent treatment of employee by employer – principles considered – no inconsistency shown

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerns an application by the applicant to review and set aside an arbitration award of the second respondent in his capacity as an arbitrator of the GPSSBC (the first respondent). This application has been brought in terms of Section 145 of the Labour Relations Act[1] ("the LRA").

[2] This matter concerned an unfair dismissal dispute. The applicant contended that he had been unfairly dismissed by the third respondent and pursued a dispute to the first respondent as the applicable bargaining council. The matter came before the second respondent for arbitration, pursuant to which arbitration proceedings the second respondent determined that the applicant's dismissal was fair and dismissed his referral. It is this determination by the second respondent that forms the subject matter of the review application brought by the applicant, which application was ultimately filed some 32 days out of time. As such, the issue of condonation for this late referral needs to be considered.

Condonation

[1] Act No 66 of 1995.

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[3] The applicant contends his union received the award on 17 September 2009. This corresponds with the telefax transmission report appearing on the award as attached to the founding affidavit. The review application was served and filed on 2 December 2009, which makes it more than a month late, which insofar as it concerns review applications, can be considered in general to be material. In *Academic and Professional Staff Association v Pretorius NO and Others,*[2] even a three weeks' delay was found to be excessive when it comes to review applications. Because the delay is material, a comprehensive and proper explanation is required for the delay.

[4] The Labour Appeal Court in *A Hardrodt (SA) (Pty) Ltd v Behardien and Others*[3] dealt with a condonation application for the late filing of a review application. The Court referred with approval to the judgment in *Queenstown Fuel Distributors CC v Labuschagne NO and Others*[4] 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.'

[5] What is clear from the judgment in *A Hardrodt* is that in seeking condonation for the late filing of a review application, the explanation that needs to be submitted must be compelling and the prospects of success need to be strong. Where it comes to the issue of prejudice, the applicant in fact has to show that a miscarriage of justice will occur if the applicant's case is not heard. The reason for these particular considerations is that review applications occur after the

[2] (2008) 29 ILJ 318 (LC).
[3] (2002) 23 ILJ 1229 (LAC).at para 4.
[4] (2000) 21 ILJ 166 (LAC).

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parties have already been heard, presented their respective cases and a finding has been made. Under such circumstances, considerations of justice, fairness and expedition require that challenges of such findings must not be delayed and must be completed as soon as possible, especially considering that no appeal lies against such findings.

[6] The Court in *Academic and Professional Staff Association,*[5] developed the principles applicable to the consideration of condonation in the context of review applications even further, and held as follows:

> 'The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with time frame; (c) prospects of success or bona fide defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. See *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC). It is trite law that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay.'

[7] The applicant explained the delay in this matter as follows: (1) the applicant himself only became aware of the award on 7 October 2009; (2) the applicant was told by Mnguni from his union NEHAWU that the award was reviewable and that he (Mnguni) would call him on 9 October 2009 to pursue the matter further; (3) the drafting process was delayed because NEHAWU had to procure the services of an attorney; (4) Mnguni was often unavailable prompting the applicant to approach Pandelani Attorneys himself; (5) the applicant collected his file

[5] *Academic and Professional Staff Association* (*supra*) at paras 17–18.

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content from NEHAWU on 30 October 2009, and handed the same to Pandelani Attorneys on the same day to proceed with the review.

[8] I consider the above explanations to be wholly insufficient. In particular, the entire period from 30 October 2009 to 2 December 2009 is unexplained. It also appears that the applicant blames his union and his erstwhile attorneys for the failures and it is now trite that in the absence of proper explanation of the applicant that he actually regularly pursued and follow up on the matter with his representatives, he must stand or fall by the conduct of his chosen representatives.[6] The explanation is lacking to the extent that it could justifiably lead to conclusion that condonation be refused on this basis alone. What however, in my view saved the applicant's review from failure on this basis is the fact that the third respondent did not oppose this condonation application and the issue of condonation was not raised by the third respondent when the matter was argued before myself. Therefore, and despite the lack of proper explanation, the absence of opposition to condonation, and the fact that the matter was fully and properly ventilated and argued before me on the merits thereof, convinces me to consider the issue of the prospects of success of the review application and this in turn entails a determination of the merits of the applicant's review application, which I will now proceed doing. I will thus record that condonation is granted for this purpose.

Background facts

[9] The applicant was employed by the third respondent as a chief administration clerk in the third respondent's customary marriages section. The principal part of the duties of the applicant is the actual registration of customary marriages,

[6] See *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A); *Superb Meat Supplies CC v Maritz* (2004) 25 ILJ 96 (LAC); *Arnott v Kunene Solutions and Services (Pty) Ltd* (2002) 23 ILJ 1367 (LC); *Parker v V3 Consulting Engineers (Pty) Ltd* (2000) 21 ILJ 1192 (LC); *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others* (2010) 31 ILJ 1413 (LC); *GIWUSA obo Heynecke v Klein Karoo Kooperasie BPK* (2005) 26 ILJ 1083 (LC); *Theron v AA Life Assurance Association Ltd* 1995 (4) SA 361 (A) at 365; *Swanepoel v Albertyn* (2000) 21 ILJ 2701 (LC).

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which act of registration clearly, as a matter of common sense, has material implications to the applicable parties.

[10] Where it comes to customary marriages, it is the registering officer, in this case the applicant, that has a discretion whether to register the marriage or not. The applicant's position therefore carries with it a duty of integrity, honesty, and also responsibility. The applicant in fact decides on the status of individual citizens coming before him.

[11] The third respondent, in the past, had experienced difficulties with the registration of customary marriages, and in particular, there were instances where the husband in a customary marriage was not present or refused to be present, before the registering official, in order to sign the required application documents. The normal process is that both parties must be present, ask for the marriage to registered, and both parties then complete and sign the relevant documents in the presence of witnesses of each party. However, and as a result of the deliberate non attendance by the husband parties or the refusal to co-operate by husband parties, which would then abort the registration process, the third respondent issued a directive on 21 September 2001 in the form of Department Circular 34 of 2001. In terms of this directive, the registration officer of the customary marriage was given a discretion to decide to register a customary marriage in the absence of the husband party (or for that matter the wife party), provided certain requirements are met. The first is that the husband party must be given the opportunity to respond to the application. This of course, as a matter of simple logic, means that it has to be shown that the husband party was aware of the application. Then independent evidence that is available to establish the customary marriage exists must be considered, and the date of the marriage established. If the registering officer still decides to refuse to register the marriage, reasons must be given for such refusal.

[12] There is also a prescribed application process and application form which must

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be completed by the parties and the registering officer to register such marriages, known as form BI – 1699. Some attention must be paid to this application form itself, and the accompanying application process. Firstly, the date of the marriage must be considered. Once the date of marriage is determined, the BI – 1699 form must be completed. Part A consists of the particulars of the husband. Part B is a declaration by the husband, and of relevance to this matter, if the husband refuses to participate details of the circumstances should be furnished, and where applicable the response to the application recorded in the application. Parts C and D are the particulars of the wife and declaration by the wife, with the same provisions mutatis mutandis applicable is she refuses to participate. Finally, and as a general proposition, the registering officer must be able to substantiate any decision he or she made in this registration application process in a Court.

[13] A final consideration is the provisions of the Recognition of Customary Marriages Act 120 of 1998 ("the Marriages Act") itself. In terms of Section 4(3)(b) of the Marriages Act, any marriage entered into after the Marriages Act came into operation, must be registered within 3 months after conclusion of the marriage, otherwise it cannot be registered.

[14] Dealing then with the particular background facts of this matter, the issue concerned an alleged customary marriage between one Sydwell Mfeka ("Mfeka") and Lugile Octavia Nkosi ("Nkosi"). According to the evidence, this marriage was concluded on 6 December 2003. Nkosi then came before the applicant only in 2007 to register this customary marriage with Mfeka.

[15] The first and most immediate difficulty is that this marriage was concluded in 2003. The Marriages Act had by that time been in operation for some years. The appearance before the applicant in 2007 was therefore way beyond the 3 month time limit prescribed by Section 4(3)(b) of the Marriages Act. The date of the marriage was the first thing the applicant had to determine and surely he must

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have known of the 3 month time limit, that this time limit had passed, and there it was simply not competent for him to have registered the marriage.

[16] This then leads to a consideration of the registration application itself before the applicant in 2007. The application form was completed by the applicant. There is no evidence or indication that the applicant satisfied himself that Mfeka was even aware of the application. In fact, all the applicant did was to obtain an affidavit provided by Nkosi which recorded that Mfeka was refusing to register the marriage because Nkosi caught him cheating with another woman. This affidavit was dated 14 August 2007 and was part of the documentary evidence.

[17] In completing the form itself, the applicant merely recorded under the declaration by Mfeka (Part B of the form) under the paragraph dealing with possible other customary marriages that this information was "unavailable" and did not record anything to the effect that Mfeka refused to participate in the process or what steps were taken to ensure he was aware of the process or what his contentions with regard to the process may have been. There is no evidence that the applicant ever contacted Mfeka. In addition, the applicant signed part B of the form as registering officer as if Mfeka had made a declaration in part B of the application as the husband party. Under the representative (witness) for Mfeka, the applicant also only simply records "unavailable". The applicant duly registered this marriage on 15 August 2007.

[18] What was common cause is that Mfeka subsequently attended at the offices of the third respondent to express his dissatisfaction with the registering of the marriage to Nkosi without his knowledge. It is also clear that Mfeka laid a charge with the SAPS about this. In addition, the entire incident formed the subject matter of an article appearing in the Soweto Newspaper of 9 June 2008. The third respondent was compelled, in the end, to deregister the marriage and the entire saga then led to High Court litigation.

[19] On 24 July 2008, the applicant was then charged by the third respondent on two

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charges of misconduct. The first charge was essence one of fraud relating to the applicant's processing and registering of the customary marriage of Mfeka and Nkosi on 15 August 2007 and his completion of the application form in the manner that he did. The second charge related to misconduct in that the applicant registered the marriage outside the time limit prescribed by the Marriages Act.

[20] The disciplinary hearing took place on 4 August 2008. On 14 October 2008, the outcome of the disciplinary hearing was conveyed to the applicant and his dismissal was recommended. The applicant appealed against his dismissal and on 9 January 2009, the applicant's dismissal was upheld on appeal.

[21] The applicant the referred his dispute to the first respondent which dispute then came before the second respondent for arbitration. The applicant challenged his dismissal only on the basis that it was substantively unfair. The second respondent ultimately determined that the applicant's dismissal was substantively fair and dismissed his application. This determination then gave rise to the current proceedings before me.

The relevant test for review

[22] The proper test for review test came about following the judgment of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[7] where Navsa, AJ held that in the light of the constitutional requirement (in s 33 (1) of the Constitution) that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, and that 'the reasonableness standard should now suffuse s 145 of the LRA'. The majority of the Constitutional Court set the threshold test for the reasonableness of an award or ruling as the following: 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'[8]

[7] (2007) 28 ILJ 2405 (CC).
[8] Id at para 110.

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Following on, and in *CUSA v Tao Ying Metal Industries and Others,*[9] O'Regan J held:

> 'It is clear…. that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.*'*

[23] The review test set out in *Sidumo* (and *Tao Ying Metal Industries*) envisaged a comparison by a review court of the totality of the evidence that was before the arbitrator as well as the issues that the arbitrator was required to determine, to the outcome the arbitrator arrived at, in order to ascertain if the outcome the arbitrator came to was reasonable. The *Sidumo* review test was applied in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[10], and the Court, as to what would be considered to be unreasonable for the purposes of this test, said:[11]

> 'The Constitutional Court further held that to determine whether a CCMA commissioner's arbitration award is reasonable or unreasonable, the question that must be asked is whether or not the decision or finding reached by the commissioner 'is one that a reasonable decision maker could not reach' (para 110 of the *Sidumo* case). If it is an award or decision that a reasonable decision maker could not reach, then the decision or award of the CCMA is unreasonable, and, therefore, reviewable and could be set aside. If it is a decision that a reasonable decision maker could reach, the decision or award is reasonable and must stand. It is important to bear in mind that the question is not whether the arbitration award or decision of the commissioner is one that a reasonable decision maker *would* not reach but one that a reasonable decision maker *could* not reach ...'

[9] (2008) 29 *ILJ* 2461 (CC) at para 134.
[10] (2008) 29 ILJ 964 (LAC).
[11] Id at para 97.

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The Court in *Fidelity Cash Management Service* concluded:[12]

> '…It seems to me that,… there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner's decision does not depend - at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.'

[24] One of the most recent instances of consideration of the review test can be found the SCA judgment of *Andre Herholdt v Nedbank Ltd*[13] where the Court concluded as follows:[14]

> 'In summary the position regarding the review of CCMA award is this: A review of a CCMA award is permissible if the defect in the proceedings fall within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(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 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.'

[12] Id at para 102.
[13] 2013 (6) SA 224 (SCA) per Cachalia and Wallis JJA.
[14] Id at para 25.

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What the Court was saying, simply put, is that if the arbitrator ignored material evidence, and in considering this material evidence together with the case as a whole, the review court believes that the arbitration award outcome cannot now be reasonably sustained on any basis, then the award would be reviewable.

[25] Following the judgment of the SCA in *Herholdt*, the Labour Appeal Court has now in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[15] again interpreted and applied the *Sidumo* review test and held as follows:[16]

> 'Sidumo does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. … In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material'

The Court concluded:[17]

> 'In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her, evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decision he or she arrived at.'

[26] In the light of the above, the first step in a review enquiry is to consider or determine if an irregularity indeed exists. A review court determines whether such an irregularity exists by considering the evidence before the arbitrator as a whole, as gathered from the review record and comparing this to the content of

[15] (JA 2/2012) [2013] ZALAC 28 (4 November 2013) (4 November 2013) not yet reported, per Waglay JP.
[16] Id at para 14.
[17] Id at para 16.

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the award and reasoning of the arbitrator as reflected in such award. The review court must also at this stage apply all the relevant principles of law in order to determine what indeed constituted the proper evidence that the arbitrator, as a whole, would have had to consider. Once an irregularity is identified, the materiality of the irregularity then becomes relevant and must be considered. This means that the irregularity committed by the arbitrator must be a material departure from the acceptable norm or a material deviation from the actual evidence before him or a material departure from the proper principles of law or a material failure to consider and determine the evidence or case, in order to constitute an irregularity of sufficient magnitude to satisfy this first step in the enquiry. If the review court in conducting this first step enquiry should find that no irregularity exists in the first instance, the matter is at an end, no further determinations need to be made, and the review must fail.

[27] Should the review court however, conclude that a material irregularity indeed exists, then the second step in the review test follows, which is a determination as to whether if this irregularity did not exist, this could reasonably lead to a different outcome in the arbitration proceedings. Put differently, could another reasonable decision-maker, in conducting the arbitration and arriving at a determination, in the absence of the irregularity and considering the evidence and issues as a whole, still reasonably arrive at the same outcome? In conducting this second step of the review enquiry, the review court need not concern itself with the reasons the arbitrator has given for the outcome he or she has arrived at, because the issue of the arbitrator's own reasoning was already considered in deciding whether an irregularity existed being the first part of the test. The review court, in essence, takes the proper evidence as a whole, as ascertained from the review record, considers the relevant legal principles and decides whether the outcome that the arbitrator arrived at could nonetheless reasonably be arrived at by another reasonable decision-maker, even if it is for different reasons. If, and pursuant to this second step in the review enquiry, the

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review court is satisfied that the same outcome could not reasonably follow even for any other reasons, then the review must succeed, because, simply put, the irregularity would have affected the outcome. The end result always has to be an unreasonable outcome flowing from an irregularity for a review to succeed.

[28] I will now proceed to determine the applicant's review application on the basis of the above principles and the two step enquiry in the application of the *Sidumo* test as I have set out above.

The reasoning of the arbitrator

[29] The second respondent accepted that the marriage between Mfeka and Nkosi was contended to have been concluded on 6 December 2003. The second respondent then considered the provisions of the Marriages Act and held that the time frame for registering a customary marriage, as applicable in this instance, was 3 months from the date when it was celebrated. The second respondent then concluded that the applicant had registered the marriage after the expiry of this 3 month period and thus committed misconduct as contemplated by the second charge against the applicant.

[30] The second respondent next dealt with the BI – 1699 form completed by the applicant in registering the marriage between Mfeka and Nkosi and his conduct relating to the same. The second respondent accepted that the applicant misrepresented the facts on this application form, with specific reference to the applicant in effect certifying that Mfeka made a declaration when Mfeka did not and that he registered the marriage when no witnesses for Mfeka was present. The second respondent further concluded that the applicant had a duty to confirm that the customary marriage existed with Mfeka and did not do so and in effect registered the customary marriage based on a lie.

[31] The second respondent also dealt specifically with the applicant's two primary defenses raised in the arbitration. The first defense was that the applicant was

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unaware of the provisions of the Marriages Act, and this defense the second respondent rejected. The second defense was that the applicant was not properly trained on how to complete the registration application or even trained at all, and this defense the second respondent also rejected on the basis of being unlikely and in any event unsubstantiated by the applicant.

[32] The second respondent accepted the applicant was in fact guilty of fraud and that the third respondent was prejudiced as a result. The second respondent concluded that the applicant's dismissal was justified in the circumstances.

[33] I may mention that the second respondent made no finding on the issue of procedural unfairness, as he was not called on by the parties to determine the issue of procedural fairness. Inexplicably, the applicant however, has a lot to say about procedural unfairness in his founding affidavit in the review application, but considering there was no issue about procedural unfairness before the second respondent, I shall not regard to any of these contentions of the applicant.

The applicant's grounds of review

[34] The applicant has raised a number of grounds of review in the founding affidavit, spanning some 8 pages. I do not propose to set out all of these grounds of review individually, some of which are duplicated and others overlap. In summary, and distilled to the core, the applicant's grounds of review are the following: (1) the second respondent failed to apply his mind in that he preferred the evidence of the third respondent over that of the applicant (including documentary evidence); (2) the second respondent failed to refer in his award to certain documents submitted by the applicant, and in particular the application forms completed by other employees; (3) the second respondent committed misconduct by not considering the evidence of two of his witnesses (Cooney and Sibanda), and by not properly assessing their evidence; (4) the second respondent adopted a "criminal mode" when determining the issue of an appropriate sanction; (5) the second respondent acted irregularly in not finding

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that there was nothing peculiar in the applicant registering the marriage of Mfeka and Nkosi; (6) the second respondent erred in his conclusions as the probabilities favoured the applicant; (7) the second respondent failed to consider the issue raised that another employee (Smal) had also registered customary marriages in a similar manner as the applicant but was not dismissed; and (8) the second respondent ignored the applicant's documents.

[35] In presenting argument, Mr Malhabathe, who represented the applicant, based the applicant's case on five basic pillars. Firstly, and according to the applicant, what the actual evidence in this matter showed was that the applicant was never trained in completing the marriage registration forms. Secondly, the applicant was not aware of the provisions of the Marriages Act. Thirdly, the actual provisions of the Marriages Act and accompanying regulations did not require that the husband had to be there or give a declaration. Fourthly, the evidence showed that the third respondent was inconsistent in applying discipline to other employees that did the same as the applicant were not disciplined. The final pillar was that the applicant never committed fraud and was always *bona fide*, and if any fraud was committed it was committed by Nkosi.

Merits of the review: substantive fairness

[36] The first issue to consider is the applicant's complaints with regard to the fact that the second respondent preferred the evidence and case of the third respondent over that of the applicant. The point of departure in determining this ground of review is to state that where the second respondent prefers the evidence of the third respondent over that of the applicant's and his witnesses, this is in essence a finding of credibility. As was said in *Sasol Mining (Pty) Ltd v Ngqeleni NO and Others:*[18] 'One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him.' In this regard, I also refer to *Standerton Mills*

[18] (2011) 32 ILJ 723 (LC) at para 9.

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(Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others[19] where the Court said:

> '... Credibility issues are indeed difficult to determine in motion proceedings such as these. The commissioner is undoubtedly in a better position to make a finding on this issue. In *Moodley v Illovo Gledhow and Others* (2004) 25 *ILJ* 1462 (LC) at 1468C-D Ntsebeza AJ observed in this regard as follows:
>
> > 'Sitting as I do as a review judge, I fail to understand, in this case, how I could decide to set aside an award given by an arbitrator who sat at the hearing, observed the witnesses, their demeanour and the manner in which they came across. I cannot see that I can interfere merely on an assessment of whether she misdirected herself by reason of the fact that she considered whether the witnesses were credible before determining what the probabilities were in the light of their testimonies.... I should be extremely reluctant to upset the findings of the arbitrator unless I am persuaded that her approach to the evidence, and her assessment thereof, was so glaringly out of kilter with her functions as an arbitrator that her findings can only be considered to be so grossly irregular as to warrant interference from this court.'

[37] I also dealt with the very issue of the challenge of credibility findings of arbitrators in review proceedings, in the matter of *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others*[20] and said:

> 'The issue of the importance of credibility findings made by the commissioner being accepted in this court on review was made by Mr *Snider*, who represented the third respondent. He submitted that it was the commissioner who sat in the arbitration proceedings, looked at the witnesses, listened to them, and assessed their credibility, and on review, this court should not readily interfere with this, as the commissioner was in the best position to make these findings. I agree with

[19] (2012) 33 ILJ 485 (LC) at para 18.
[20] (2013) 34 ILJ 945 (LC) at para 31.

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these submissions. This court should not readily interfere with credibility findings made by CCMA commissioners, and should do so only if the evidence on the record before the court shows that the credibility findings of the commissioner are entirely at odds with or completely out of kilter with the probabilities and all the evidence actually on the record and considered as a whole. Findings by a commissioner relating to demeanour and candour of witnesses, and how they came across when giving evidence, would normally be entirely unassailable, as this court is simply not in a position to contradict such findings. Even if I do look into the issue of the credibility findings of the second respondent in this case, I am of the view that the record of evidence in this case, if considered as a whole simply provides no basis for interfering with the credibility findings of the second respondent. There is simply nothing out of kilter between the evidence by the witnesses on record and the credibility findings the second respondent came to. The evidence on record in my view actually supports the second respondent's credibility findings. The credibility findings of the second respondent therefore must be sustained.'

[38] I have considered the record of evidence in this matter, as a whole. There is in my view simply nothing that can be ascertained from the record which could serve as a basis to interfere with the second respondent having preferred any evidence by the third respondent over that of the applicant. In order for the second respondent's credibility findings to be susceptible to being assailed on review, the record of evidence had to reveal that the second respondent's preference of the evidence of the third respondent was completely out of kilter with the actual evidence as gathered from the transcript. An example would be where there are material contradictions in the testimony of a witness appearing clearly from the record and then, from a comparison of the arbitrator's award to such testimony on the record, it is apparent that these contradictions were entirely ignored. The problem the applicant has is that I can find nothing of such significance on the record of evidence which can substantiate any form of interference with the award of the second respondent. I hasten to say that I consider the second respondent's credibility finds to be actually correct.

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[39] For the sake of completeness, I am also compelled to state that I have read the evidence presented by Mr Jimmy Malema ("Malema"), the witness for the third respondent, as it appears on record, and have found his evidence to be concise and consistent. Under cross examination, Malema was never found wanting and his evidence corresponded with what he had testified to in chief, and in any event made sense as compared to the documentary evidence. It was entirely proper and rational to have considered him to be a credible witness. The applicant, on the other hand, simply did not fare as well as Malema. I found material contradictions in the evidence of the applicant, especially on the issue of training, where the applicant's version varied depending on the questions he was being asked. The applicant's evidence on the completion of the application documents was also entirely unsatisfactory, and in my view quite self serving. At one point, and following extensive cross examination by the third respondent's representative, the applicant was actually compelled to concede that how he testified the form had to be completed could not be correct, and having so conceded, the applicant then contended that he simply did as he was taught (despite having earlier contended he was taught nothing). I would not have considered the applicant to be a credible witness, and as such, I simply cannot find any substantiation or basis to interfere with the second respondent's conclusions as to what evidence he preferred. In the end, the second respondent's credibility findings must be sustained.

[40] I will next deal with the issue of the applicant registering the customary marriage between Mfeka and Nkosi outside the 3 month time period prescribed by the Marriages Act. The undisputed evidence was that such registration after this 3 month period had elapsed was prohibited. In considering this issue, I start by making specific reference to the contention of the applicant that he was unaware of the provisions of the Marriages Act. I find this contention to be simply unpalatable. In fact, for the applicant, being the responsible registering officer that registers customary marriages in terms of the Marriages Act, to contend that

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he was unaware of the provisions of the very legislation that forms the basis of his duties, is a firm indictment of the applicant in itself. The applicant is thus saying he does not even know the provisions of the very legislation he must apply every day as part of his core duties. This kind of contention, in itself, would go a long way in justifying the termination of employment of the applicant. The situation is exacerbated by the fact that the only reason why the applicant would say this is to get around the fact that he proceeded to register the customary marriage between Mfeka and Nkosi when it was glaringly apparent that it was long after the 3 month prescribed period and as such, the registration was actually prohibited. The applicant actually has no explanation for this misconduct. It is flagrant, and the applicant's attempts to disavow responsibility by pleading ignorance is manifestly unacceptable. The second respondent's findings with regard to the second charge relating to the registration of the marriage outside the 3 month period is not only reasonable, but in my view actually correct. The second respondent's conclusion that the applicant indeed committed the misconduct as contemplated by the second charge against him is certainly no irregularity, and must be sustained.

[41] This then leads me to consider the first charge, being the manner of completion of the BI – 1699 document by the applicant and his subsequent registration of the customary marriage of Mfeka and Nkosi as a result. As I have touched on above, even the applicant in the end had to concede that the manner in which he completed the form cannot be correct. The Circular 34 of 2001 was also undisputed evidence and actually made it clear what was required. In any event, a consideration of the application document itself, and its completion, is very much a matter of common sense. It surely cannot take much insight to appreciate that where a husband party is not present to complete his part of the form and make a declaration, as prescribed, that the registration officer must at least ascertain if this party is actually aware of the application and give that party an opportunity to explain why he is not there. It was also undisputed that the

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registration officer has a discretion to register the marriage or not and must be able to substantiate the decision taken in this regard in Court. Now all of this must result in considerable difficulties having regard to what the applicant actually did. He never made contact with Mfeka. He never asked Mfeka to explain himself. He did not even ascertain from Mfeka if he actually knew of the application. The manner in which the applicant then completed part A and B of the form was actually consistent with Mfeka having been there. The same consideration applies to the absence of the witness party for Mfeka. All that the applicant relied on was the lobola agreement and an affidavit by Nkosi herself, which was woefully inadequate. On the undisputed facts, the applicant should never have registered the customary marriage of Mfeka and Nkosi, and committed misconduct in doing so The third respondent had thus made out at least a *prima facie* case in this regard. The next question then is why did the applicant do this, and the applicant carried the evidentiary burden to provide an acceptable explanation. In *Aluminium City (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others*[21] the Court held as follows:

> '…In *Federal Cold Storage Co Ltd v Angehrn and Piel* 1910 TS 1347 at 1352, the court stated
>
> 'But 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...' (emphasis added)

[42] In *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others*[22] I said:

[21] (2006) 27 ILJ 2567 (LC).at para 20.
[22] (*supra*) footnote 20 at para 41.

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> '… As stated above, the third respondent had at least made out a prima facie case. That meant that there was a duty on the second applicant to advance and provide a reasonable alternative explanation. His failure to do so in my view counts heavily against him. … '

[43] The explanation the applicant then proceeded to offer was a lack of training. I however, have little hesitation in rejecting this explanation not only as being unacceptable per se, but also on the basis of it being false. There are a number of reasons for this conclusion. The first is the evidence presented by Malema. Malema stated that proper training is always provided. He specifically referred to in occupation training, and training facilitated from head office. Malema also stated that areas of concern are dealt with by memorandums from head office, such as the Circular 34 of 2001. Malema also referred to a manual in the possession of all officers which they are fully acquainted with. Malema was extensively cross examined on the issue of training and I am satisfied that his evidence under cross examination remained entirely consistent with that presented in chief. Secondly, and when coming to the applicant, his evidence on the issue of training left a lot to be desired. The applicant, in giving evidence, initially conceded that he received in occupation training from his supervisor when he started his appointment as registering officer. The applicant then contended he received no training whatsoever and was left to his own devices to complete the forms. Then, and when challenged on the fact that the manner in which he completed the form made no sense considering the content of the form itself, the applicant then contended that he completed the form in the manner that he did because that was how he was trained to do it. Then, later on in his evidence, the applicant again reverted to the version he was not trained at all. Now, clearly, this evidence by the applicant is simply unacceptable. The applicant can either use an explanation of being incorrectly trained, or an explanation that he was not trained. He cannot use both, as these explanations simply cannot exist in conjunction with one another. To prefer the evidence of Malema with regard to the issue of training is in the circumstances a matter of

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logic and simple consequence, and as a result, the explanation of the applicant of any lack of training fails.

[44] The applicant sought to bolster his case of not having been trained by calling two witnesses, being Cooney and Sibanda. The applicant took issue on review with the fact that the second respondent considered the evidence of these two witnesses of no consequence. I however, consider the approach and determination of the second respondent in this regard to have been entirely justified. Cooney actually testified that she had no knowledge of the process relating to the registration of customary marriages or training relating to the same, and she did not even deal with it. Sibanda testified that he ceased to be a registering officer in 2004, and with the applicant only becoming a registering officer in 2006, it is difficult to comprehend how Sibanda can give reliable comment or testimony on any aspect or issue of the training of customary marriage registering officers from 2006 onwards. I am left with the distinct feeling that the applicant called these witnesses simply to argue that he had more witnesses than the third respondent. I conclude that the testimony of Cooney and Sibanda did not substantiate the explanation of the applicant of not being trained in any manner, and the second respondent was actually correct in so determining.

[45] There is in any event an answer founded in simple logic to the applicant's lack of training explanation. It is surely a matter of common sense that where a customary marriage between two persons is registered, both parties must be present. It also has to be common sense that if one of the parties is not there, then the registering officer should at least be sure this party knows about the application being made and is given an opportunity to explain why, if the party does not want to be there, the party has adopted this view. The considerations of logic is in any event actually recorded in Circular 34 of 2001. After all, the decision to register the marriage or not must be able to be substantiated in Court. The application form also speaks for itself, and surely as a matter of common

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sense the registering officer cannot sign part B of the form as if the husband made a declaration, and the part relating to the husband's witness as if his witness was there. In my view, the applicant's defense, which is in essence is one of ignorance, is an artificially created one. In this context, it cannot be ignored that the applicant, as discussed above, even went so far as to contend that he did not know what the provisions of the Marriages Act was, and sought to rely on an affidavit deposed to by Nkosi herself to substantiate registering the marriage in the absence of Mfeka. Common sense and logic thus directly contradicts the explanation of the applicant.

[46] In the circumstances, the second respondent was entirely justified in rejecting the lack of training explanation of the applicant as unlikely and unsubstantiated. The second respondent was actually correct in concluding that the applicant's registration of the marriage was based on a lie and constituted fraud. There is simply no basis to interfere with the conclusion of the second respondent that the applicant was indeed guilty of misconduct in respect of the first charge as well.

[47] Accordingly, I conclude that there exists no irregularities of any kind in the reasoning of the second respondent and in the determination he came to with regard to the misconduct having been committed by the applicant. There is therefore no basis to review and set aside the second respondent's conclusions in this regard. I thus uphold the second respondent's award concerning the substantive merits of this matter.

The issue of inconsistency

[48] The decision I have come to above then leaves only the applicant's case of inconsistency. As was submitted by Mr Malhabathe for the applicant, this was the applicant's "main" case. I will thus give it particular attention. In deciding this issue, I will assume that inconsistency was properly raised as an issue by the applicant in the arbitration and that the second respondent did not consider and determine the issue. I will also assume that this failure by the second respondent

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to consider and determine this issue constitutes a gross irregularity. What I therefore will do is to consider whether the issue of inconsistency, considering the record of evidence as a whole, could render the ultimate outcome arrived at by the second respondent as being an unreasonable outcome, because if that is the case, then the award of the second respondent would be reviewable.

[49] The point of departure in considering the case of inconsistency in this matter is that the applicant carries the evidentiary burden to at least establish a *prima facie* case of inconsistency before the third respondent is compelled to supply an answer of a defense. I had the opportunity to deal with this issue in the judgment of *Frans Mashubele v Public Health and Social development Sectoral Bargaining Council and Others,*[23] and said:

> 'Mr S M Shaba, representing the third respondent, contended that the applicant had the evidentiary burden to at least prove a prima facie case of inconsistency, before the third respondent could be expected to answer the same. Mr Shaba stated that in this instance, the applicant failed to even provide prima facie evidence to establish inconsistency and consequently the third respondent had nothing to answer. Mr Shaba stated that the applicant should have led evidence, and only has himself to blame for not doing so. I agree with these submissions of Mr Shaba. The applicant had to at least have provided a prima facie evidentiary platform to support his contentions of inconsistency….'

[50] The above approach is also in line with what was said in *SA Municipal Workers Union on behalf of Abrahams and Others v City Of Cape Town and Others*[24] where it was held:

[23] Unreported judgment dated 17 January 2013 under case number JR 1151 / 2008 at para 29.
[24] (2011) 32 ILJ 3018 (LC) para 50. See also *Minister of Correctional Services v Mthembu No and Others* (2006) 27 ILJ 2114 (LC) at para 13 where it was said: 'The third respondent placed in issue the fairness of the decision to dismiss him and pertinently raised the issue of consistency. He established a basis therefor by presenting evidence with sufficient particularity in order to have enabled the applicant to deal therewith. Faced with a challenge to the consistency of the applicant's treatment of employees, the applicant, who bore the onus of proving the fairness of the dismissal (s 192(2) of the Act), elected not to place any evidence before the first respondent demonstrating that there was no inconsistent disciplining of employees.'

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> 'This situation is, in my view, akin to the question of inconsistency where an employee alleges inconsistency. The employee must show the basis thereof, for example he must reveal the name of the concerned employee and also the circumstances of the case. This is necessary for the employer to respond properly to the allegation. Failure to do so may lead to a finding that no inconsistency exists or was committed by the employer. This situation never shifts the onus from the employer to the employee to prove that there is no consistency.'

[51] In *Comed Health CC v National Bargaining Council for the Chemical Industry and Others*[25] the Court said the following:

> 'It is trite that the employee who seeks to rely on the parity principle as an aspect of challenging the fairness of his or her dismissal has the duty to put sufficient information before the employer to afford it (the employer) the opportunity to respond effectively to the allegation that it applied discipline in an inconsistent manner. One of the essential pieces of information which the employee who alleges inconsistency has to put forward concerns the details of the employees who he or she alleges have received preferential treatment in relation to the discipline that the employer may have meted out.'

[52] Considering the above duty of the applicant to establish inconsistency, what was then the evidence presented by the applicant in this respect? In the arbitration and in this review application, the applicant introduced as evidence three other application forms completed in a manner similar to the application for completed by the applicant in this matter. The applicant contended that these three other application forms completed by other employees in the same manner as he did, establishes inconsistency. It is however, significant that the record shows that the applicant did not seek to introduce these forms in the arbitration to establish inconsistency on the part of the third respondent in dismissing him, but that the actual reason for the applicant seeking to introduce these forms was to prove

[25] (2012) 33 ILJ 623 (LC) at para 10.

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that other persons were trained to complete the forms in the same manner as the applicant did. The forms were thus relied on by the applicant to prove wrong training, and not inconsistency.

[53] However, and even accepting that the applicant sought to rely on these forms to establish inconsistency, one must ask what was actually then proven. The second respondent, as is apparent from a debate between him and the applicant's representative reflected in the record, was very much alive to this issue. It is clear from this debate that it was made clear to the applicant by the second respondent that the mere introduction of the forms cannot establish inconsistency without calling the persons that completed these forms to testify about the actual circumstances under which these forms were completed. To put it simply – the mere forms prove nothing where it comes to inconsistency. For example, it may well be that a form was completed as it was, after the registering official made sure the husband party was aware of the application and actually extracted an explanation from him. The applicant had to establish like for like, and could only do this with testimony by the persons that completed the forms. When it was actually made clear to the applicant's representative that this was needed, the applicant's representative then again reiterated that the forms were there to prove the issue of training and not inconsistency. The applicant's representative said in so many words, in the debate with the second respondent: 'I understand we are not questioning consistency'.[26] But now in this review the applicant sings a different tune, and this in my view is unacceptable.

[54] Malema testified that he was unaware of any instance of a form being completed as the applicant did, and under the circumstances the applicant did. Malema testified that without proper context, he simply could not comment on the forms. There was certainly no evidence that the third respondent was aware that its officials were completing the forms as the applicant did and conducting themselves as the applicant, and took no disciplinary action against officials or

[26] Record page 291 line 15 – 16

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condoned such behaviour. There was no case or evidence that the applicant was being singled out for treatment. If anything, the evidence showed that the third respondent was entirely unaware that what the applicant contended was happening, was actually happening.

[55] The applicant never testified about inconsistency. The applicant never made out a case in his evidence that the third respondent was *mala fide* or discriminatory, or had knowledge of what was happening. All the applicant had to show inconsistency existed was three forms which on face value appeared to have been completed in the same fashion as the form completed by the applicant in this case. That is all. I am thus of the view that the applicant, on the facts, has not even established a *prima facie* case of inconsistency, which should be the end of this part of the case of the applicant.

[56] However, I will nonetheless apply the relevant legal principles to the above factual matrix, for the sake to a complete determination. The judgment in *SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd,*[27] aptly determined the principles applicable, as follows:

> '…In my view too great an emphasis is quite frequently sought to be placed on the 'principle' of disciplinary consistency, also called the 'parity principle' (as to which see eg Grogan Workplace Law (4 ed) at 145 and Le Roux and Van Niekerk The SA Law of Unfair Dismissal at 110). There is really no separate 'principle' involved. Consistency is simply an element of disciplinary fairness (M S M Brassey 'The Dismissal of Strikers' (1990) 11 ILJ 213 at 229). Every employee must be measured by the same standards (*Reckitt and Colman (SA) (Pty) Ltd v Chemical Workers Industrial Union and others* (1991) 12 ILJ 806 (LAC) at 813H-I). Discipline must not be capricious. It is really the perception of bias inherent in selective discipline which makes it unfair. Where, however, one is faced with a large number of offending employees, the best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility,

[27] (1999) 20 ILJ 2302 (LAC) at para 29.

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> which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of a plurality of dismissals, a wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy.... Even then I dare say that it might not be so unfair as to undo the outcome of other disciplinary enquiries. If, for example, one member of a group of employees who committed a serious offence against the employer is, for improper motives, not dismissed, it would not, in my view, necessarily mean that the other miscreants should escape. Fairness is a value judgment. It might or might not in the circumstances be fair to reinstate the other offenders. The point is that consistency is not a rule unto itself.'

[57] What is meant by *Irvin and Johnson Ltd* is that in order to ensure inconsistency is not found to exist in the case of dismissal of employees: (1) Employees must be measured against the same standards (like for like comparison); (2) The chairperson of the disciplinary enquiry must conscientiously and honestly determine the misconduct; (3) The decision by the employer not to dismiss other employees involved in the same misconduct must not be capricious, or induced by improper motives or by a discriminating management policy (this conduct must be bona fide); (4) A value judgment[28] must always be exercised.

[58] In *Minister of Correctional Services v Mthembu NO and Others,*[29] the Court said:

> 'The consideration of consistency of equality of treatment (the so-called parity principle) is an element of disciplinary fairness.... When an employer has in the past, as a matter of practice, not dismissed employees or imposed a specific

[28] In *SRV Mill Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 135 (LC) at para 31 the Court said: 'Ultimately, questions of fairness and, perhaps particularly, issues of inconsistency require the exercise of a value judgment ...'

[29] (2006) 27 ILJ 2114 (LC) at paras 8 – 9.

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sanction for contravention of a specific disciplinary rule, unfairness flows from the employee's state of mind, ie the employees concerned were unaware that they would be dismissed for the offence in question. When two or more employees engaged in the same or similar conduct at more or less the same time but only one or some of them are disciplined or where different penalties are imposed, unfairness flows from the principle that like cases should, in fairness, be treated alike. However, as stated by Conradie JA in the *Irvin and Johnson* case at 2313C-J, the principle of consistency should not be applied rigidly....

….Consistency is therefore not a rule unto itself, but rather an element of fairness that must be determined in the circumstances of each case...'

[59] In *Consani Engineering (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[30] it was held as follows:

'…The requirement of consistency is not a hard and fast rule. It is something to be kept in mind as an aspect of disciplinary fairness. Flexibility in adapting to a changing environment is equally important. Shifts in policy inevitably introduce standards not consonant with past practices. The applicant's change in policy to one of zero tolerance hence can be fairly regarded as a legitimate modification of the operational means for protecting the company from ongoing stock losses. Any ensuing element of inconsistency cannot be considered arbitrary or in bad faith in the circumstances.'

[60] Of relevance to the current matter, the Court in *Chemical Energy Paper Printing Wood and Allied Workers Union v National Bargaining Council for the Chemical Industry and Others*[31] concluded:

'…An employer can only be accused of selective application of discipline if, having evidence against a number of individual employees, it arbitrarily selects only few to face disciplinary action.' (emphasis added)

[30] (2004) 25 ILJ 1707 (LC) at para 19.
[31] (2010) 31 ILJ 2836 (LAC) at para 20.

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[61] In the post *Sidumo* era, the Court in the judgment of *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[32] specifically dealt with the principle of inconsistency, and said the following:

> '…The courts have distinguished two forms of inconsistency - historical and contemporaneous inconsistency. The former requires that an employer apply the penalty of dismissal consistently with the way in which the penalty has been applied to other employees in the past; the latter requires that the penalty be applied consistently as between two or more employees who commit the same misconduct.
>
> A claim of inconsistency (in either historical or contemporaneous terms) must satisfy a subjective element - an inconsistency challenge will fail where the employer did not know of the misconduct allegedly committed by the employee used as a comparator (see, for example, *Gcwensha v CCMA and Others* [2006] 3 BLLR 234 (LAC) at paras 37-38). The objective element of the test to be applied is a comparator in the form of a similarly circumstanced employee subjected to different treatment, usually in the form of a disciplinary penalty less severe than that imposed on the claimant. (See *Shoprite Checkers (Pty) Ltd v CCMA and Others* [2001] 7 BLLR 840 (LC) at para 3). Similarity of circumstance is inevitably the most controversial component of this test. An inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of inter alia differences in personal circumstances, the severity of the misconduct or on the basis of other material factors.
>
> Further, the Labour Appeal Court has held that employees cannot profit from an

[62] I also rely on the judgment of *Mphigalale v Safety and Security Sectoral*

[32] (2010) 31 ILJ 452 (LC) at paras 10–11. See also *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others* (2008) 29 ILJ 1180 (LC) at paras 36; 40; 41 and 42.

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Bargaining Council and Others[33] which in my view would be of direct application to the nature of the misconduct by the applicant properly found to exist in this matter, and the fact that the applicant works in the public service in a position of trust. The following extract from the judgment is apposite:[34]

> 'The evidence before the commissioner was that the chairperson's decision in respect of the two previous instances of corruption by police officers had been made in error. Applying the judgment in *SACCAWU*, the SAPS is not required to repeat a decision made in error or one which is patently wrong. This is all the more so given the nature of the misconduct committed. In *S v Shaik and Others* the Constitutional Court warned that corruption is 'antithetical to the founding values of our constitutional order'. Similarly, in *SA Association of Personal Injury Lawyers v Heath and others* 2001 (1) SA 883 (CC) this court held that: '[C]orruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State.'

[63] In applying the above principles to the current matter, there is no contention by the applicant or case made out by the applicant that discipline was not conscientiously and honestly applied and there were improper motives or capricious behaviour on the part of the third respondent. There certainly was no discriminating policy. The fact is that even if the third respondent was wrong in not disciplining the other employees referred to, there was no case or evidence that the third respondent was still not acting *bona fide vis-à-vis* the applicant, or even had any prior knowledge of such similar wrongdoing by other employees. Considering the conduct of the applicant in this matter, and especially his false contentions that he was not trained and was not even aware of the provisions of

[33] (2012) 33 ILJ 1464 (LC).
[34] Id at para 22.

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the very legislation he was tasked to apply, there is simply no cause or reason why the applicant should profit from any failure on the part of the third respondent to discipline other employees, even should it be assumed to exist. Given also the complete absence of any factual particularity in respect of the other employees referred to, it cannot even safely be said that the misconduct of the applicant is readily comparable to the other employees mentioned. Most certainly, there is no case made out or reference made to the fact that responsible management at the third respondent was actually aware of the misconduct by the other employees referred to. Therefore, and also in terms of the relevant provisions of law, the applicant's inconsistency challenge has to fail as well.

[64] I hasten to make some concluding remarks about this matter, considering that the applicant also raised as a ground of review that his dismissal was not justified. Considering the applicant actually committed fraud, I refer to *Theewaterskloof Municipality v SA Local Government Bargaining Council (Western Cape Division) and Others*[35] where it was held:

> 'The general principle that conduct on the part of an employee which is incompatible with the trust and confidence necessary for the continuation of an employee relationship will entitle the employer to bring it to an end is a long-established one. See Council for Scientific & Industrial Research v Fijen (1996) 17 ILJ 18 (A) at 26E-G.'

[65] In *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[36] the Court held as follows, which in my view is quite apposite to the current matter, considering the false explanations offered by the applicant:

> '…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

[35] (2010) 31 ILJ 2475 (LC) at para 23..
[36] (2000) 21 ILJ 1051 (LAC) at at para 25.

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> 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.'

[66] I therefore conclude that even where the issue of inconsistency is considered, by having regard to the record of evidence before the second respondent as a whole (including the three forms), the applicant has not established any case of inconsistency on the facts of this matter, or in terms of the relevant principles of law. Any issue of inconsistency thus cannot affect the outcome in this matter, as an outcome a reasonable decision maker could come to. I therefore conclude that the issue of inconsistency cannot serve as substantiation to interfere with the award of the second respondent.

Conclusion

[67] It is therefore my view and conclusion that the second respondent's conclusions on the substantive merits of this matter and ultimate determination that the applicant's dismissal was substantively fair, simply cannot be an irregularity. It is further my conclusion that the issue of inconsistency raised in this matter does not affect the outcome arrived at by the second respondent by rendering it unreasonable, and in fact the outcome remains entirely reasonable. Accordingly, there is no basis to interfere with the award of the second respondent, and it must thus be upheld. The applicant's review application must fail.

[68] In dealing with the issue of costs, both parties asked for an award of costs. I consider that the second respondent's award was a clear, concise and a properly reasoned award, and it should have been apparent to the applicant, who was at all times assisted by his union, that the review case never had merit. I further consider the nature of the applicant's misconduct and his persistent reliance on clearly false explanations. In terms of the provisions of Section 162(1) and (2) of the LRA, I in any event have a wide discretion where it comes to the issue of

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costs. In exercising this discretion in the current matter, I do believe a costs order against the applicant is appropriate.

Order

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

The applicant's review application is dismissed with costs.

_____

Snyman AJ

Acting Judge of the Labour Court of South Africa.

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APPEARANCES:

For the Applicant:	Advocate S Malhabathe
	Instructed by The State Attorney
For the Third Respondent:	Advocate S B Nhlapo
	Instructed by Motanya Madiba Attorneys

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