



IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PR 01/2017

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL

DEPARTMENT OF HEALTH, EASTERN CAPE

and

THE PUBLIC HEALTH AND SOCIAL

DEVELOPMENT SECTORAL BARGAINING COUNCIL

ARBITRATOR RAYMOND JONATHAN N.O

NONKQUBELA CARVIE KULA

Applicant

First Respondent

Second Respondent

Third Respondent

Heard: 7 February 2018

Delivered: 22 November 2018

JUDGMENT

TLHOTLHALEMAJE, J.

Introduction:

- [1] The applicant seeks an order reviewing and setting aside the arbitration award issued by the second respondent (Arbitrator) dated 15 December 2016. In the award, the Arbitrator had found that the dismissal of the the third respondent (Ms. Kula) by the applicant was substantively and procedurally unfair. The Arbitrator ordered that Kula should be reinstated with backpay in the amount of R1 666 666.70.

Preliminary issues:

- [2] Other than opposing the review application, an issue was raised on behalf of Kula surrounding the late filing of the transcribed record of the arbitration proceedings. According to Kula, the delay in filing the record was about three months, and no request for an extension was sought either from her attorneys of record or from the Judge President of this Court as contemplated in the provisions of clause 11.2.3 of the Court's Practice Manual¹. It was contended that in the absence of an application to reinstate the review application upon it having been deemed withdrawn, the application for condonation (which it was also disputed that it was launched) could not be determined, and that as a consequence, the review application ought to be dismissed.
- [3] It is trite that the provisions of the Practice Manual have a binding effect². Counsel for Kula referred this Court to *Sol Plaatjie Local Municipality v South*

¹ Which provides;

"If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given. If consent is refused, the applicant may, on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties, and answering and replying affidavits may be filed within the time limits prescribed by Rule 7. The Judge President will then allocate the file to a judge for a ruling, to be made in chambers, on any extension of time that the respondent should be afforded to file the record."

See also *Ralo v Transnet Port Terminals and Others* [2015] 12 BLLR 123 at paras [10] and [11], where Van Niekerk J held that;

'.... The plain and unambiguous wording of the practice manual is to the effect that the applicant must be regarded as having withdrawn the review application.'

And,

'To the extent that the applicant contends that he will suffer prejudice on account of any application of paragraph 11.2.3 of the practice manual and that he will be deprived of his right to access to court and to have his application fully ventilated, this is simply not so. The proper order, it seems to me, in circumstances such as the present, is to strike the review application from the roll. There is no bar, either in the Rules of this court or the practice manual to the applicant filing an application in which he seeks to have the review application reinstated, together with an application in which condonation for the late filing of the record is sought'

² See *Rumba Samuels v Old Mutual Bank* [2017] 7 BLLR 681 (LAC); (2017) 38 ILJ 1790, where it was held that;

"[14] The consolidated practice manual which came into operation on 2 April 2013 constitutes a series of directives issued by the Judge President over a period of time. Its purpose is, *inter alia*, to provide access to justice by all those whom the Labour Court serves; promote uniformity and/or consistency in practice and procedure and set guidelines on standards of conduct expected of those who practise and litigate in the Labour Court. Its objective is to improve the quality of the court's service to the public, and promote the statutory imperative of expeditious dispute resolution.

*African Local Government Bargaining Council and Others*³ in regards to the status of matters deemed withdrawn in accordance with the provisions of clause 11.2.3 of this Court's Practice Manual, and I agree with the principles restated therein. I however did not understand the import of that judgment or the message in *Ralo*, to be that it was a *requirement* to file two separate applications, *i.e.* the application to reinstate the review application, and application for condonation in respect of the late filing of the record were envisaged, nor did I understand the judgments to imply that the court's discretion when confronted with such matters is obliterated. As stated in

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- [15] The practice manual is not intended to change or amend the existing Rules of the Labour Court but to enforce and give effect to the Rules, the Labour Relations Act as well as various decisions of the courts on the matters addressed in the practice manual and the Rules. Its provisions therefore, are binding. The Labour Court's discretion in interpreting and applying the provisions of the practice manual remains intact, depending on the facts and circumstances of a particular matter before the court.

And,

- “[23] ...It must be emphasised that the Practice Directive, in particular the provisions relating to archiving and retrieval are there to facilitate expeditious but fair adjudication of the disputes in the Labour Court. The manual should not be used to enable a party to gain an unfair advantage over the other. In this matter, the refusal of the application to retrieve the file from archives would mean that an employee who has served her employer for a period of 26 years, who is not guilty of any misconduct, and elected to exercise her constitutional rights to fair labour practise is dismissed at will through trumped up charges by her senior manager. That would indeed be a wrong message to send.

³ (PR192/15) [2017] ZALCPE 11 (13 June 2017), where it was held that;

- “[24] *In casu* the Applicant has not filed the record within the prescribed 60 day period and has not approached the Third Respondent for consent for an extension of time this. It follows that the review application is deemed to be withdrawn.

- [25] In *Ralo v Transnet Port Terminals and others (Ralo)* the Court accepted the legal definition of 'deemed' as set out in the Namibian authority of *Municipal Council of the Municipality of Windhoek v Marianna Esau (LCA 25/2009, 2 March 2010)* where the Court held that the word 'deemed' is considered to have a conclusive effect. This Court concluded by stating the following:

“...The plain and unambiguous wording of the practice manual is to the effect that the applicant must be regarded as having withdrawn the review application”

- [26] *In casu* the same fate meets the Applicant and the status of the review application is 'withdrawn'. In view of the fact that the review application is withdrawn, the alternative relief sought by the Applicant cannot be granted.

- [27] There is however no bar, either in the Rule of this Court or the Practice Manual to the Applicant filing an application in which it seeks to have the review application reinstated. Logic dictates that the review should be reinstated and be alive before the late filing of the record could be condoned. An application to have the review application reinstated could be filed together with an application in which condonation for the late filing of the record is sought.

- [28] I accept that this application was an attempt to get the review application back on track. The Applicant however should have filed an application wherein the order sought is for the review application to be reinstated.

- [29] *In casu* the Applicant sought condonation for the late filing of a record without an application to reinstate the review application. Condonation for the late filing of a record cannot be granted in respect of a withdrawn application.” (Citations omitted)

Samuels, this Court's discretion in interpreting and applying the provisions of the Practice Manual remains intact, depending on the facts and circumstances of a particular matter before the court.

- [4] Where the record of proceedings is filed outside of the 60 days' period, and the review application is deemed to be withdrawn on account of an extension not having been sought or granted, it would not only be onerous, but also defeat the objectives of an expeditious resolution of disputes, to first require the defaulting party to make an application to reinstate the review application, which the court may or may not grant, and where granted, to thereafter seek condonation for the late filing of the record.
- [5] Even if a separate application for reinstatement of the review application was a procedural requirement, (Something which the Practice Manual is silent on) ordinarily, such an application in these circumstances would essentially be akin to an application for condonation, because central to the issue is the late filing of the record. Essentially the same objective can be achieved in a single application for condonation⁴, which can in its Notice of Motion, incorporate a prayer for reinstatement of the review application. To therefore require a defaulting party to launch two applications designed to achieve the same objective, viz, a reinstatement of a matter and condonation for the late filing of a record is a big ask, and this Court cannot countenance a duplication of processes which would unnecessarily burden its already congested motion roll.
- [6] It is appreciated that in this case, the applicant's application for condonation does not incorporate a prayer for reinstatement of the review application. However, given the circumstances of this case and the discretion enjoyed by

⁴ See *MJRM Transport Services CC v Commissioner for Conciliation, Mediation and Arbitration and Others* [2017] 1 BLLR 40 (LC); (2017) 38 ILJ 414 (LC) at para 17, where it was held that;

"By all accounts, and to the extent that the Manual requires the Applicant to apply to the Judge President for extension by way of notice of motion supported by an affidavit, and to serve such an application, and further to the extent that answering and replying affidavits may be filed within the time limits prescribed by Rule 7, it can only be inferred that the extension sought can only be akin to an ordinary application for condonation as Van Niekerk J correctly pointed out in *Ralo*. There is therefore no merit in the Third Respondent's contention that the application for condonation as in this case is an irregular step. An extension sought from the Judge President must be in the form of an application for condonation"

this Court in such matters, and further in the light of what has been stated above, I see no reason why if condonation is granted, *ipso facto*, the review application cannot be considered to be properly before the Court.

The condonation application:

[7] In the founding affidavit to the condonation application, MM Govender, the Senior State Attorneys averred the following;

- 7.1 The arbitration award was issued on 15 December 2016, and the review application was timeously launched on 17 January 2017.
- 7.2 The first respondent (PHSDSBC) couriered the record on 17 January 2017. When the written record was uplifted, a copy was then couriered to Kula's attorneys of record on 17 February 2017.
- 7.3 The Registrar of the Court issued a directive to the applicant on 24 January 2017 advising it of the availability of the disc with the recording of the arbitration proceedings.
- 7.4 Upon the applicant forwarding the disc to the transcribers, it was advised by the latter on 3 February 2017 that one of the disc could not be transcribed as it was faulty. Correspondence from the state attorneys' office subsequently followed to PHSDSBC between February and March 2017 with a view of securing another copy. The sixty-day time limit for the filing of the record expired on 26 April 2017.
- 7.5 In the midst of attempting to secure another disc to be transcribed, Kula obtained a warrant of execution to enforce the award, resulting in the applicant approaching the court on two occasions on an urgent basis to stay the execution. Orders in that regard were granted by this Court on 10 and 12 May 2017.
- 7.6 On 24 April 2017, a letter of demand was despatched to the PHSDSBC in respect of the outstanding disc, which was ultimately made available in May 2017. It was then sent to the transcribers on 16 May 2017. Notices in terms of Rule 7A (8) were served and filed on 29 June 2017.

- 7.7 Govender further averred that there was a lapse between 3 and 18 July 2017 when her secretary went on leave without having couriered the record to Kula's attorneys of record, but that this was done on 19 July 2017 upon her return from leave.
- 7.8 On 20 July 2017, Kula's attorneys of record advised the applicant that the review had lapsed, and the application for condonation was filed on 16 October 2017.
- 7.9 Govender further averred that the review and written record were timeously served, and that a delay in serving the transcribed record was purely an administrative oversight on her part. She further contended that at no stage was an objection to the late filing of the transcribed record registered, nor was any notice of an irregular step filed.
- 7.10 Govender further averred that Kula would not suffer any prejudice should condonation be granted, and that the main review enjoyed excellent prospects of success in that on the grounds set out for review, the decision of the Arbitrator was not one which a reasonable decision maker could have arrived at.
- [8] The Labour Court enjoys a discretion when deciding whether to condone the late filing of the record of arbitration proceedings. In the exercise of that discretion the court must consider a number of factors including: the degree of delay and the reasons or explanation for the delay; the prospects of success on the merits of the main application; and the prejudice that the parties will suffer should condonation be granted or refused. Ultimately the question is whether it is in the interests of justice to grant the condonation⁵.

⁵ *Brummer v Gorfil Brothers Investments (Pty) Ltd* 2000 (5) BCLR 465 ; 2000 (2) SA 837 (CC) at para 3; See also *Ndlovu v S* 2017 (10) BCLR 1286 (CC); 2017 (2) SACR 305 (CC) (15 June 2017) at paras 22 – 23; *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as amicus curiae)* 2008 (2) SA 472 (CC) at 477A-B; *SA Post Office Ltd v CCMA* [2012] 1 BLLR 30 (LAC) at para [23], where it was stated that;

'In my view, each condonation application must be decided on its own facts bearing in mind the general criteria. While the rules are there to be applied, they are not inflexible but the flexibility is directly linked to and apportioned in accordance with the interests of justice; prejudice; prospects of success; and finally, degree of delay and the explanation thereof.

- [9] In the light of the explanation proffered for the delay, it would in my view be iniquitous to simply dismiss the review application as contended for on behalf of Kula. It is appreciated that the applicant neither requested an extension of time from Kula's attorneys nor approached the Judge President of this Court to seek an indulgence. However, it is apparent from the averments made in seeking condonation that this is not one of those cases where the applicant had folded its arms and did nothing in ensuring that the record was timeously filed and served.
- [10] The delay in filing the record was three months, which is indeed excessive, *albeit* not in the extreme. There were lapses as Govender had conceded, but the explanation proffered in regards to the other delays are in my view more than adequate. Furthermore, given the circumstances that led to the dismissal of Kula and the grounds set out for a review as shall be dealt with below, the applicant does indeed enjoy some prospects of success, and it cannot be said that overall, Kula will be severely prejudiced by the granting of condonation and reinstatement of the matter. On the whole, I am satisfied that upon a conspectus of the relevant factors to be taken into account, the interests of justice dictates that the late filing of the record by the applicant be condoned.
- [11] A further preliminary point that needs to be disposed of quickly relates to the applicant's contention that Kula's answering affidavit was filed and served out of time. The answering affidavit was filed on 14 September 2017 when the Notice in terms of Rule 7A (8) was filed on 29 July 2017. The applicant had belatedly objected to the late filing of the answering affidavit⁶, and this issue was not pursued with any vigour in any event.

The review:

The issue of delay must be viewed in relation to the expedition with which the law expects the principal matter to be resolved

⁶ See Clause 11.4.2 of the Practice Manual, which provides that;

'Where the respondent or the applicant has filed its opposing or replying affidavits outside the time period set out in the rules, there is no need to apply for condonation for the late filing of such affidavits unless the party upon whom the affidavits are served files and serves a Notice of Objection to the late filing of the affidavits. The Notice of Objection must be served and filed within 10 days of the receipt of the affidavits after which time the right to object shall lapse.'

[12] Kula was employed by the applicant with effect from 1 November 2014 as Chief Director: Priority Health Programs, and was based at the applicant's head office in Bisho. She was by virtue of her position, a Senior Manager in terms of the provisions of the Public Service Act of 1994. She was dismissed on 10 May 2016 following upon a disciplinary enquiry into allegations of misconduct related to;

1. "Misrepresentation in that you claimed to have a higher educational qualification than the one you submitted. You obtained a tertiary degree (B. Cur) sometime in 1991 from Unisa and you failed to provide proof of having obtained such qualification.
2. You falsified your CV in that you claimed in your CV that you had worked as a Deputy Director in the Northern Cape Province from 1st September 1995 to 31 December 2006. However, the persal system shows that your appointment was terminated on February 2005"

[13] Kula occupied the post that was advertised in June 2014. Prior to then, she was employed as a Deputy Director HIV/AIDS and TB Department in the Gauteng Department of Health. The requirements for the post were *inter alia*;

- i. A relevant Bachelor's Degree or equivalent in Public Health Management or equivalent qualification.
- ii. A minimum of 6 years proven managerial experience in a health sector environment at Senior Management level.

The arbitration proceedings:

[14] Following her dismissal, Kula had referred a dispute to the PHSDSBC, and when conciliation failed, the dispute proceeded to arbitration before the Arbitrator. Both parties were represented by counsel at those proceedings. They had also filed statements of claim and defence. The applicant called two witnesses to testify on its behalf. Kula elected not to testify at those proceedings but however called a witness on her behalf. This was despite the fact that as can be gleaned from the transcribed record, various versions were

put to the applicant's witnesses by her counsel during cross-examination, which it was contended she would testify to.

- [15] The evidence of Ms Khunjelwa Livi, the applicant's Deputy Director: Recruitment and Selection (Head Office), was essentially that the National Intelligence Agency (NIA) conducted a verification and security clearance of all three shortlisted candidates for the post. The Human Resources Department of the applicant was also to conduct its reference checks and verification of qualifications of the candidates through the South African Qualification Authority (SAQA). At the time of the interviews and after the number of candidates was reduced to three, the NIA had already completed its verification process. The verification by SAQA and the applicant's HR was still outstanding.
- [16] The interviews were nonetheless completed without the verification of Kula's academic credentials. Kula was issued with a letter of appointment on 8 October 2014, in which she was *inter alia* advised that should it be found that the information on her CV was incorrect, the offer could be withdrawn.
- [17] According to Livi, it was only in November 2014 when Kula assumed her position that the discrepancies in her CV in regards to her service period at Northern Cape and Gauteng surfaced. Livi further testified that at no stage did Kula submit a certificate in respect of a B Cur degree which she claimed to have obtained in her CV.
- [18] Another witness, Mr Bongani Lose, the Employee Relations Manager, had testified in regards to the process leading to the disciplinary enquiry. He had represented the applicant at that enquiry and testified that Kula had pleaded guilty to both charges at the enquiry. Mr Lose had reiterated that the dismissal was due to the fact that Kula had claimed that she had a B. Cur degree which was of a higher status than the BA Nursing Science degree, even though she did not know what the SAQA grading of the two qualifications was, and further that she had concede that the dates of her employment at Northern Cape Department of health were incorrect.

- [19] Upon Kula's PERSAL information being transferred to the Eastern Cape in November 2014, it was then discovered that there were discrepancies in her employment history. The available information was that Kula terminated her employment with the Northern Cape Department of Health in 2005, and was re-appointed in a similar department in the Gauteng Province on 6 January 2007. Furthermore, despite indicating in her CV that she had a (Bachelor of Science/B. Cur degree (4 year degree), she had only obtained a BA in Nursing Science (Three year degree). Mr Lose further testified that he was not aware that Kula's corrected CV at the time of the disciplinary hearing.
- [20] Under cross-examination, Mr Lose could not dispute it when it was put to him that Kula had merely admitted to making omissions in regards to the accuracy of the period of employment at Northern Cape Health Department, and that this was merely an admission of error, and not a plea of guilt. Mr Lose further conceded that Kula, in compliance with the requirements of the post had the necessary Bachelor's degree (Bachelor of Arts in Nursing Science)⁷. The issue however according to Lose was that Kula had claimed in her CV to have a B. Cur, when she had a BA in Nursing Science. He could not however attest to the ranking of the two degrees, even though he was made aware that the two were not the same, as a degree in B. Cur required four years to complete, whilst BA in Nursing Science required three years to complete. In regards to the second charge, Lose conceded that the advertised post also required a candidate to have six years' experience.
- [21] As already stated, Kula had not testified at the arbitration proceedings, but had called Dr. Patrick Maduna as her witness. Maduna is a Deputy Director General for Clinical Management Services in the applicant. Kula reported to him directly.
- [22] Maduna was part of the interviewing panel that had accepted that the HR department had conducted the verification process prior to shortlisting of candidates, when in fact that was not the case. The panel had concluded that all three candidates met the requirements of the post. In regards to the requirement of years' experience at senior management level 13 (Director

⁷ Page 253 of the Record

level), the panel had also concluded that based on the candidates' experience, Kula had in excess of 15 years' experience in the field, and was accordingly recommended.

- [23] According to Maduna, the qualifications of the candidates were compared to the requirements of the post in the advert, and had looked at the candidates information contained in the CVs as compared to the requirements in the advert. Two of the candidates had PhD degrees, and even though Kula did not have a PhD degree, she was a qualified midwife with university qualification. Maduna denied that Kula had misrepresented her qualifications in her CV, and further testified that as a panel, they could not at the time establish whether Kula's history and dates of employment as contained in her CV were correct or not. He had accepted that she had worked as a Deputy Director before, and had 15 years' experience in the public service.
- [24] In regards to the different academic degrees, Maduna had testified that the panel did not compare degrees, as the advert only required a Bachelors' degree. He had testified that Kula had not at any stage, given an impression that she was claiming a higher degree as she was not asked that question. He further testified that in his capacity as chairperson of the Academic Governance Committee of all the three universities in the Eastern Cape, which was tasked with developing curricular in the health field, he was aware that the admission requirement in BA Nursing Science was three years General Nursing Diploma, and one year certificate in Midwifery, and took an additional three years to obtain. That degree was replaced with a B Cur, which only required a matric certificate for admission and took four years to obtain. Maduna had testified that there was a move towards the latter admission requirements as it was found that graduates with B Cur degrees were not sufficiently trained as compared to those with BA Nursing Science degrees, who had more practical experience.

The Award:

- [25] In regards to the first charge, the Arbitrator made the following conclusions;

- a) It was common cause that Kula had acknowledged that she had stated in her CV that she had obtained a B Cur in Nursing Science in 1991, whereas she had only obtained a BA in Nursing Science;
- b) Having referred to a document ('H1), it should be found that despite Kula having indicated in her CV that she had obtained a B. Cur in Nursing Science, there was no such a degree, as it was either a graduate obtained a B Cur Nursing Science or BA in Nursing Science. It was therefore incorrect as alleged by the applicant, that Kula had only claimed to have a B Cur degree, as the testimony of Lose (Applicant's Manager: Employee Relations (Deputy Director), was that she was advised that a B Cur degree was of a higher status than a BA Nursing Science.
- c) Having regard to the internet printouts of qualifications presented by the Universities of Pretoria, UNISA and Nelson Mandela Metropolitan (NMMU), and from those printouts, only UNISA had indicated that BA in Nursing Science was pitched at NQF level 6, whilst NMMU did not indicate the NQF level of the B Cur degree.
- d) The Arbitrator further lamented the fact that the applicant had not submitted feedback from SAQA relating to Kula's qualifications, since the only way of establishing whether a B Cur degree was higher than a BA in Nursing Science degree would have been a determination of the NQF level of both degrees.
- e) The applicant had not indicated what the difference was between the two degrees, and further that there was no evidence to support Lose's version that the one degree was higher than the other.
- f) Kula despite indicating that she had a B Cur in Nursing science instead of BA in Nursing Science was *confused* about the qualifications, and the applicant had not established on a balance of probabilities that Kula had claimed to have a higher degree than the one she had obtained, or that a B Cur degree was of a higher status than BA in Nursing Science.

[26] In regards to the second charge, the Arbitrator concluded that;

- a) Kula had indicated in her CV that she had worked at the Department of Health in the Northern Cape from 1 September 1995 until 31 December 2006, when in fact she was employed between 1 September 1995 until 7 September 2005
- b) The Commissioner took into account that in a document marked 'A34' placed at the arbitration proceedings, Kula had contended that she had made a *mistake* in regards to the dates.
- c) It should be accepted that Kula had mixed up the dates of her employment at the Northern Cape Department of Health since it was that employment took place a long time ago;
- d) Kula as a state employee was not an external appointment but was merely promoted from the position of Deputy Director in Gauteng health Department to Chief Director in the Eastern Cape, meaning that she was merely transferred from Gauteng to Eastern Cape.
- e) The applicant was required to have verified the information contained in the candidates' CVs before shortlisting and appointment, and it had also established that the dates were incorrect when Kula assumed the position in October 2014.
- f) Kula was afforded an opportunity to correct her CV and thereafter the employment relationship had continued. The applicant could have taken steps at the time but had not done so, and thus there was no basis to conclude that the trust relationship had broken down.
- g) Since Kula was not an external candidate but was promoted, the applicant had information that could have disqualified her from shortlisting but had not done so. Thus on the strength of *Eskom Holdings Ltd v Fipaz & others*⁸, it could not be concluded that Kula had

⁸ [2013] BLLR 327 (LAC)

made a misrepresentation since the applicant was aware of that information.

- h) Since the applicant's Human Resources Department failed to conduct a verification exercise in the light of the information at its disposal, it could not rely on the terms of the letter of appointment that such appointment could be withdrawn

[27] In regards to the sanction of dismissal, the Arbitrator concluded that;

- a) The applicant had not called any witness to testify on the issue of a broken trust relationship;
- b) Kula's witness and supervisor, Dr. Mabusa had testified that he trusted her and was prepared to work with her in the future, and that this evidence was not refuted
- c) Even if he (Arbitrator) was wrong in his conclusions that Kula did not commit any misrepresentation or falsification of her CV, the applicant had not established that a trust relationship was broken since the employment relationship had continued for 18 months after her appointment or promotion.
- d) The dismissal was also substantively unfair in that even if Kula was guilty of the second charge, a warning would have been more appropriate.

[28] The Arbitrator further concluded that the dismissal was also procedurally unfair, as a junior officer was appointed as a presiding officer of the disciplinary enquiry. In the same vein however, the Arbitrator refused to award Kula any 'compensation' in regards to procedural unfairness as she could have asked the presiding officer to recuse himself, and only if there was a refusal in that regard would compensation have been ordered.

The grounds of review, the submissions and evaluation:

[29] Central to the applicant's grounds of review is that the Arbitrator committed a series of gross irregularities and caused a miscarriage of justice as a result of fundamental flaws in the adjudication of the matter, which consequently had the effect that it had not received a fair trial. To the extent that the applicant complained of irregularities on the part of the Arbitrator which it was alleged had prevented a fair trial of issues, it was held in *Head of Department of Education v Mofokeng*⁹ that;

"...Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination."

[30] As with any dismissal for misconduct, the starting point is a determination of the reason or nature of the allegations that the dismissed employee had to answer to, and whether the employer had on a balance of probabilities, discharged the onus placed on it to demonstrate that indeed the dismissal was substantively and procedurally fair. In this regard, and in determining whether the Arbitrator's award is reviewable, this Court must ask whether (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate?(iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?¹⁰

⁹ [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC) at para 33

¹⁰ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para 20

- [31] In line with the above, it is not clear on what basis it can be said that the Arbitrator failed to afford the parties an opportunity to have their say in respect of the dispute, and any suggestion to the contrary ought to be rejected. I have gone through the record of the transcribed proceedings, and the manner with which the Arbitrator conducted the arbitration proceedings cannot be faulted.
- [32] The problems however with the Arbitrator's award is whether he had identified the dispute he was required to arbitrate, whether he understood the nature of the dispute he was required to arbitrate, whether he dealt with the substantial merits of the dispute, and whether he arrived at a reasonable outcome.
- [33] It is trite that arbitration proceedings under the auspices of Bargaining Councils or the CCMA are *de novo*¹¹. This however does not imply that the arbitrator must ignore the record of the internal proceedings (if there is any) when making a determination of whether the dismissal was fair or not¹².
- [34] A dismissed employee may at the arbitration proceedings, elect not give evidence in his own defence. Since both parties were represented by counsel at the arbitration proceedings, it is safe to assume that the election made by Kula not to testify was a conscious one, specifically since her rights were explained to her by the Arbitrator at the commencement of the proceedings¹³. The flipside of this election however is that Kula must live with its consequences. This is so in that it has been said that in an unfair dismissal case relating to misconduct, the 'evidentiary burden' starts with the employer. However, once the employer had provided *prima facie* proof of the misconduct as alleged, the 'evidentiary burden' shifts to the employee to prove his own defence. If the employee then fails to put up a defence or fails to prove his defence, the employers *prima facie* proof of misconduct becomes

¹¹ See *County Fair Foods (Pty) Ltd v CCMA & others* (1999) 20 ILJ 1701 (LAC), where it was held that;

"The decision of the commissioner as to the fairness or unfairness of the employer's decision is not reached with reference to the evidential material that was before the employer at the time of its decision but on the basis of all the evidential material before the arbitrator. To that extent, the [arbitration] proceedings are a hearing *de novo*."

¹² *Palluci Home Depot (Pty) Ltd v Herskowitz and Others* [2015] 5 BLLR 484 (LAC) ; (2015) 36 ILJ 1511 (LAC) at paras [44] to [46]

¹³ Page 31 of the transcribed record, lines 3- 10

conclusive proof and the employer has then discharged the 'overall onus' that always rested with it¹⁴.

- [35] From the onset, it is safe to conclude that the charges against Kula in this case were relatively uncomplicated. These pertained to whether Kula had misrepresented that she had 'higher educational qualifications' than the one she had submitted in that she had represented that she had a B Cur in Nursing Science degree obtained in 1991 from UNISA, but had failed to provide proof of having obtained such qualification. The second charge related to whether she had falsified the information in her CV related to her period of employment in the Northern Cape, and whether it was between September 1995 and 31 December 2006, or whether it was terminated on 7 February 2005.
- [36] It was not in dispute that Kula had listed amongst other qualifications in her CV, a B. Cur in Nursing Science degree obtained from Unisa in 1991, nor was it in dispute that she had in fact, obtained a BA in Nursing Science. It was further not in dispute that she had indicated her period of employment at Northern Cape as being between September 1995 and 31 December 2006, instead of September 1995 to 7 February 2005.
- [37] Kula's letter of appointment had warned her that if the information on the CV was found to be incorrect, the offer of employment could be withdrawn. There were no time limits to this 'provisional appointment', and once at any stage of the appointment it was found that the information contained in her CV was indeed incorrect, nothing prevented the applicant in this case from acting on that information. This is so in that the position she occupied would be deemed

¹⁴ *Woolworths (Pty) Ltd v CCMA & others* (2011) 32 ILJ 2455 (LAC) at par 34; See also *Klaasen v CCMA & others* [2005] 10 BLLR 964 (LC) at paragraph [26], where it was held that;

"[26] In the employment law context, where there is evidence directly implicating an employee in misconduct, or which is adverse to his or her version, such employee cannot afford to leave that evidence unanswered. Although the commissioner would not be obliged to accept that evidence solely on the grounds that it was uncontradicted, provided it is credible, it is unlikely to be rejected if the employee has chosen not to deny or contradict it. An employee's failure to testify will always strengthen the case of the employer (see Hoffmann & Zeffertt *The South African Law of Evidence* at 598- 599. Nevertheless, it is clearly not an invariable rule that an adverse inference be drawn or that the uncontradicted version should stand. In the final analysis the decision must depend upon the circumstances of the litigation.

(unless the contrary is shown), to have been secured by the making of false statements, which in turn constitutes dishonesty that would underpin the substantive fairness of a dismissal.

- [38] The contention therefore on behalf of Kula that she was only charged with misrepresentation and not dishonesty is without merit. Any misrepresentation made in a CV if proven amounts to dishonesty. The conclusions of the Arbitrator that Kula should effectively be exonerated from the charges as the applicant had not done its own verification prior to shortlisting, or that it had not provided any report from SAQA in respect of the different qualification/degrees, or that it had not acted against Kula for 18 months, are equally unreasonable. This is so in that the letter of appointment specifically warned Kula of the consequences of incorrect information that may be obtained subsequent to the appointment.
- [39] It is within the context of the established principles in regards to the failure testify that a few points needs to be made in regards to the Commissioner's conclusions related to certain aspects of the evidence Kula did not testify to despite certain versions being put to the applicant's witnesses. In this regards, it is worth repeating that first, as apparent from the 'record' of the internal disciplinary enquiry, no evidence was led at those proceedings in that once Kula had entered her plea (whether she had pleaded guilty to the charges or had simply conceded that she had made errors in her CV is irrelevant for now), the chairperson had asked her and Lose who represented the applicant, to make written submissions in regards to mitigating and aggravating factors. The second issue is that statements of case and defence are not in affidavit form as were placed before the Arbitrator.
- [40] It was put to Lose during cross-examination that Kula had not pleaded guilty to the charges at the disciplinary enquiry, and that all that she did was to admit to having made a mistake in her CV, or having been confused with the dates of her employment in Northern Cape and Gauteng. In her submissions in regards to mitigating factors, Kula had stated that when she presented all her documents in respect of the post, it was not her intention to misrepresent herself, and that the errors that were subsequently identified were genuine

errors, and she had no intention to misrepresent her qualifications or service experience.¹⁵ The Arbitrator for some reason agreed that the Kula had made an error or was confused in relation to the details of her CV. That conclusion however came about without hearing from her in regards to the details of that 'error' or 'confusion'.

- [41] The Arbitrator's conclusion as above is clearly unsustainable for a number of reasons. It points to the failure to identify, understand and deal with the nature of the dispute before him. The Arbitrator's conclusions further failed to take into account the principles stated in *Woolworths*, where a *prima facie* case had been made out by the employer, and where no attempt was made to put up a defence against that *prima facie* case.
- [42] Central to the determination of the dispute was whether Kula had made a misrepresentation in her CV, by claiming to have a B Cur Nursing Science degree, when she did not, and whether she had misrepresented her employment period at the Northern Cape Health Department. It can be accepted that on the evidence of Maduna, the panel was satisfied that any bachelor degree in the field was sufficient, and this required of the applicant to *inter alia*, demonstrate that indeed a higher educational qualification was required, and further that a B Cur Nursing Science degree was higher than a BA Science degree. Sadly, the evidence of both Livi and Lose failed to shed any light in that regard.
- [43] In respect of the second charge, Maduna's evidence was that the post required 6 years of experience in the field at senior management level. Overall, Kula had 15 years (minus the one year in relation to the period at Northern Cape Health Department). Maduna had further testified that other considerations were decided and agreed upon in making an appointment since all the other candidates met the requirement of six years' experience. In essence, the applicant could not at the arbitration proceedings, establish that the differences in the actual period of service at Northern Cape Health Department as compared to what was stated in the CV had a bearing on the appointment.

¹⁵ Page 211-212 of the 'Written Record'

[44] The Arbitrator may have been swayed by the above considerations, but that should not have been the end point. This is so in that the basis of the charges against Kula remains what was stated in her CV, which the applicant deemed as misrepresentation. When such misrepresentations are made in CVs by applicants for appointments, this Court and the Labour Appeal Court have displayed little or no sympathy for the accused employees. The authorities referred to by Myburgh AJ in *In LTE Consulting (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*¹⁶ are in point, as they demonstrate the Courts' approach in this regard.

¹⁶ [2017] 12 BLLR 1259 (LC) ; (2017) 38 ILJ 2787 (LC), where it was held that;

"[21] That leaves the central controversy between the parties, namely whether a reasonable commissioner could have found the employee's dismissal substantively unfair. To my mind, the answer is clearly "no". Manifestly, the employee was grossly dishonest in misrepresenting that he is a chartered accountant. To aggravate this grave misconduct, he also lied about having a B.Com and MBA, and showed no remorse whatsoever. This to the extent of describing the company's concerns as being about "stupid little things". Dismissal was patently warranted.

[22] I am fortified in my view that the commissioner's decision was unreasonable by three judgments of the LAC, which are directly in point. The first is *SA Post Office Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2011) 32 ILJ 2442 (LAC). The employee had misrepresented that she had a driver's licence in her application for employment and was dismissed for dishonesty. A CCMA commissioner found her dismissal substantively unfair and reinstated her, with the award having been upheld on review by this court. But the LAC reversed this court on appeal, with Waglay DJP (as he then was) finding the award unreasonable, *inter alia*, on this basis:

"[34] ... To place an employee who was guilty of dishonesty back in her position where honesty and integrity are paramount to the execution of duties, is to my mind grossly unreasonable, but more importantly, it cannot be right and proper to reinstate or re-employ a person in a position that was secured by the making of false statements."

[23] The second judgment in *Department of Home Affairs & another v Ndlovu & others* (2014) 35 ILJ 3340 (LAC). The employee had misrepresented in his CV that he had a degree in technology marketing and was dismissed for dishonesty. A bargaining council commissioner upheld the dismissal, with the award having been set aside on review by this court. But the LAC reversed this court on appeal, and restored the commissioner's award. In the process, Dlodlo AJA held:

"The fact that the misrepresentation in the CV might very well not have induced the first respondent's appointment to the post most certainly does not detract from the fact of the first respondent's initial dishonesty. The dishonesty as contained in the CV is ultimately what underpins the substantive fairness of the first respondent's dismissal. Why did the first respondent put in his CV that which is untrue? He knew how to describe the MBA degree which was then unfinished. He could have described the bachelor of technology marketing degree similarly if he found it necessary to mention it at all in his CV."

[24] The third and most recent judgment is *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO & others* (2017) 38 ILJ 881 (LAC). The employee failed to disclose a criminal conviction in his application for employment as a security guard and was dismissed for dishonesty (14 years later). A CCMA commissioner found the dismissal substantively unfair and awarded the employee compensation, with the award having been upheld on review by this court. But, again, the LAC reversed this court on appeal and set aside the award, with Savage AJA finding:

- [45] This brings me back to the question of Kula's failure to testify. It is accepted that there is no obligation on an employee to testify if the employer has not made out a case of misconduct. If however a *prima facie* case is made out by the employer, and employee takes a risk if no defence is put up.
- [46] In this case, even if the conclusions on the evidence indicated that Kula met the requirements of the post, and the Arbitrator was persuaded that the information contained in her CV were mere errors, mistakes or a result of confusion as was contended on her behalf, in line with *Department of Home Affairs & another v Ndlovu & others*¹⁷ as referred to by Myburgh AJ in *LTE*

"[30] ... The false misrepresentation made by the third respondent was blatantly dishonest in circumstances in which the appellant is entitled as an operational imperative to rely on honesty and full disclosure by its potential employees. It induced employment and when discovered was met with an absence of remorse on the part of the third respondent. The fact that a lengthy period had elapsed since the misrepresentation, during which time the third respondent had rendered long service without disciplinary infraction, while a relevant consideration, does not compel a different result. This is so in that the fact that dishonesty has been concealed for an extended period does not in itself negate the seriousness of the misconduct or justify its different treatment. To find differently would send the wrong message." (Citations omitted)

¹⁷ (2014) 35 ILJ 3340 (LAC), where it was held that;

"[14] The fact that the misrepresentation in the CV might very well not have induced the first respondent's appointment to the post most certainly does not detract from the fact of the first respondent's initial dishonesty. The dishonesty as contained in the CV is ultimately what underpins the substantive fairness of the first respondent's dismissal. Why did the first respondent put in his CV that which is untrue? He knew how to describe MBA degree which was then unfinished. He could have described the Bachelor of Technology Marketing Degree similarly if he found it necessary to mention it at all in his CV. John Grogan in his work *Dismissal*, (Juta & Co. Ltd First published 2010, republished 2012) says the following about dishonesty at page 188):

"*"Dishonesty" is a generic term embracing all forms of conduct involving deception on the part of employees. In criminal law, a person cannot be convicted of dishonest conduct unless that conduct amounts to a recognized offence. However, in the employment law, a premium is placed on honesty because conduct involving moral turpitude by employees damages the trust relationship on which the contract is founded. The dishonest conduct of employees need not therefore constitute a criminal offence. "Dishonesty" can consist of any act or omission which entails deceit. This may include withholding information from the employer, or making a false statement or misrepresentation with the intention of deceiving the employer...*

The above extract was referred to with approval by the Constitutional Court in *Chemical Energy Paper Printing Wood & Allied Workers Union on behalf of Hlebela and Lonmin Precious Metals Refinery* (2011) 32 ILJ 2782 (CC) at paragraph 69. A misrepresentation by an employee (as to his qualification and skills etc.) before the commencement of employment has been held sufficient to warrant dismissal even if it is discovered some time later and the employee has rendered satisfactory performance. In *Auret v Eskom Pension & Provident Fund* (1995) 16 ILJ 462 (LC), the dismissal of an employee was upheld because

Consulting, the fact that a misrepresentation in the CV might very well not have induced an appointment to the post, or was discovered long after the appointment, does not detract from the fact of the employee's initial dishonesty, as it is that dishonesty as contained in the CV that is ultimately what underpins the substantive fairness of the dismissal of the employee.

- [47] It being common cause that the information in Kula's CV was incorrect, and thus the applicant having established *prima facie* proof of misconduct, the 'evidentiary burden' shifted to Kula to prove her own defence. Once she failed to put up a defence or prove her defence, the applicant's *prima facie* proof of misconduct became conclusive proof, and the applicant had then discharged the overall onus.
- [48] The import of the above is that the obligation remained that of Kula to explain her actions and why incorrect/untrue information was put in her CV in the first place. This was even more necessary in circumstances where no oral evidence was led at the disciplinary enquiry. Even if the failure by Kula to testify at the disciplinary enquiry might have been as a result of the approach of the chairperson, the arbitration proceedings nonetheless provided a prime opportunity to raise a defence. By virtue of Kula's election not to testify, no evidence was adduced to indicate what causes the alleged errors/mistakes or confusion, or whether these were pointed out either at the stage of the interviews or voluntarily by her at any stage prior to the appointment. On the contrary, such information came to light in November 2014, some-time after her appointment.
- [49] Allegations of misrepresentation in a person's CV are not to be taken lightly, and the onus is upon the employee to explain how the incorrect information

he had not disclosed the true extent of fraud in which he had been involved while working for his previous employer.

- [15] In *Hoch v Mustek Electronics (Pty) Ltd* (2000) 21 ILJ 365 (LC), the court held that the employer was justified in terminating the contract of an employee who had misrepresented her qualifications prior to her appointment. The same conclusion was reached in *Boss Logistics v Phopi and Others* [2010] 5 BLLR 525 (LC) where a senior employee was found to have inflated his qualifications and experience in his CV. In the latter case, the court held that to accept that such an employee is entitled to guidance, training or assistance before work performance would be to reward the employee for his dishonesty."

found its way into a CV, and for the Arbitrator to make an assessment on the probabilities as to whether a sustainable defence had been put up or not. In the absence of any defence, and to the extent that in the applicant's view, what was contained in the CV was a misrepresentation, that view should prevail.

- [50] The Arbitrator had further justified his conclusions and decision to reinstate on the basis that the applicant for not adduced any evidence of a breakdown of the trust relationship with Kula. The Arbitrator in reinstating Kula further relied on the evidence of Maduna that a trust relationship had not broken down. Again, the Arbitrator misconstrued the test in this regard. It has since been held that in cases of misconduct, it is not always necessary to lead evidence pertaining to a breakdown in a trust relations, as the gross nature of the misconduct, if proven, can on its own lead to a breakdown in a trust relationship¹⁸.
- [51] In this case, the misconduct in question related to misrepresentation, which on its own and given the circumstances of this case, amounts to dishonesty. Kula might have been reporting to Maduna, but the latter is not an employer but is also an employee. The issue of trust is between an employer and employee, and irrespective of how Maduna had trust and confidence in Kula, that was irrelevant for the purposes of determining whether the employment relationship could be restored.
- [52] Information that is put in a CV by a job candidate says a lot about him or her. A prospective employer relies on that information in making any informed choices regarding candidates, on the basis that it is true and correct. Any likelihood that the information is or might be false would lead to dire consequences. This is so in that it cannot be expected of any employer to trust an employee who starts or obtains an appointment through falsehoods or

¹⁸ *Impala Platinum Ltd v Jansen and others* [2017] 4 BLLR 325 (LAC); See also *Interstate Bus Lines (Pty) Ltd v Phakwe* (2017) 38 ILJ 915 (LAC) at para 23, where it was held that;

"The appellant did not lead any evidence to suggest that the trust relationship between the appellant and the employee had been destroyed as a result of the employee's conduct. It is, of course, acceptable that the breakdown of trust may be inferred from the nature and seriousness of the misconduct, the conduct of the employee after the misconduct and from any other factors justifying such an inference. However, there exists, in this case, no such circumstances justifying such a conclusion."

misrepresentation. It is of no consequence that Kula in this case was a public official being transferred from one province to another. The duty remained on her to ensure that the information contained in her CV was true and correct.

[53] Taking into account all of the above and in consideration of the enquiry stipulated in *Goldfields*, it ought to be concluded that it is apparent that the Arbitrator clearly misconstrued the nature of the enquiry, and/or undertook the enquiry in a wrong manner, thus leading to no fair trial of the issues. In essence, the Arbitrator diverted from the correct path in the conduct of the arbitration and as a result, failed to address the question raised for determination, which was whether the applicant had discharged its onus of proving the misrepresentations and falsification in Kula's CV. Ultimately, the Arbitrator came to a conclusion that does not fall within a band of reasonableness. The result thereof is that the award ought to be set aside.

[54] There is no need to deal with the Arbitrator's findings in regards to procedural fairness of the dismissal as no relief was granted in that regards.

[55] Placed before the Court was the record of the proceedings and all relevant documentation, and in my view, and further in the light of the conclusions as above, no point will be served by remitting this matter to be heard afresh. Accordingly, the Court having had regard to all that material is in a position to substitute the Arbitrator's award with its own order. I have further had regard to the requirements of law and fairness, and hold the view that a cost order is not warranted in this case.

[56] Accordingly, the following order is made;

Order:

1. The late filing of the record of transcribed proceedings is condoned.
2. The arbitration award issued by the second respondent under case number PSHS178-16/17 dated 15 December 2016 is reviewed, set aside and substituted with an order that;

'The dismissal of Nonkqubela Carvie Kula was fair'

3. There is no order as to costs.

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant: I Dala and K Mtshizana-Canca

Instructed by: State Attorney: Port Elizabeth

For the First Respondent: M Nduzulwana

Instructed by: Sithembele Zibi Attorneys Inc

LABOUR COURT