



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR1909/12

In the matter between:

VINCENT DLAMINI

Applicant

and

TSHWANE UNIVERSITY OF TECHNOLOGY

First Respondent

TOKISO DISPUTE SETTLEMENT (PTY) LTD

Second Respondent

KENNETH MOSIME N.O

Third Respondent

Heard: 13 January 2015

Delivered: 15 May 2019

Summary: Pre-dismissal arbitration in terms of the Arbitration Act. Strict test on review applies - Preparation of Court file. Court file to be properly prepared and paginated. The onus to do so rests on the Applicant.

Bias - alleged as a consequence of favours done for the Arbitrator during the course of the arbitration which were known to the Applicant – No objection raised at the time and misconduct not sustainable on this ground.

Bias - alleged due to prior professional relationship through a building exercise conducted by CCMA and being a panelist together with an alleged employee of the First Respondent – Applicant failing to prove the existence of untoward relationships – even if proved this did not constitute misconduct in itself and an arbitrator had no obligation to *mero motu* disclose same – parties should make appropriate enquiries prior to the appointment of an arbitrator in a private arbitration as to the independence and suitability of an arbitrator

Review – private arbitration award based on a nebulous relationship raised *post facto* the award could lead to an abuse of Court – this does not detract from an arbitrator being required to disclose a relationship if there could be an apprehension of bias.

Misconduct and/or gross irregularity - alleged incorrect factual findings – material errors not made by the Arbitrator – errors if proven must be so material as to show partiality or evidence a misconception of the arbitrator's duties to sustain a review in terms of the Arbitration Act – voluntary nature of a private arbitration means a stricter test would apply

Misconduct - alleged that the Arbitrator permitted numerous procedural irregularities which prejudiced the Applicant by not being allowed a fair hearing - procedural irregularities considered and rejected

Probabilities - accepting the version of the First Respondent is not unfounded - the First Respondent had made out a *prima facie* case in the arbitration - obligation shifts to the Applicant to present evidence to refute the First Respondent's version.

Misconduct - the Arbitrator engaged in mediation in which he had interacted directly with a representative of the First Respondent is rejected and out of hand.

Errors - submission that numerous errors can sustain a conclusion of misconduct considered but not upheld as no material errors were made.

JUDGMENT

HERTOG, AJ

Introduction

- [1] This is an application for the review and setting aside of a pre-dismissal arbitration award (the award)¹ of the Third Respondent (the Arbitrator), who was appointed to conduct the proceedings in accordance with the Arbitration Act². The application concerns a lengthy arbitration, held over the course of eleven days, in which the employer (the First Respondent) and the employee (the Applicant) were legally represented.
- [2] The Applicant sought condonation in respect of his non-compliance with the prescribed time periods for the filing of the record of the proceedings and delivery of the supplementary affidavit. Pursuant to an agreement between the Applicant and the First Respondent in this regard, I ruled that the failure to comply with the time periods as prescribed in the Labour Court Rules is condoned. It was appropriate to do so not only in light of the agreement between the parties but also in view of the voluminous record in this matter.
- [3] By way of a Notice of Amendment the Applicant amended his Notice of Motion so as to introduce what he termed a claim ("Claim A"). Claim A sought a declarator that the Arbitration Agreement entered into between the Applicant and the First Respondent was validly cancelled by the Applicant therefore the award of the Arbitrator was to be set aside. The basis for Claim A is the Applicant's view that there was a duty on the First Respondent to disclose that it had a previous relationship with the Arbitrator and that its failure to disclose this was deliberate. After the First Respondent raised three *points in limine* Claim A was abandoned. The Applicant therefore proceeded only with the alternative Claim B, in terms of which he seeks the setting aside of the arbitration award and the referral of the matter back to the Second Respondent for determination before an arbitrator other than the Arbitrator, and costs.

¹ Part C, Annexure "A" to the Founding Affidavit, pages 41 to 73.

² Act 42 of 1965.

- [4] In argument before me it was submitted that the Arbitrator had associated himself with the opposition to the application by providing the First Respondent with a confirmatory affidavit and therefore costs should be awarded against the Arbitrator.
- [5] Before proceeding I express my displeasure with the manner in which the Court file was indexed, paginated and assembled. While I appreciate the difficulty occasioned in a matter such as this, where there is voluminous documentation and a lengthy transcript; it is imperative for an Applicant, on which this onus rests,³ to ensure that the arbitration record put before the Court and the pleadings are properly prepared. Difficulty has been occasioned in processing this matter as a consequence of numerous shortfalls by the Applicant's representatives in this respect. By way of example: some pages were out of sequence, there were blank pages in the transcript, repeated pages, some pages in the transcript were partly legible as only portion of those pages had been photocopied and some of the transcript is missing. As a consequence, it has been necessary on occasion to rely on the Arbitrator's recordal of the essence of the testimony of certain witnesses, which recordal was not challenged by the Applicant. For instance, the evidence of Dr Motlatla appears over some thirty pages, of which one page was blank and another illegible as a consequence of only a portion of the page being copied.
- [6] Notwithstanding that it appears from the pleadings that the First Respondent's attorneys had at time of filing the Supplementary Affidavit informed the Applicant that he had filed incomplete and incorrect bundles under his Rule 7A(6) Notice and that proper and complete bundles had thereafter been formulated between the two sets of attorneys⁴. Despite this collaboration, while laudable, the record of the proceedings nonetheless has the shortfalls I have mentioned. This collaboration was to ensure that there is a proper record before the Court, does not detract from the obligation on the Applicant to ensure that the Court file is properly prepared.

³ Rules for the Conduct of Proceedings in the Labour Court, Rule 7A(5) and (6).

⁴ Part C, Answering Affidavit, page 227, para 63.

The allegations of misconduct against the Applicant

- [7] The Applicant was initially called to an internal disciplinary enquiry but it was thereafter agreed to between the Applicant and the First Respondent that the matter would be dealt with as a pre-dismissal arbitration in terms of the Arbitration Act.
- [8] In the arbitration, the Applicant was required to answer to the following allegations:
1. "Gross Negligence - On or about 15 and 16 August 2011 you allowed monitoring equipment to be installed on the premises of Tshwane University of Technology (TUT). Your actions have exposed TUT to risk in that the right to privacy of certain individuals has been unfairly infringed upon;
 2. Gross Dishonesty - On or about 4 August 2011 you requested access to the TUT e-mail system, from the Director: ICT Services, under false pretence that your department was investigating a case and the information was required for evidentiary reasons, when in fact your intention was for D&K Management Consultants to gain access to information pertaining to a personal and unsanctioned investigation on behalf of Prof Molefe;
 3. Unlawful Conduct - On or about 15 and 16 August 2011 you allowed monitoring equipment to be installed on the premises of Tshwane University of Technology (TUT). Your actions have exposed TUT and yourself to criminal liability in that the right to privacy of certain individuals has been unfairly infringed upon;
 4. Non-compliance with TUT Policy-You did not comply with TUT's Policy on Tenders and Policy on Procurement of Goods and Services, read with the Policy on Unauthorised Purchases, regarding the services and goods obtained from D&K Management Consultants. Refer to the Tender Policy and the Policy on Procurement of Goods and Services, 2004, read with the EMC decision of 31 January 2011, circular 03/2011;

5. Conspiracy to bring the reputation of TUT into Disrepute-You, Prof Molefe and Mr M Dilotsotlhe conspired to bring TUT's good reputation and standing into disrepute through your actions in connection with the above charges;
6. Actions that caused a total break in the trust relationship between employer and employee-Your actions as described in the above five charges, whether found guilty in part or as a whole, caused a total break in trust between TUT and yourself as a senior employee"

[9] The Arbitrator found the Applicant guilty on all the charges but 5 on the basis that no evidence had been led to substantiate that allegation, and as a result the Applicant was dismissed.

The Disciplinary Arbitration Agreement

[10] In the arbitration agreement⁵ concluded between the Applicant and the First Respondent on 1 February 2012 to regulate the pre-dismissal arbitration, the following terms of reference were agreed:

"The arbitrator must determine whether there are fair reasons to discipline the employee. The arbitrator must first hear the evidence and arguments of the employer and the employee and then determine whether the employee is guilty of the disciplinary charges. If the arbitrator makes a finding of guilt, he or she must hear argument and consider any evidence in mitigation or aggravation before determining the appropriate sanction. Evidence regarding mitigation and aggravation will be presented by the parties during evidence on the merits."⁶

[11] As to the powers of the Arbitrator it was agreed, amongst other aspects, that he would have the power "*to make an appropriate award with due regard to the facts of the case, the law and the disciplinary procedures of the employer*"

⁵ Part C, Disciplinary Arbitration Agreement, pages 139-141.

⁶ Part C, Disciplinary Arbitration Agreement, page 139, para 4.

and furthermore “to decide upon the procedure that will be used at the arbitration”.⁷

[12] It was specifically recorded that the parties had agreed to the appointment of the Third Respondent as the Arbitrator and that the Arbitrator’s decision would be final and binding, subject to a party’s right to review the award before this Court in terms of the Arbitration Act.⁸ Furthermore, legal representation was agreed.

[13] In the process leading up to and in the conclusion of the arbitration agreement the Applicant and the First Respondent were legally represented.

Background

[14] The facts in this matter appear from the award of the Arbitrator. I only outline the factual framework that is important below:

[15] The Applicant was employed as the Chief Internal Auditor of the First Respondent, a position to which he was appointed with effect from 1 October 2007.⁹ In this position he reported to the Audit Committee and the Vice Chancellor. The Job Profile of the Applicant states that “*The internal audit directorate derives its authority from University Council through the Audit Committee, it is an autonomous unit within the Vice Chancellor’s Office.*”¹⁰ This is pointed out by the Arbitrator in his award. The Job Profile stipulates as well that work “is conducted independently within established university policies and procedures and within professional guidelines for internal auditing and financial and management accounting.”¹¹

⁷ Part C, Disciplinary Arbitration Agreement, page 140, para 5.

⁸ Part C, Disciplinary Arbitration Agreement, page 140, para 6.

⁹ Part A, Bundle “B”, page 45. The Applicant had initially been engaged by the Technikon Northern Gauteng from 1 September 2000 and which on its merger with Technikon North-West and Technique Technikon became the First Respondent.

¹⁰ Part A, Bundle “B”, page 146, second portion of para 1.

¹¹ Part A, Bundle “B”, page 153, second clause of para 2.

[16] In terms of the First Respondent's Internal Audit Activity Charter, the Applicant reported *"functionally to the Audit Committee and administratively to the Vice-Chancellor..."*¹² and was accountable to Management and the Audit Committee.¹³ This Charter specifies that the Applicant had *"... full and free access to the Audit Committee"*¹⁴ and that the *"mission of the internal audit activity is to provide independent, objective assurance and consulting services designed to add value and improve the organisation's operations. It helps the organisation accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control and governance processes"*.¹⁵ Notably, the Internal Audit Activity Charter pertinently states that Internal Audit is not authorised to perform any operational duties for the University or its affiliates nor is it to initiate or approve accounting transactions external to the internal auditing activity, amongst further prohibitions. These prohibited functions are reiterated in the First Respondent's Internal Audit Function Charter¹⁶. The Internal Audit Function Charter also stipulates that the Applicant is to be accountable to the Audit Committee¹⁷ and that the Applicant *"reports functionally to the Audit Committee and administratively to the VC..."*¹⁸ This last-mentioned Charter specifies that it is one of the responsibilities of the Applicant to *"conduct investigations of suspected fraudulent activities and other significant misconduct within the Institution, and notify EMC [being the Executive Management Committee] and the Audit Committee of the results"*¹⁹.

[17] In May 2010, following the termination of the contract of Prof EM Tyobeka, the First Respondent's Vice-Chancellor at the time, Prof SJ Molefe ("Prof Molefe") was appointed as Acting Vice Chancellor. Notwithstanding that Prof Molefe was a candidate for the position of Vice Chancellor, he was tasked with the recruitment process for the position of Vice Chancellor.

¹² Part A, Bundle "B", page 82, the para appearing under the heading "Independence".

¹³ Part A, Bundle "B", page 82, para 1, first 2 lines.

¹⁴ Part A, Bundle "B", page 83, second bullet point under "Authority".

¹⁵ Part A, Bundle "B", page 81, under the heading "Mission".

¹⁶ Part A, Bundle "B", page 71, para 1.

¹⁷ Part A, Bundle "B", page 71, first sentence under the heading "Accountability".

¹⁸ Part A, Bundle "B", page 70, in the 4th para under the heading "Authority and Independence".

- [18] As a number of queries had been raised about the qualifications of Prof Molefe and the status of an institution where he had apparently obtained some qualifications, a task team (the task team) was appointed by the First Respondent's Council ("the Council") to conduct investigations into these concerns.
- [19] On 21 June 2011 Prof JD Volmink, who was the Chairperson of the task team, reported to the Council that it was difficult to establish if one of the institutions from which Prof Molefe had apparently obtained qualifications existed, as it seemed to have disappeared. As members of the task team were waiting for information, the Chairperson of the Council, Dr MDC Motlatla, decided that the Council could not take the matter further. A disagreement occurred at the Council meeting between members of the task team regarding the management style of the Chairperson of the task team. The consequence of this was that Prof Volmink left the meeting.²⁰ Although the recordal of this Council meeting is disputed by the Applicant, the purported minute of the meeting held on 21 June 2011 reflects that it was resolved that the task team would be given two weeks to complete its report and that Mr OM Mathafa was to be appointed to the task team to replace Prof Volmink.
- [20] It was further resolved at the Council meeting that a further investigation was to take place into the leaking of information to the media. On this aspect, the draft minute of the Council meeting of 21 June 2011 records that the Chairperson of the Council was to co-opt Mr N Skhosana so that *"the two [could] gradually deal with leakage of information to the media as those who leak information should be disciplined."*²¹ The accuracy of the draft minute was contested at arbitration as it had not been approved by that time, due to the fact that there had not been a subsequent meeting of the Council and furthermore, there were various versions as to what occurred at the meeting of 21 June 2011. It was, however, common cause that at the Council meeting

¹⁹ Part A, Bundle "B", page 72, 2nd last para under the heading "Responsibility".

²⁰ Part A, Bundle "B", pages 138 and 139.

²¹ Part A, Bundle "B", page 139.

the issue of media leaks had been discussed and a resolution was taken to address this concern.

- [21] It was also common cause that the media leakages related to matters concerning Prof Molefe, as well as various other issues.
- [22] The Applicant was not a participant in the meeting of 21 June 2011 but it is his case that Prof Molefe was appointed by the Council to be part of the task team to deal with the leaking of information to the media. A number of witnesses called by the First Respondent and some of the witnesses called by the Applicant held contrary views as to whether Prof Molefe was appointed by the Council to be part of the task team.
- [23] A witness on behalf of the First Respondent, Mr Lehasa, who was the minute taker at the Council meeting was ambivalent, conceding in cross-examination that he could not say his minute was entirely accurate, nor could he deny that Mr Dilotsohle had said in the arbitration that Prof Molefe was included in the task team, nor could he deny that Prof Molefe was to "spearhead" the task team,²² as he could not recall and he may well have been wrong in his recordal of the draft minute.
- [24] The evidence of Dr Motlatla who had been called by the Applicant was, according to the award of the Arbitrator, that there were four people on the task team, being Prof Molefe, Mr Dilotsohle, Dr Motlatla and Mr Skosana. Under cross-examination, Dr Motlatla testified that the crux of the resolution of the Council was that it provided for the appointment of two people, while the other two were "co-opted". Prof Molefe had been approached by Dr Motlatla himself, when he had been briefed on the resolution taken by the Council. On my consideration of the transcript which was, as I noted above, to a certain extent incomplete, the evidence of Dr Motlatla was that initially three people had been appointed, being himself, Prof Molefe and Mr Dilotsohle and the Council had felt that Mr Skosana was also to be included.²³ Under cross-

²² Part B, Transcript, 1 March 2012, page 143, lines 8 to 16.

²³ Part B, Transcript, 13 April 2012, page 10, lines 13 to 18.

examination Dr Motlatla said it was at this Council meeting on 21 June 2011 that Prof Molefe was appointed to the task team and Prof Molefe was immediately informed of this by Dr Motlatla following the conclusion of the meeting.²⁴

[25] There were a number of other versions put before the Arbitrator on this aspect. By way of illustration, Mr Moshathoni testified that in this Council meeting only Dr Motlatla and Mr Skosana were appointed to the task team to deal with media leakages²⁵ and he specifically testified that Prof Molefe was not a part of the task team. This version was supported by Dr Mukhola, the Executive Dean of Humanities. Mr Dilotsotle, called by the Applicant, testified that a number of people were "co-opted" to assist in the task team which was ultimately comprised of Prof Molefe, Dr Motlatla, Mr Skosana as well as the Applicant himself. The Arbitrator, quite correctly in my view, did not accept the testimony of Mr Dilotsotle that the Applicant was appointed to this task team. The Chairperson of the Audit Committee, Ms Maleho Nkomo, also called by the Applicant, testified that the Council had resolved that Dr Motlatla and Mr Skosana were appointed to investigate leakages to the media and that they been tasked to involve Prof Molefe and Mr Dilotsotle. Mr Matlejoane, also called as a witness by the Applicant, testified that the task team comprised Dr Motlatla, Prof Molefe and that Mr Skosana and Mr Dilotsotle were co-opted and that in addition this team could "incorporate" any other person.²⁶

[26] Just who formed part of the task team to investigate the media leakages was therefore unclear from the evidence before the Arbitrator. The Arbitrator in his award finds there to be a dispute as to the size of the task team and of who was recommended by the Council to serve on it.²⁷

[27] Prof Molefe was appointed as the Vice Chancellor of the First Respondent on 29 July 2011.

²⁴ Part B, Transcript, 13 April 2012, page 9, lines 24 to 25.

²⁵ Part B, Transcript, 1 March 2012, page 666, lines 15 to 25.

²⁶ Part B, Transcript, 13 April 2012, page 105, lines 12 to 19.

- [28] The Applicant's version was that in a meeting with Prof Molefe on 28 July 2011, which I remark is more than a month after the Council had adopted the resolution to investigate media leaks, he was informed by Prof Molefe that the Council had appointed a task team to investigate media leaks and Prof Molefe requested that internal audit assist the task team with the investigation. This version is recorded in a report, dated 29 August 2011, provided by the Applicant to Prof Mosia in response to a request that the Applicant was to give him background detail in respect of the briefing of D&K Management Consultants ("D&K").²⁸
- [29] In this report, the Applicant said that in a meeting with Prof Molefe on 28 July 2011, they had discussed a number of issues *"affecting the institution including the leaking of information to the media"* at which time he had been informed by Prof Molefe that the Council had appointed a task team to investigate the media leaks that were *"impacting on the reputation and image of the institution"*.²⁹ The Applicant mentioned that *"the rationale behind the assignment was to assist the task team to gather information and compile a report to the Council on these leaks as well as devise a mechanism to stop the leaks"*³⁰, which I mention the Arbitrator considered to be an operational duty which the Applicant was not to perform in terms of the Internal Audit Activity Charter. The Applicant then mentions a number of leaks that had occurred *"besides the issue of Prof Molefe's qualification"*. The Applicant added that he had proposed the use of D&K as the investigation would require specialist skills and it would be a long-term project necessitating the application of some resources and he had worked with them before.
- [30] The Applicant also reported that Prof Molefe had mentioned that he was feeling extremely uncomfortable working with his new secretary as she was investigating him³¹ and she had made a number of comments indicating that she was not happy with his appointment. Prof Molefe had also said he was

²⁷ Part A, Bundle "C", page 47, para 5.7.

²⁸ Part A, Bundle "A", pages 6 to 18.

²⁹ Part A, Bundle "A", page 8, para 2.

³⁰ Part A, Bundle "B", page 9, para 2.

³¹ Part A, Bundle "A", page 10, para 1.

concerned about his telephone and cell phone and suspected they were being tapped and that he had discussed the issue of the phone tap with the Director of Logistics and had given him the telephone for a month or two to see if he could find anything.³² I observe that this indicates that Prof Molefe had likely commenced his own investigation before or at about the time that the Council had decided to investigate media leaks.

- [31] The Arbitrator in part relied on this report by the Applicant to conclude that the use to which D&K were put was personal to Prof Molefe.³³
- [32] It is not clear whether the Applicant had two meetings with D&K as the Applicant contends, but that is of no import. What is apparent is that in the face-to-face interaction with D&K, at which the Applicant, Prof Molefe and Mr Declan Condon of D&K were present and which occurred, according to the Applicant, on 1 August 2011, D&K were requested to investigate the media leaks. In this meeting Mr Condon of D&K was informed that allegations were being made behind Prof Molefe's back and in the press. Prof Molefe had also said there could be a leak originating from his office and that he felt his name was being sullied. Mr Condon was informed that the leaks could either originate from senior staff or the cellphone Prof Molefe was using was being monitored or from the interception of his emails. Mention was made that there were allegations regarding a judgment debt of Prof Molefe and that certain of his qualifications were fraudulent.
- [33] It is also apparent from the report of the Applicant given to Prof Mosia that D&K had been requested to investigate the media leaks and that "*particular attention was placed on Prof Molefe's bad publicity.*"³⁴ D&K were also told of the dynamics regarding the appointment of Prof Molefe and of the issues of mistrust between Prof Molefe and his new secretary and of the three lobbying

³² These aspects of the report of the Applicant appear at Part A, Bundle "A", page 10, the first two paras.

³³ Part C, Award, page 65, para 6.52.

³⁴ Part A, Bundle "A", page 11, para 3, second sentence.

camps around the appointment of the Vice Chancellor and their respective interests.³⁵

- [34] D&K had suggested that the investigation could be dealt with in a number of ways and had, for example, suggested the use of undercover people to infiltrate the workforce but Prof Molefe had felt that this would take too much time. Mr Condon also suggested that if Prof Molefe believed people from his own office were responsible, then their telephones should be monitored. Prof Molefe and the Applicant had asked if emails of the suspects could be intercepted and if Prof Molefe's cell phone could be sanitized. Prof Molefe said at this time that he wanted D&K to interview people to ascertain how they felt about his appointment.³⁶
- [35] In the discussions on this day, Prof Molefe had said that staff should not know about the investigation, nor about the nature of the payments made to D&K. It was the testimony of the Applicant that the payment would be sorted out between himself and Prof Molefe and that D&K should liaise with him in that respect. D&K were therefore requested to sanitise their invoices so they would not identify the nature of the services provided. The Applicant believed he was justified in doing this, as he had previously investigated the conduct of staff members and there was nothing untoward in such investigations to sanitise invoices, in particular as the Applicant's department and cost-centre would be responsible for that payment.
- [36] It was further accepted by the Applicant that the employees to be investigated had been identified by Prof Molefe and that the Applicant used his personal email to communicate with D&K in respect of the investigation.
- [37] There was no evidence in the arbitration that the Applicant had liaised with the other task team members about the investigation or that he had kept the Audit Committee informed of the investigation. On this point it was the testimony of

³⁵ Part A, Bundle "A", page 11, para 3.

³⁶ Part C, Answering Affidavit, pages 186 and 187 at paras 17.33 to 17.36 and Replying Affidavit, pages 272 and 273 at para 19.

Ms Nkomo, the Chair of the Audit Committee, that it would not have been expected of the Applicant, "*... if he was busy with something... to report to us on a daily basis.*"³⁷ It is also instructive to note that within the report that the Applicant provided to Prof Mosia, the Applicant held the view that the Audit Committee, which is a sub-committee of the Council, "*mandates internal audit to perform special reviews and investigation*"³⁸ yet there is no contention by the Applicant that such a mandate had been provided to internal audit to perform the investigation he had initiated. The Applicant's contention was that he was entitled to rely on an instruction from Prof Molefe to undertake this investigation.

- [38] In respect of the allegations regarding breaches of procurement procedure, the First Respondent led evidence of the procedures that were in place and contended that these had been flaunted by the Applicant. The evidence was that the value regarding the procurement of D&K required the Applicant to have obtained a purchase requisition and three written quotations, which he had not done. It was the evidence of Dr Tromp that deviations would only be permitted in limited circumstances, such as when this was required by urgency. On this, the Applicant's contention was that the sensitivity of the matter permitted him to conduct a special investigation and that the value limits did not apply to the audit unit in matters that were sensitive or secretive or urgent. Using normal procurement processes would, in his view, would have compromised the assignment and unusual procurement processes had been used in the past. Furthermore, his direct superior, Prof Molefe, was fully aware of the processes and the steps that had been taken. The evidence of Ms Nkomo, called as a witness by the Applicant, was further that "*there was provision and there is past precedent where we actually do have to go out on tender*"³⁹ although she later says "*it was not sort-of expected that the same [tender] process would be followed.*"⁴⁰ The evidence of Ms Makinta, who was

³⁷ Part B, Transcript, 21 April 2012, page 72.

³⁸ Part A, Bundle "A", page 16, para 5, last sentence.

³⁹ Part B, Transcript, 21 April 2012, page 1479, lines 10-12.

⁴⁰ Part B, Transcript, 21 April 2012, page 1480, lines 1-2. The applicant's view was that Ms Nkomo had testified as to his autonomy and her evidence ought to have trumped that of Dr Tromp as she was the head of the Audit Committee. See Part C, Supplementary Affidavit, pages 121 to 123 ,para 5.4.4 to 5.4.7.

also called to testify by the Applicant and who was the Finance Director, Specific Environment Expenditure, was to the effect that in the ordinary course procedures had to be complied with but in investigations recourse could be had to an approved service provider. In the particular circumstances she was of the view that prior to the work being performed it would have been appropriate for a motivation to be obtained to permit a deviation from the standard process.⁴¹

[39] It was common cause that the Applicant had approached the Director of ICT to obtain permission to monitor the emails of the First Respondent's staff. However, it was the First Respondent's contention that in representing to the Director of ICT that the monitoring was for purposes of internal audit, the Applicant had been dishonest as the purpose was to enable D&K to do this for Prof Molefe's personal agenda. The Applicant's position was that he had legitimately approached the Director ICT in pursuance of an instruction given to him by Prof Molefe. Regarding the installation of equipment to monitor the employees of the First Respondent the position adopted by the Applicant was that he was the conduit for Prof Molefe in his interaction with D&K. This is not entirely correct as the evidence was that the Applicant actively participated in discussions with D&K as to what could and should be done in the investigation and regarding the sanitation of the D&K invoice so as to hide the true purpose of the engagement of D&K. The Applicant's further contention was that there was no evidence that cameras had actually been installed and the telephone interception was to occur on telephone lines that were associated with those of Prof Molefe and there could therefore be no question that this would pose any threat to the right to privacy.

[40] On 18 August 2011 the First Respondent was placed under Administration and Prof Mosia was appointed to be the administrator. In that month Prof Molefe was suspended and his services were thereafter terminated.

⁴¹ Part B, Transcript, 13 April 2012, page 1423, lines 9-20 and page 1451, lines 13-17.

[41] After the appointment of Prof Mosia as Administrator, the account of D&K came to his attention. This resulted in the First Respondent taking steps to ascertain if its policies regarding procurement had been breached which culminated in the Applicant being called to a disciplinary enquiry and his dismissal.

Applicant's grounds of review

[42] The Applicant raised a number of grounds for the review and setting aside of the Arbitrator's award. The Applicant's contention is that collectively the grounds show misconduct by the Arbitrator in failing to effectively discharge his duties as an Arbitrator.⁴²

[43] The grounds for the review are that the Arbitrator:

- 43.1. was biased, as evidenced by his approach in the arbitration as well as his failure to disclose material interests⁴³; and
- 43.2. misconducted himself as a result of these interests and consequently adopted an approach that was prejudicial to the Applicant, which included a failure to properly assess the evidence and a failure to apply his mind⁴⁴; and
- 43.3. allowed procedural irregularities which evidenced bias and prejudice and did not permit a fair hearing;⁴⁵ and

⁴² Applicant's Heads of Argument, page 8, para 8.1.

⁴³ Part C, Founding Affidavit, page 14, para 3.5.1. A principle approach of the Applicant in the pleadings is that the relationship the Arbitrator had with the First Respondent or one of its employees tainted his decision-making which resulted in incorrect findings of fact and an arbitration that was not fair. These alleged relationships were not dealt with at all in the Applicant's Heads of Argument and the First Respondent's denial of any untoward relationship, supported by a Confirmatory Affidavit by the Arbitrator, was not materially refuted. The Applicant's Heads of Argument also do not deal with a number of further alleged irregularities such as the complaint that the Arbitrator had acted as a mediator at the commencement of the arbitration process, that the Arbitrator had allowed the First Respondent to make use of further witnesses and documentation that had not initially been specified and the like. Within the Applicant's Heads of Argument and in the hearing of the matter it was contended that although only the primary aspects of complaint would be addressed, the Applicant did not abandon the further grounds of review. In order to deal with all challenges to the Award, I have dealt with the grounds raised in the Founding and Supplementary Affidavits, as these are the complaints before the Court.

⁴⁴ Part C, Founding Affidavit, page 14, para 3.5.2.

⁴⁵ Part C, Founding Affidavit, page 14, para 3.5.3.

- 43.4. failed to properly assess the evidence and as such came to incorrect conclusions "*that cannot be justified*"⁴⁶; and
- 43.5. failed in the execution of his mandate to ensure a fair trial.⁴⁷

The statutory grounds of review and the test to apply.

[44] Section 33 of the Arbitration Act provides:

- “(1) Where -
- (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
 - (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
 - (c) an award has been improperly obtained,

the Court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.”

[45] Although the grounds for review under the Arbitration Act are the same as those in section 145 of the Labour Relations Act, section 33 of the Arbitration Act does not incorporate considerations of reasonableness.⁴⁸ In *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another*⁴⁹ the Constitutional Court established the basis for this differentiation as follows:

“The twin hallmarks of private arbitration are thus that it is based on consent and that it is private, i.e. a non-State process. It must accordingly be distinguished from arbitration proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of the Labour Relations Act 66 of 1995 which are neither consensual, in that respondents do not have a choice as to whether to participate in the proceedings, nor

⁴⁶ Part C, Founding Affidavit, page 22, para 5.20.

⁴⁷ Part C, Founding Affidavit, page 22, para 5.21.

⁴⁸ *National Union of Mineworkers obo 35 Employees v Grogan NO and another* (2010) 31 ILJ 1618 (LAC) at para 32.

private. Given these differences, the considerations which underlie the analysis of the review of such proceedings are not directly applicable to private arbitrations.”⁵⁰

[46] The Constitutional Court also held that “... *the values of our Constitution will not necessarily best be served by interpreting s 33(1) in a manner that enhances the power of Courts to set aside private arbitration awards. Indeed, the contrary seems to be the case.*”⁵¹

[47] The Constitutional Court further stated that:

“Courts should be respectful of the intention of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If Courts are too quick to find fault with the manner in which arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of section 33(1), the goals of private arbitration may well be defeated.”⁵²

[48] There is also substantial authority that the grounds contained in Section 33(1) of the Arbitration Act are confined to the process that the Arbitrator followed.

[49] In *Telcordia Technologies Inc v Telkom SA Ltd*⁵³ it was held:

“[50] By agreeing to arbitration parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else. Typically, they agree to waive the right of appeal, which in context means that they waive the right to have the merits of their dispute re-litigated or reconsidered. They may, obviously, agree otherwise by appointing an arbitral appeal panel, something that did not happen in this case.”

⁴⁹ 2009 (4) SA 529 (CC).

⁵⁰ Ibid fn 49 at para 198.

⁵¹ Ibid fn 49 at para 235.

⁵² Ibid fn 49 at para 236.

⁵³ 2007 (3) SA 266 (SCA).

"[51] Last, by agreeing to arbitration the parties limit interference by Courts to the ground of procedural irregularities set out in s 33(1) of the Act. By necessary implication they waive the right to rely on any further ground of review, 'common law' or otherwise. If they wish to extend the grounds, they may do so by agreement but then they have to agree on an appeal panel because they cannot by agreement impose jurisdiction on the Court."⁵⁴

[50] In *Telcordia* supra it was further held that:

"An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry"⁵⁵

"Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; to determine what evidence was admissible, rightly or wrongly. Errors of the kind mentioned have nothing to do with him exceeding his powers; they are errors committed within the scope of his mandate. To illustrate, an arbitrator in a 'normal' local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd."⁵⁶

[51] As determined in *Volkswagen SA (Pty) Ltd v Koorts NO and others*⁵⁷, a reviewing Court is not:

"... legally able to give effect to the parties' requirement that a private arbitrator render an award which is "rational and justifiable, or any other review standard for that matter. Unless the error thus vitiates the award a

⁵⁴ Ibid fn 53 at paras 51 and 52.

⁵⁵ Ibid at para 85.

⁵⁶ Ibid fn 53 at para 86.

⁵⁷ 2011 (32) ILJ 1892 (LAC).

review Court is bound to measure the product of private arbitration proceedings against the narrow grounds of review encapsulated in the Arbitration Act of 1965"⁵⁸

[52] Harms JA in *Telcordia* supra referred to *Dickenson & Brown v Fisher's Executors*⁵⁹ where reference was made to "the general principle that when parties select an arbitrator as the judge of fact and law, the award is final and conclusive, irrespective of how erroneous, factually or legally, the decision was... unless the mistake was so gross and manifest that it could not have been made without some degree of misconduct or partiality, in which event the award would be set aside not because of the mistake, but because of misconduct."⁶⁰

[53] The Appellate Division, as the Supreme Court of Appeal was then known, in *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd*,⁶¹ when considering the effect of mistakes made by an arbitrator similarly held that:

"... it is clear that the word [misconduct] does not extend to bona fide mistakes the arbitrator may make whether as to fact or law. It is only when a mistake is so gross or manifest that it would be evidence of misconduct or partiality that a Court might be moved to vacate an award: *Dickenson & Brown v Fishers's Executors* 1915 AD 166 at 174-81. It was held in *Donner v Ehrlich* 1928, WLD 159 at 161 that even a gross mistake, unless it establishes mala fides or partiality, would be insufficient to warrant interference"⁶²

Analysis

The Arbitrator's alleged bias, relationships and interests.

⁵⁸ Ibid fn 57 at p. 1897 A – C.

⁵⁹ 1915 AD 166.

⁶⁰ Ibid fn 53 at para 55.

⁶¹ 1994 (1) SA 162 (A).

⁶² Ibid fn 61 at p. 169 C-E.

- [54] The starting point to the Applicant's case is that the Arbitrator was biased, had failed to disclose material interests, in that there was a prior relationship between the First Respondent and the Arbitrator, which influenced the Arbitrator's decision-making. The contention is that the Arbitrator had previously provided services to the First Respondent through the Commission for Conciliation, Mediation and Arbitration (CCMA) and that the Arbitrator had a business association with one of the employees of the First Respondent. These relationships the Applicant believes influenced the Arbitrator to find in favour of the First Respondent. Most certainly, if the facts support this contention the Arbitrator would have misconducted himself and committed a gross irregularity if he had acted as the arbitrator of the matter, however, the facts do not support this contention.
- [55] On 19 January 2012, the attorneys for the First Respondent provided to the Applicant's attorneys the profile of 5 panelists who were available to arbitrate the disciplinary enquiry. The attorneys for the First Respondent informed the Applicant's attorneys that its counsel was well-known to one of the identified panelists and that the relationship extended beyond a professional relationship as they were friends and it would not be appropriate for that panelist to be appointed as the arbitrator. The First Respondent's attorneys proposed that the Arbitrator should be appointed. The First Respondent requested the Applicant to confirm whether this was agreed or if the services of a different Arbitrator would be required. The Applicant accepted the appointment of the Arbitrator.⁶³
- [56] In his papers the Applicant contended that had he known of any relationship between the First Respondent and the Arbitrator, he would not have agreed to the appointment of the Arbitrator. The Applicant goes further to submit that any "*past liaison*" with the First Respondent by any candidate would disentitle

⁶³ In my view, it would be expected that a party contemplating the appointment of an unknown arbitrator would, prior to agreeing to the appointment of such arbitrator, make enquiries as to the appropriateness or otherwise of the person as an arbitrator, including his or her prior experience, reputation and the like and would do so in addition to considering the curriculum vitae of the arbitrator. In the usual course, a curriculum vitae would not identify every party with which the arbitrator had previous dealings. If the professional independence of the arbitrator is considered to be paramount,

such person from acting as the arbitrator and he would not have agreed to his or her appointment.⁶⁴

- [57] Particularly where the parties are legally represented, as was the case, they are at liberty to and have the ability to make enquiries to ascertain the professional standing of the potential arbitrator and to do research to assist them in the selection process. Notably in this instance, the First Respondent had stated that if the Applicant was not happy with its recommendation, the Applicant was at liberty to suggest a further arbitrator. The selection process was voluntary. If it is the view of a party that any arbitrator to be appointed was to have no association whatsoever with the other party, that party is in a position to ask if there had been a prior relationship. Notwithstanding this, there may be relationships which an identified arbitrator has with one of the parties and it is incumbent on the identified arbitrator to allay any apprehension of bias. The question is therefore whether there was any relationship the Arbitrator had with the First Respondent *"that in law would be recognised as raising a legitimate concern about the adjudicator's impartiality"*.⁶⁵ I deal with the parties' contentions in respect of the alleged relationships below.

- [58] The Applicant complains that the Arbitrator was biased as he had rendered services to the First Respondent in a relationship building exercise through the CCMA. However, the First Respondent points out,⁶⁶ supported by the confirmatory affidavit of the Arbitrator, that the Arbitrator, although initially identified to be part of the CCMA's Building Workplace Relations Group to conduct that process at the First Respondent in or about 2007 or 2008, but had not done so as another Commissioner of the CCMA had then been assigned. The First Respondent's further submission was that the Arbitrator's profile on the Second Respondent's website, which had alerted the Applicant to this relationship, had incorrectly been amended by a personal assistant

as the Applicant contends is the case for him, those enquiries should be made before agreeing to the appointment of the arbitrator.

⁶⁴ Part C, page 112, para 4.28.

⁶⁵ *Raswiswi v Commission for Conciliation Mediation and Arbitration and Others* [2011] 9 BLLR 911 (LC) para 19.

⁶⁶ Part C, Replying Affidavit, pages 204 to 205, paras 28.6 to 28.8. The Applicant pleads that he "disagrees" with this contention but goes no further.

employed by the Second Respondent and the Arbitrator had only found out about that amendment after the receipt of the Applicant's Founding Affidavit. The Applicant's reply was that the amendment of a CV without the input of the Arbitrator appears to be highly irregular. While that may be so, the Applicant did not refute the denial of the Arbitrator's alleged participation in a workplace relations exercise and failed to objectively establish the alleged relationship.

[59] Even if the Arbitrator had provided services to the First Respondent of the type alleged, this would not be something that needed to be disclosed by the Arbitrator or a basis to conclude there was misconduct by the Arbitrator or that such a failure constitutes a gross irregularity in the conduct of the private arbitration. For the Applicant to succeed in this type of complaint, something more than the mere allegation of a relationship is necessary. The Applicant in my view would need to provide context to show that a relationship existed that was of the sort that would incline an Arbitrator to find in the favour of the First Respondent, which the Applicant has not done. The Applicant having failed to establish this relationship and further having failed to give content to the relationship, this contention warrants no further consideration.

[60] It was also contended that the Arbitrator was influenced to find in the favour of the First Respondent, as he had accepted the offer of the First Respondent to fix his motor vehicle clutch which was troubling the Arbitrator during the Arbitration⁶⁷. This occurred with the knowledge of the Applicant at that time. The Applicant says that while this appeared innocent at first, his view changed on receiving the award. While I am of the view that the acceptance by an arbitrator of gratuities from a party to an arbitration is inappropriate and should be avoided and could constitute misconduct and an irregularity, this did not amount to that in the circumstances. The Applicant was aware of the offer by the First Respondent to effect the repairs and raised no objection at the time.

[61] The Applicant further asserts that the Arbitrator was biased and misconducted himself as he had a pecuniary relationship with the First Respondent since a

⁶⁷ Part C, Founding Affidavit, pages 25 and 26, paras 8.1 to 8.4

Director in the Merger Office of the First Respondent, one Dr Rampai, was a business associate of the Arbitrator.⁶⁸ The Arbitrator, it was alleged, is a member of a Close Corporation called Farisanani Management Services CC, on which the Arbitrator was a panelist, as was Dr Rampai. In the answering affidavit, to which there is a confirmatory affidavit attached by the Third Respondent, both the First Respondent and the Arbitrator deny the relationship. The Arbitrator says he had never met Dr Rampai and is not even sure if the Dr Rampai referred to was the person who worked for the First Respondent. This was not refuted by the Applicant. This contention by the Applicant is also not confirmed by the Dr Rampai to whom the Applicant refers. The contention by the Applicant is therefore not established. Furthermore, the Applicant presents no evidence to substantiate the allegation that there was a "pecuniary" relationship between the Arbitrator and the Dr Rampai to whom he refers.

[62] I am further in agreement with the First Respondent that there was no requirement for the Arbitrator to inform the parties of this relationship, even if the Dr Rampai was a co-panelist with the Arbitrator on the Farisanani Management Services CC panel and was employed by the First Respondent. The Arbitrator would have been under obligation to do so if there was a pecuniary relationship between himself and an employee of the First Respondent if it held the possibility of manifesting an inference of bias or impartiality. However, the Applicant makes no averment giving substance to the allegation that there was a pecuniary relationship between the Arbitrator and Dr Rampai. I also agree with the submission of the First Respondent that prior contact between an arbitrator and a party does not in itself constitute a basis to assume misconduct or that a gross irregularity has occurred if this prior contact was not disclosed.

[63] While the Applicant has not been able to prove the existence of a relationship which could reasonably lead a Court to infer that the Arbitrator was biased, this is not to detract from the principle that an arbitrator has an obligation to

⁶⁸ Part C, Founding Affidavit, page 15, paras 7.5 and 7.6

disclose of his own volition a relationship which could indicate a conflict of interest or relationship with one of the litigants that could create a perception of impartiality. Where there is such a relationship or link, an arbitrator should *"not only... ask himself or herself whether, notwithstanding his, or her interest or link to one of the litigants, he, or she, can nevertheless bring the necessary impartiality (or dispassion) to the issues in the case, but also whether the link or interest in the litigant might create a perception of impartiality. If there is any doubt about any of those questions, it was for the arbitrator to err on the side of disclosing the interest rather than not disclosing it in order to avoid the consequences of a later finding by an appeal or reviewing body that he, or she, ought to have disclosed the interest or link in the first place."*⁶⁹

[64] If it was of such material import for the Applicant, as he says was the case, that there was to be no relationship whatsoever between the Arbitrator and the First Respondent, he could have asked the Arbitrator for such declaration at the commencement of the arbitration or more appropriately, before agreeing to the appointment of the Arbitrator. Having this opportunity available and the opportunity to conduct background and further checks in respect of the potential arbitrator in a private arbitration in my view places an obligation on a litigant alleging an untoward relationship to put before the reviewing Court compelling evidence of the relationship and the potential for the arbitrator to be biased in order for misconduct or any irregularity to be established. It could lead to abuse to allow a party who is dissatisfied with an award to *post facto* ascertain if there were some prior relationship between its opposing party and the arbitrator that it had agreed could be appointed. This is a strategy which should be discouraged and it would be an exceptional case where an arms-length relationship could justify the setting aside of a private arbitration award on the basis of that relationship not being disclosed by the Arbitrator.

[65] I now turn to consider if there is a basis to conclude that the Arbitrator misconducted himself or perpetrated a gross irregularity in the manner in

⁶⁹ *Infrachem v Sefafe and Others* [2015] 2 BLLR 115 (LAC) at para 57.

which he conducted the arbitration before him, or if the award was improperly obtained.

[66] I am not required to determine whether or not the award made by the Arbitrator is correct. I am to determine if there was misconduct by the Arbitrator in relation to his duties as an arbitrator. Such misconduct could be constituted by manifest bias or errors of fact or law or deviations from accepted principles: but this must be to such an extent that it is to be concluded that there is misconduct or partiality as opposed to bona fide errors.⁷⁰ I am also to determine whether the arbitrator committed any gross irregularity in the conduct of the arbitration proceedings. While there is an allegation by the Applicant that the award was improperly obtained,⁷¹ no allegations substantiating this are set out in the application. This last-mentioned ground of review, mirrored in section 145 (2)(b) of the LRA requires, in the words of Maserumule AJ, that:

"... one party to the arbitration, through fraud or other improper means, obtains an Award in his or her favour. This can either be in the form of a bribe or by misleading and false or fraudulent representations which lead to an Award being granted in that party's favour."⁷²

[67] Although not stated to be the basis for alleging that the award was improperly obtained it is conceivable that the alleged untoward relationships and interests which the Applicant contended existed between the First Respondent and the Arbitrator and the offer of assistance with regards to the repair of the Arbitrator's vehicle constituted the grounds for the allegation that the award was improperly obtained. In light of my findings above on those matters, there is no basis to conclude that the award was improperly obtained.

Alleged procedural irregularities.

⁷⁰ Ibid fn 61.

⁷¹ Part C, Supplementary Affidavit, page 125, para 6.3.

⁷² *Moloi v Euijen and Others* [1997] 8 BLLR 1022 (LC) 1029 at E-G.

- [68] The Arbitration Agreement affords the Arbitrator the power to decide on the procedure that was to be used at the arbitration.⁷³ Notwithstanding this broad power, it is still to be exercised within accepted principles and does not permit the Arbitrator to conduct the Arbitration in a manner which deprives a party of a fair trial of issues.
- [69] A ground of review raised by the Applicant in this respect is that the Arbitrator allowed procedural irregularities in the arbitration that led him to incorrectly assessing the evidence.⁷⁴
- [70] It was contended by the Applicant that although his legal team had formulated a request for relevant documentation and further particulars to enable him to prepare his defence in the matter, the First Respondent had failed to effectively answer these requests but, notwithstanding this, the Arbitrator allowed the matter to proceed.⁷⁵ The Applicant does not embellish on the effect that this had on the fairness of the process, nor does the record reflect that he sought a ruling to compel the provision of any documentation or information. In these circumstances I do not see how permitting the matter to continue can be construed to be misconduct or an irregularity.
- [71] A further alleged irregularity is that the Arbitrator permitted the First Respondent to call ten witnesses when this was substantially different from the anticipated number of witnesses that had been indicated would be led by the First Respondent and the Arbitrator further allowed the introduction of documents during the course of the hearing.⁷⁶ The complaint was that, in allowing this, the Arbitrator had enabled the First Respondent to develop its case as the Arbitration went on. The Applicant concedes in his founding affidavit⁷⁷ that permitting the introduction of further documentation and additional witnesses would in normal circumstances "*not have been seen as abnormal*". I believe this complaint is devoid of any substance. It is quite

⁷³ Part C, Disciplinary Arbitration Agreement, page 140, para 5.1.2.

⁷⁴ Part C, Founding Affidavit, pages 26 and 27, para 8.5.

⁷⁵ Part C, Founding Affidavit, page 27, paras 8.5.1 and 8.5.2.

⁷⁶ Part C, Founding Affidavit, pages 27 and 28, paras 8.5.3 to 8.5.5.

⁷⁷ Part C, Founding Affidavit, page 28 at para 8.5.4.

usual, particularly in situations where cases are not defined through pleadings as occurs in CCMA proceedings and in disciplinary enquiries, and as is the case in this matter, that the party commencing with the presentation of evidence is required to vary its approach to the case as its opposition's case becomes clearer through cross-examination. The Applicant furthermore had an opportunity to deal with the additional witnesses and evidence. Most notably, again the Applicant did not seek a ruling from the Arbitrator to preclude this occurring. It was not for the Arbitrator himself to *mero motu* interfere in the process by preventing witnesses from being introduced by the First Respondent or to prevent it from introducing new documentation. Had the Arbitrator done so, that would have been a gross irregularity in the conduct of the proceedings.

- [72] Another irregularity, the Applicant contends, came about as the Arbitrator acted as a mediator in the matter on the first day of the hearing and in that process had a private discussion with a senior representative of the First Respondent, Prof Mosia. The Applicant says this resulted in a prejudicial view of the Applicant's defence,⁷⁸ but how this interaction resulted in the Arbitrator having a prejudicial view was not substantiated in any way. Mr Welman, the attorney for the First Respondent during the arbitration and the deponent to the answering affidavit conceded that an interaction occurred between the Arbitrator and Prof Mosia and noted that he was also present at the time. It was added that there were similarly occasions when the Arbitrator interacted with the Applicant and his legal representatives on their own. The First Respondent contended that there was nothing strange about this since it was in the form of mediation and is a common process. I am in full agreement with this contention since mediation in an arbitration or disciplinary enquiry only comes about with the consent of the parties. When they engage in the mediation process, the parties accept that private interactions will occur between the Arbitrator as a mediator and representatives of the other party. If it had been alleged, which it has not been, and shown, which it has not, that when acting as a mediator the Arbitrator had acted inappropriately, for

⁷⁸ Part C, Founding Affidavit, page 28-29, para 8.5.6.

example by expressing a firm view on the merits of the matter, that may well constitute misconduct and an irregularity. However, in the absence of inappropriate action on the part of the Arbitrator having been shown at mediation and no such complaint being raised in the Arbitration itself, I find that there was nothing untoward in the Arbitrator acting as a mediator.

- [73] The Applicant further contends that the Arbitrator failed to give regard to mitigating circumstances, particularly the circumstances regarding the instruction given to him by Prof Molefe and the practice and work standard within the First Respondent.⁷⁹
- [74] The Applicant deals with mitigation pertinently in the Heads of Argument presented to the Arbitrator,⁸⁰ where his primary thrust was that the internal procedures of the First Respondent had allowed him in the past to conduct himself in a manner to achieve the objectives of his designation.⁸¹ In his Supplementary Affidavit he avers that the Arbitrator failed to rule on the circumstances the Applicant offered in mitigation and failed to consider his work record, personal circumstances and the effect that a dismissal would have on his standing within his profession.⁸² The Arbitrator, he says, merely recorded that he was required to consider evidence on aggravation and mitigation and an appropriate sanction but did not do this.⁸³ I find that the Arbitrator's failure to specifically deal in the award with each aspect raised by the Applicant in mitigation does not warrant interference on review. The Arbitrator concluded, obviously based on the direct evidence of Prof Mosia, that there had been "*a total breakdown in trust between the TUT and himself as senior employee.*"⁸⁴ The Arbitrator in the Award deals at length with the Applicant's view that he was acting under instruction from Prof Molefe. The Arbitrator considered the report the Applicant had sent to Prof Mosia in which he stated that he had been informed by Prof Molefe "*that Council has appointed a Task Team and mandated it to investigate and probe the media*

⁷⁹ Part C, Founding Affidavit, page 29, para 8.5.7.

⁸⁰ Counsel's file- No.1, page 53 to 56.

⁸¹ Counsel's file No.1, page 56, para 43.4.

⁸² Part C Supplementary Affidavit, page 124, para 5.4.10.

⁸³ Part C, Supplementary Affidavit, page 124, para 5.11.

leaks"⁸⁵ to reach the conclusion that the approach made by Prof Molefe so as to involve the Applicant to look into the sources of personal attacks against Prof Molefe was not sanctioned by the Council.⁸⁶

[75] The Arbitrator also thoroughly considered the First Respondent's policies and the Job Profile of the Applicant and reached relevant conclusions based on these policies. The Arbitrator concluded that the internal audit position occupied by the Applicant derived its authority from the Council, through the Audit Committee and that it is an autonomous position, that the Applicant only had an administrative reporting line to the office of the Vice Chancellor, while the Applicant's responsibilities were determined by the Audit Committee of the Council. The Arbitrator also relied, *inter alia*, on the Internal Audit Function Charter to find that the Applicant was not entitled to perform operational duties for the First Respondent and could not initiate or approve accounting transactions that were external to the internal audit functions.⁸⁷ The Arbitrator further had regard to the Policy on Internal Audit which describes internal audit as being "*independent of all line and functional management ... answerable solely to the Vice Chancellor and Principal and to the Audit Committee*"⁸⁸ and which policy ensures the independence of the Department under the control of the Applicant by also specifying that "*...the day to day administrative activities of the Internal Audit will rest with the Vice Chancellor and Principal*" and in particular that "*Internal Audit will not assume any line management functions apart from running its own department*".⁸⁹

[76] It is apparent from this lengthy analysis that the Arbitrator gave substantial consideration to the contention by the Applicant that he was acting under the authority of Prof Molefe. As the Arbitrator concludes that the Applicant had no

⁸⁴ Part C, Award, page 73, para 6.85.

⁸⁵ Part C, Award, page 62 at para 6.41 quoting from the letter from the Applicant to Prof Mosia dated 29 August 2011 and which is to be found in Part A, pages 6 to 18, in particular in the second unnumbered paragraph that appears on page 8 of Part A.

⁸⁶ Part C, Award page 59, para 6.26.

⁸⁷ The consideration of the reporting lines of the Applicant and the determination that the Applicant was precluded from engaging in any operational duties is to be found at Part C, Award, pages 58 to 62, paras 6.24 to 6.39.

⁸⁸ Part A, Bundle "B", page 3 of the Policy on Internal Audit, at page 77 of Bundle B.

⁸⁹ Part A, Bundle "B", page 3 of the Policy on Internal Audit, at page 77, para 6, of Bundle B.

authority, derived either from the Policies, Charters or the Job Profile of the Applicant to contend that he was acting under the instruction of Prof Molefe, the contention that it constituted mitigation would have had no weight whatsoever in the view of the Arbitrator.

- [77] The Arbitration Agreement only required the Arbitrator, if any finding of guilt was made, to "*hear argument and consider any evidence in mitigation and aggravation before determining the appropriate sanction. Evidence regarding mitigation and aggravation will be presented by the parties during evidence on the merits.*"⁹⁰ I am satisfied on a conspectus of the evidence, the Heads of Argument presented by both parties in the Arbitration and the Award, that the Arbitrator materially acted as he was enjoined to do by the Arbitration Agreement in dealing with mitigation.

Further grounds of review

- [78] The Applicant contends further that the Arbitrator "*evaded his duties of a reasonable arbitrator so as to ensure that he did not damage his relationship with the First Respondent*".⁹¹ The essence of this contention is that because there was a business relationship with the First Respondent, the Arbitrator had not dealt with his duties as a reasonable arbitrator, so as to ensure that he did not damage his relationship with the First Respondent. The First Respondent correctly contends in my view that the question as to whether the Arbitrator was reasonable is not relevant to the matter. The Arbitrator, being elected by the parties to determine the matter is to be judged only on the statutory grounds of review. Whether he was reasonable is not one of them.⁹²
- [79] The Applicant contends that the conclusions reached by the Arbitrator were not all supported by evidence and he rather preferred the version of the First Respondent than that of the Applicant⁹³, the latter complaint in this regard more properly being referred to as bias, which is also a complaint the

⁹⁰ Part C, Disciplinary Arbitration Agreement, page 139, para 4.

⁹¹ Part C, Founding Affidavit, page 29, para 8.7 and at page 39, para 9.2.9.

⁹² Ibid fn 57 at paras 8 and 9.

Applicant specifically raises in his Supplementary Affidavit.⁹⁴ The First Respondent generally adopts the view that this ground is not sustainable in terms of the Arbitration Act. I disagree with this broad assertion since it is necessary to assess if there was evidence before the Arbitrator to justify his conclusions, for if there is not or if there are errors of fact or law that are so gross as to indicate partiality, bad faith or a misconception of his role as arbitrator, that could constitute misconduct or gross irregularity.

[80] In *Stocks Civil Engineering (Pty) Ltd v Rip NO and Another*⁹⁵ it was held that:

“A Court is entitled on review to determine whether an arbitrator in fact functioned as arbitrator in the way that he upon his appointment impliedly undertook to do, namely by acting honestly, duly considering all the evidence before him and having due regard to the applicable legal principles. If he does this, but reaches the wrong conclusion, so be it. But if he does not and shirks his task, he does not function as an arbitrator and reneges on the agreement under which he was appointed. His award will then be tainted and reviewable. It is equally implicit in the agreement under which an arbitrator is appointed that he is fully cognizant with the extent of and limits to any discretion or powers he may have. If he is not and such ignorance impacts upon his award, he has not functioned properly and his award will be reviewable. An error of law or fact may be evidence of the above in given circumstances, but may in others merely be part of the incorrect reasoning leading to an incorrect result. In short, material malfunctioning is reviewable, a wrong result per se not (unless it evidences malfunctioning). If the malfunctioning is in relation to his duties, that would be misconduct by the arbitrator as it would be a breach of the implied terms of his appointment.”⁹⁶

[81] In *SACCAWU and Others v Pick 'n Pay Retailers (Pty) Ltd and Others*⁹⁷ it was held that for an irregularity to warrant interference on review, two conditions had to be met:

⁹³ Part C, Founding Affidavit, page 29, para 9.

⁹⁴ Part C, Supplementary Affidavit, page 113, para 5.1.

⁹⁵ [2002] 3 BLLR 189 (LAC).

⁹⁶ Ibid fn 109 at para 52.

“ ... firstly, the omission on the part of the arbitrator must involve him or her having misconceived the nature of the enquiry or his or her duties in connection with the enquiry, and thus result in him preventing a fair trial of the matter. Secondly, there must not exist material that would serve to justify the arbitrator’s decision, because ‘if there was material before the [arbitrator], justifying the action taken, the Court would not be entitled to interfere even if an irregularity had been committed’. Put differently, if an arbitrator was caused by inappropriate means to reach one conclusion whereas if he had adopted appropriate means he might have reached another conclusion favourable to the applicant, then the award is reviewable.”⁹⁸

- [82] It is in this context that consideration is to be given to the circumstances raised by the Applicant which he says justifies interfering with the Arbitrator's award. There are numerous complaints under this heading.
- [83] The Applicant says the Arbitrator incorrectly set out a version regarding what led to the investigation and could not distinguish between the two task teams, the one being in respect of an investigation regarding the qualifications of Prof Molefe (under the leadership of Prof Volmink) and the other being in respect of media leaks set up at the Council meeting of 21 June 2011.⁹⁹ The Applicant's perspective was that the Arbitrator had intentionally created this confusion.¹⁰⁰
- [84] While the Arbitrator did reflect in his Award that the Council had earlier appointed a task team that was led by Prof Volmink to investigate the negative press as well as to investigate allegations against Prof Molefe¹⁰¹ and while I agree with the Applicant that there was no specific evidence to the effect that this first task team was to investigate media leakages, this is not a material error and there is certainly nothing which points to the Arbitrator

⁹⁷ [2012] 1 BLLR 71 (LC).

⁹⁸ Ibid fn 111 at para 8. See also: *Telcordia* (Id fn 53) at para 85 where the Supreme Court of Appeal determined that even if the Arbitrator misinterpreted an agreement, failed to apply the law correctly or had regard to inadmissible evidence this did not mean that he misconceived the nature of the enquiry but means only that he erred in the performance of his duties. It was reiterated in this case that an arbitrator "has the right to be wrong".

⁹⁹ Part C, Founding Affidavit, page 30, paras 9.1 and 9.2.

¹⁰⁰ Part C, Founding Affidavit, pages 30 and 31, para 9.3.

having intentionally created this confusion: and this error in no way shows that the Arbitrator misconceived the nature of the matter before him or the critical issues that he was to consider. In the context of the negative reports in the media about the First Respondent and reports regarding the qualifications of Prof Molefe this mistake is understandable and I find no reason to consider that it was purposefully made in order to skew the Award. It had no effect on the Award as it related only to context and not to material aspects that impacted on the Award. Certainly, this mistake was not in any way material to the findings made by the Arbitrator in respect of the allegations against the Applicant. The Applicant himself also concedes that the information regarding the various task teams was "background"¹⁰².

[85] I also find that the complaint of the Applicant that the Arbitrator incorrectly referred, on one occasion, to the meeting of 21 June 2011 as being a meeting on 21 July 2011¹⁰³ as being irrelevant to his determination and nitpicking by the Applicant which is of no consequence whatsoever.

[86] The Applicant maintains that the Arbitrator finds, without substance, that Prof Molefe had never been appointed by the Council to the task team that investigated the media leakages, on the basis of the Arbitrator's view that this would not be permitted from a perspective of good corporate governance, although no evidence in that regard was presented. He says this was in direct contrast with the uncontested evidence that the Chairperson of the Council, Dr Motlatla, had instructed Prof Molefe to be a part of the task team.¹⁰⁴

[87] The Arbitrator accepts the evidence of Dr Motlatla that he had interacted with Prof Molefe after the Council meeting of 21 June 2011 for the purpose of involving him in the investigation and clearly did so in the context of his finding that the Council itself had never appointed Prof Molefe to be a member of the task team. The Arbitrator relies on the testimony of Dr Motlatla in cross-examination that he had informed Prof Molefe of the decision made by the

¹⁰¹ Part C, Award, page 47, paras 5.3 to 5.5.

¹⁰² Part C, Founding Affidavit, page 30 at para 9.1, line 3.

¹⁰³ Part C, Founding Affidavit, page 31 at para 9.4.

Council to have a task team and further finds that although not appointed by the Council to this task team he may well have been co-opted to the team by Dr Motlatla.¹⁰⁵ In the circumstances I find nothing turns on the complaint of the Applicant¹⁰⁶ that the Arbitrator had failed to apply his mind to the question whether Prof Molefe had been informed of his appointment to the task team or whether he had been instructed to fulfil its mandate.

- [88] The Arbitrator specifically finds that on a balance of probability, the Council had mandated Dr Motlatla and Mr Skosana to investigate the media leakages.¹⁰⁷ The Arbitrator does not, as contended by the Applicant, make a finding that Prof Molefe was not appointed to the task team as that would not be permitted by good governance. The Arbitrator, in having made his determination on this point does indeed remark that it would offend the principles of governance if a person was to investigate or in fact lead the investigation into "*the source and cause of his own assailment in the media.*"¹⁰⁸ Quite clearly this recordal by the Arbitrator does not constitute a reason for his finding but an observation that is not out of place in the context.
- [89] The Arbitrator also determined after considering a number of the First Respondent's policies, which I have mentioned, that as the head of Internal Audit the Applicant was independent and reported to Prof Molefe only for administrative purposes and could not perform functional tasks nor take functional instructions from Prof Molefe. Thus, even if Prof Molefe was mandated by the Council to investigate the media leakages, which was not the case in the view of the Arbitrator, the various policies of the First Respondent which were attested to by Dr Tromp show that Prof Molefe could not lawfully direct the Applicant to engage in a functional investigation and that in pursuing this instruction the Applicant flouted the policies which required him to act independently. The finding of the Arbitrator is therefore derived from evidence before him. On this basis, I also conclude that there is no merit to the submission by the Applicant that if Prof Molefe had not been

¹⁰⁴ Part C, Founding Affidavit, pages 31 and 32, para 9.5.

¹⁰⁵ Part C, Award, page 58, para 6.24.

¹⁰⁶ Part C, Founding Affidavit, page 38, para 9.26.

¹⁰⁷ Part C, Award, page 56, para 6.16.

tasked to investigate the matter, the Applicant himself would not have been misled by Prof Molefe on this aspect and this was not properly assessed by the Arbitrator.¹⁰⁹

[90] The Applicant also protested that the Arbitrator had ignored the evidence of the Applicant's witnesses as to what had transpired at the meeting on 21 June 2011 in concluding that only Dr Motlatla and Mr Skosana were appointed to the task team.¹¹⁰ In related criticism the Applicant complained that the Arbitrator had failed to set out a basis why he preferred the version of the First Respondent.

[91] The Applicant says he had called four witnesses and the Respondent had only called three witnesses in respect of what occurred at the meeting on 21 June 2011. It appears to be implied that since the Applicant had led more witnesses regarding a meeting, that version should be believed. That is certainly not the case.

[92] In any event, the Applicant mistakenly contends that all the Applicant's witnesses were consistent as to what transpired in that meeting when, among the numerous other aspects of difference, Mr Dilotsotlhe, who testified on behalf of the Applicant, differed from all other witnesses by contending that the Applicant was part of the task team appointed at this meeting to investigate leakages to the media.¹¹¹ My further consideration of the differences in versions as to who constituted the task team to investigate media leakages has been set out above.

[93] The Arbitrator in his Award deals with the versions that were presented to him and concludes that he finds "*on a balance of probabilities, that the Council mandated Dr Motlatla and Mr Skosana to investigate the source of the problem around media leakages and the negative publicity that was aimed at*

¹⁰⁸ Part C, Award, page 57, para 6.20, the last line thereof.

¹⁰⁹ Part C, Founding Affidavit, page 38, para 9.27.

¹¹⁰ Part C, Founding Affidavit, page 32, paras 9.6 and 9.7.

¹¹¹ Part C, Founding Affidavit, page 32, para 9.7.

ruining the reputation of the University.”¹¹² In reaching this conclusion the Arbitrator correctly notes that it was required of him to determine if the document purporting to be a minute of the meeting of the Council of 21 June 2011 was a true record of the meeting as there were variances in the versions of what actually transpired in that meeting and there had never been a subsequent meeting held by the Council to ratify and adopt the minute. Certainly, the witnesses called on behalf of the Applicant differed materially with regards to the constitution of the task team. Having taken cognizance of the fact that at this time there were media reports concerning the qualifications of Prof Molefe and reports regarding his personal finances, the Arbitrator found that it was improbable that the Council would have co-opted or involved Prof Molefe in the task team. The Arbitrator’s reasoning was that if it had been intended that Prof Molefe was to be involved in the investigation, the Council would not have appointed a dedicated task team to deal with the matter. The Arbitrator accordingly rejected the version that Prof Molefe was involved in the task team at the behest of the Council. The Arbitrator, as stated earlier, nonetheless accepted that the task team could co-opt or involve other persons, even Prof Molefe. In reaching this conclusion it is apparent that the Arbitrator considered which version was most probable and he in fact says he applied this technique. I find no fault with it. In similar complaints with which I deal below the Applicant contends that the Arbitrator failed to assess the versions of the witnesses and to explain his reasoning for accepting the versions of the First Respondent’s witnesses where there were conflicting versions.¹¹³

[94] In this regard, in *Solidarity obo Van Zyl v KPMG Services (Pty) Ltd and Others*¹¹⁴ Fourie AJ determined that it is not necessary for an Arbitrator to find that a witness was not credible to find that his version was not probable.¹¹⁵ In reaching this conclusion the Acting Judge relied on *Transnet Ltd v Gouws and Others*¹¹⁶, per Redding AJ, in which it was held that:

¹¹² Part C, Award, page 56, para 6.15 and 6.16.

¹¹³ Part C, Founding Affidavit, page 36, para 9.20.

¹¹⁴ (2014) 35 ILJ 1656 (LC)

¹¹⁵ Ibid fn 128 at para 19.

¹¹⁶ [2016] JOL 35673 (LC).

“The key question for him [the Arbitrator] was which version was more probable. He was able to reach a decision on the probabilities without having to have regard to the credibility of each witness. It is quite possible for evidence to be assessed purely on its probability, assuming for the purposes of that assessment that the witnesses who testified were credible. It is not necessary for a judicial officer or arbitrator to find a witness not to be credible in order to find that his evidence is not probable.”¹¹⁷

The learned Acting Judge held:

“In my view, the failure by the arbitrator to make a pertinent finding on credibility does not demonstrate that he failed to understand the proper approach to the assessment of conflicting evidence. The arbitrator appears clearly to me to have understood that his primary task was to resolve the conflicting versions by having regard to the balance of probability. He applied the correct judicial technique in this regard. Accordingly, his failure to address the credibility of each witness and comment thereon is not a fatal flaw which would entitle Applicant to a review of his award”.¹¹⁸

I am in agreement with these views.¹¹⁹

[95] The First Respondent’s case was that the Applicant, by doing what Prof Molefe requested, had failed in his responsibility because he ought to have reported the occurrence and that in acting as he did, acted in contravention of his duties. The contentions were that the Applicant did know or ought to have known that he was not acting in the interests of the First Respondent but in the interests of Prof Molefe and that he was associating himself with unlawful acts.

¹¹⁷ Ibid fn 130 at para 19.

¹¹⁸ Id fn 130 at para 20.

¹¹⁹ In *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (A) it was held that when deciding whether evidence is true a Court will weigh up the allegations against the general probabilities and the credibility of witnesses is therefore bound up with considerations of the probabilities. See also: *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie and Others* 2003 (1) SA 11 (SCA) at para 5.

- [96] The Applicant's defence to the allegations of misconduct was that he was acting under the instruction of the highest functionary in the First Respondent, Prof Molefe, given to him on 28 July 2011, that he was to investigate media leaks to give effect to a decision by the Council. The Applicant testified that he had never queried the underlying basis for the instruction given to him. The Applicant's stance was that he had no reason to doubt the *bona fides* of Prof Molefe¹²⁰ and that the Arbitrator had failed to appreciate that the Applicant did not attend Council meetings and was therefore reliant on instructions received from Prof Molefe.¹²¹ The Applicant concludes on this point that the Award of the Arbitrator shows a failure to appreciate the functioning of the corporate world and the chain of command¹²².
- [97] A further defence of the Applicant was that although there were established work standards in the workplace, to the extent that there were deviations he did this as a result of the independence of his post as internal auditor.
- [98] The Applicant submitted that since the First Respondent knew he was giving instructions to D&K regarding the monitoring of telephones and emails on the instructions of Prof Molefe, there was an obligation on the First Respondent to have introduced the evidence of Prof Molefe to rebut what it knew would be his version. This challenge is without merit, primarily since the selection of witnesses to be used is not the decision of the Arbitrator.¹²³ More than this, our Courts have accepted that when a *prima facie* case¹²⁴ is made out, the evidentiary burden may shift to the other party. Succinctly put, the obligation was on the Applicant himself to present the evidence of Prof Molefe to substantiate his defence. I am supported in my view by *Woolworths (Pty) Ltd v CCMA and Others*¹²⁵, where the Labour Appeal Court held that once a

¹²⁰ Part C, Answering Affidavit page 183 at para 17.23 and Part C, Replying Affidavit, pages 270 and 271 at para 15.

¹²¹ Part C, Founding Affidavit, page 37, para 9.23.

¹²² Part C, Founding Affidavit, page 36, para 9.2.

¹²³ Part C, Supplementary Affidavit, page 114 to 120, para 5.3.

¹²⁴ See: *Woolworths (Pty) Ltd v CCMA and Others* [2011] 10 BLLR 963 (LAC) at para 34. See also: *RSA Geological Services (A Division of De Beers Consolidated Mines Ltd) v Grogan and Others* [2008] 2 BLLR 184 (LC) at para 32.

¹²⁵ [2011] 10 BLLR 963 (LAC) at para 34.

prima facie case of dishonesty had been established the evidentiary burden would shift to the employee. Further, in *Emfuleni Local Municipality v SALGBC and Others*¹²⁶ Whitcher J similarly held that on raising a particular defence, an evidentiary burden fell on the employee and it was not necessary for the employer to adduce evidence to disprove positively a defence, especially if the defence is within the unique knowledge of the employee. An employer must prove its own case on a balance of probabilities. If it does so, it therefore follows that the employee's case is false.¹²⁷

[99] The Applicant says the Arbitrator incorrectly found that reputational risk did not fall within the scope of his employment and had disregarded the work standard shown by the Applicant. The Arbitrator had thus “unilaterally” accepted the First Respondent's version relating to work standards and internal policies.¹²⁸ In a similar vein, he complained that the Arbitrator had not set out any basis for his conclusion that the Applicant could not assist with operational work and in doing so disregarded the evidence presented by witnesses.¹²⁹ The Applicant also believed the Arbitrator had incorrectly found that Prof Molefe had not instructed him to assist in the investigation of media leaks, when there was no evidence presented to contradict his version. The Applicant also contended that the Arbitrator had failed to apply his mind in construing in the award that the “request” by Prof Molefe for the Applicant to assist in the investigation was not an instruction.¹³⁰

[100] The Applicant says the Arbitrator also erred in finding that he could not assist with operational work and totally disregarded the evidence presented by the Applicant's witnesses regarding the work he had provided in the past and did not accept the Applicant's version as to internal arrangements and workings. He further contended that the Arbitrator failed to assess the testimony of the Applicant's witnesses that Prof Molefe was mandated to implement resolutions of the Council as a “CEO” and had incorrectly quoted the

¹²⁶ [2015] ZALCJHB 356 at para 25

¹²⁷ See also: *Pillay v Krishna and Another* 1946 AD 946 at 951 and *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1218 E – F.

¹²⁸ Part C, Founding Affidavit, pages 32 and 33, para 9.8.

¹²⁹ Part C, Founding Affidavit, page 33, para 9.9.

witnesses as having testified that Prof Molefe was to "head" or "lead" the investigation task team, when there had been no evidence presented by the Applicant or any of his witnesses to that effect.¹³¹

[101] The Applicant asserts that the Arbitrator should have found that the criteria in respect of appointing legal services and consultancy services were the same, since both were specialised and of a privileged nature¹³². To this he adds that, in flagrant disregard of the evidence, the Arbitrator had concluded in clause 6.63 of the Award that media leaks did not fall within the ambit of a specialist investigation: but I see no such finding in the cited clause.¹³³ He also says there was a developed practice and work standard that invoices rendered by consultants could be sanitised as a result of their privileged nature¹³⁴ and that the methodology for the appointment of consultants was similar to the appointment of accounting/forensic investigation firms which also rendered a specialised service.¹³⁵

[102] The list of the Applicant's complaints about the Arbitrator failing to apply his mind, which I reaffirm is not a ground of review contemplated by the Arbitration Act but which I am considering based on the contention of the Applicant that the extent of the errors made would lead to the conclusion that the Arbitrator misconducted himself or committed gross irregularities, extend as well to the Applicant's averment that in accepting the version of the First Respondent that he had procured the services of D&K without budgeted funds,¹³⁶ the arbitrator was incorrect. In his view the evidence demonstrated that the First Respondent had deliberately used an incorrect cost code to pay for the services, while funds were nonetheless available in the correct cost center, and this incorrect assessment had resulted in the expenditure being classified as unauthorised.

¹³⁰ Part C, Founding Affidavit, page 33, paras 9.10 and 9.11.

¹³¹ Part C, Founding Affidavit, page 37, para 9.24.

¹³² Part C, Founding Affidavit, pages 34, para 9.12.

¹³³ Part C, Supplementary Affidavit, page 123, para 5.4.8

¹³⁴ Part C, Founding Affidavit, page 34, para 9.13.

¹³⁵ Part C, Founding Affidavit, page 34, para 9.14.

¹³⁶ Part C, Founding Affidavit, page 35, para 9.15.

- [103] These complaints in my view discount the Arbitrator's finding that the investigation that sought to serve the needs of Prof Molefe and not the First Respondent was not sanctioned. As a consequence, what occurred in that investigation was not sanctioned and such costs associated with it would then be unauthorised.
- [104] Having concluded that the investigation was for the personal purposes of Prof Molefe and was not sanctioned, it was only logical for the Arbitrator to find that the acts of intercepting emails, installing monitoring devices such as bugs on telephones and installing cameras would not be for a legitimate purpose and therefore there was no legitimate basis for the Applicant to represent to the Director ICT that the interception of emails was required for the purposes of an internal audit.
- [105] The Applicant avers as well that the Arbitrator erred in finding that a camera had been installed when there was inconsistency in the version of the First Respondent's witnesses.¹³⁷ While the Arbitrator did conclude that a camera had been installed, he based this finding on the evidence of Mr Herselman.¹³⁸ This may not be correct since there was only evidence that there was dust in the office of Prof Molefe and the ceiling panel had been moved, indicating that a camera was installed. There was no direct evidence that this had in fact occurred. I am of the view that an error of this nature would not be material and does not reflect any misconduct, gross irregularity, bad faith or partiality.
- [106] The view by the Arbitrator that the Applicant had led evidence to the effect that Prof Molefe was to "head" or "lead" the investigation while also incorrect is not in my view a material error of fact and had no effect on the Award.
- [107] More than this and as I have already pointed out, the Arbitrator assessed the responsibilities, functions and reporting lines of the Applicant by reference to the First Respondent's policies, Charters and the Applicant's Job Profile. While the Applicant had led evidence as to his autonomy and that he had in

¹³⁷ Part C, Founding Affidavit, page 35, para 9.16.

¹³⁸ Part C, Award, page 73, para 6.82.

the past acted in a manner similar to that which is now the subject matter of complaint. The First Respondent presented evidence through Dr Tromp (whose evidence the arbitrator found to be “*on the whole, undisputable*”¹³⁹) and by reference to the aforementioned documentation, that the circumstances at hand were not those which would permit the Applicant to deviate from established policies. As noted, even Ms Makinta, the Applicant’s own witness, had testified that the Applicant ought to have motivated a deviation from standard process.

[108] The Arbitrator determined that there was no urgency attached to the investigation as the draft minute indicated that the task team would “*gradually deal with the leakage of information to the media*”¹⁴⁰ and Dr Motlatla did not raise urgency when he requested the Applicant to be involved in the investigation. The Arbitrator’s determination was therefore that the lack of urgency meant that the ordinary processes could have been followed. The evidence before him supported this finding.

[109] While the Arbitrator refers to what the Applicant says is an instruction given to him by Prof Molefe as being a “*request*”¹⁴¹, which is a word the Applicant himself had used, the essence of the Arbitrator’s finding on this aspect is that Prof Molefe, notwithstanding being the highest functionary in the First Respondent at the time, was not in a position to instruct the Applicant to undertake the investigation as the Applicant ultimately reported to the Council through the Audit Committee and the Applicant only reported to Prof Molefe administratively and not functionally. On this basis, the Arbitrator concludes that the Applicant was not entitled to interact with D&K as he had done. A plain reading of the First Respondent’s policies and the testimony of Dr Tromp supports the above conclusions reached by the Arbitrator.

¹³⁹ Part C, Award, page 65, para 6.54.

¹⁴⁰ Part A, Bundle B, page 139.

¹⁴¹ In his report to Prof Mosia of 29 August 2011 the applicant states that “... *after briefing me on the task team, Prof Molefe requested that internal audit should assist the task team with the investigation*”. Part A, page 8, last para.

[110] In the Award the Arbitrator also gave consideration to the First Respondent's Policy on Tenders and Policy on Procurement of Goods and Services as well as the Policy on Unauthorised Purchases, in relation to the appointment of D&K by the Applicant.¹⁴² This was done in the context of the evidence of Dr Tromp that when procuring services for the First Respondent three issues were of prime importance, being the cost of the services, the authority of the person making the appointment and the availability of funds. Although the Applicant maintained that deviations from the policies were permitted as he was conducting a special investigation, the Arbitrator concluded there was no justification for deviating from the required processes when appointing D&K and that he had acted beyond the scope of his duties in following the request of Prof Molefe.

[111] A reading of the policies and the evidence of Dr Tromp supports the conclusion of the Arbitrator. The Arbitrator was of the view that as there was no urgency there would have been nothing stopping the Applicant from approaching the Audit Committee for its direction in respect of the request of Prof Molefe to assist with the investigation. At the time that would have been correct as the Audit Committee was operative when the Applicant engaged with D&K together with Prof Molefe,¹⁴³ although the Audit Committee did not meet again following the Council having been dissolved. Although the Applicant correctly asserts¹⁴⁴ that Ms Nkomo testified that he was not expected to report to the Audit Committee on a daily basis, that did not prevent the Applicant from informing the Audit Committee.

[112] I therefore find that the Arbitrator, in concluding that the Applicant had an obligation to *"...at the least, have consulted the chairpersons of the Audit and Risk Management Committees"* and further that the Applicant *"...ought to have known that he is only answerable to the VC on administrative matters and that the probe he was asked to undertake did not fall within the purview of*

¹⁴² Part C, Award, page 65, para 6.53 to page 68, para 6.66.

¹⁴³ The Applicant says as well that the Arbitrator failed to apply his mind in concluding that the Applicant ought to have reported the matter to the Risk Committee when he did not report to the Risk committee. See Part C, Founding Affidavit, pages 37 and 38, para 9.25. This is clearly an error as the Applicant reported to the Audit Committee but this is an innocent error.

¹⁴⁴ Part C, page 38, para 9.25.

that [his] authority” had evidence before him to justify such determination.¹⁴⁵ My finding is of course to the exclusion of the Arbitrator having any basis to make reference to a requirement for the Applicant to report to the Risk Committee, since stating this was clearly an error, but of no material import.

[113] The Applicant contends that the evidence of Ms Nkomo should have been accepted over that of Dr Tromp¹⁴⁶ and the Arbitrator did not appreciate that he was to reject Ms Nkomo's evidence as being false before he could accept the evidence of Dr Tromp.¹⁴⁷ He says that even if the evidence of Dr Tromp had been correct in respect of his interpretation of documentation, that could not undo the evidence of Ms Nkomo that as a fact the Applicant had the autonomy to act in the way that he did¹⁴⁸ In consideration of the Award as a whole it is apparent that the factual matrix before the Arbitrator influenced his views on the probabilities, against which he judged the testimony of the witnesses. On the narrow grounds of review contemplated by the Arbitration Act, the Arbitrator cannot be faulted. As stated, it is not necessary to reject as false the evidence of a witness in order to make a determination on the probabilities. The probabilities established from a conspectus of the evidence before the Arbitrator creates a foundation for the Arbitrator to conclude that the version of Dr Tromp, with his reference to written policies, was to be preferred, without it being necessary for the Arbitrator to state so in his Award. There was material before the Arbitrator to sustain his findings. No doubt the written documentation defining the Applicant's role must have weighed heavily on the Arbitrator when making his Award.

[114] The Arbitrator, the Applicant contends, failed to apply his mind when he accepted the version of the First Respondent that the investigation was of a personal nature and was not sanctioned or authorized, when there was no evidence to that effect. However, evidence had been presented as to what D&K had been instructed to do and it is quite apparent that the interaction that the Applicant and Prof Molefe had with D&K was focused on obtaining

¹⁴⁵ Part C, pages 66 and 67, para 6.59

¹⁴⁶ Part C, Supplementary Affidavit, pages 121 and 122, paras 5.4.4 and 5.4.5.

¹⁴⁷ Part C, Supplementary Affidavit, page 122, para 5.4.5.

information which would be of particular interest to Prof Molefe himself. It is also notable that Prof Molefe had specifically requested D&K to ascertain how people felt about his appointment. This fell well outside the mandate of the Council to investigate media leakages.

[115] As to the Applicant's contentions that the project undertaken by D&K was a special project involving urgency, sensitive issues and was to be secretive, it was the Arbitrator's perspective that the tapping of telephones of Prof Molefe's personal assistant on the basis that Prof Molefe felt uncomfortable with her and she may not support his appointment, was not in the nature of an urgent matter nor an extreme case justifying deviation from established policies.

[116] It is apparent that the instructions to investigate given to D&K concerned matters that were very pertinent to Prof Molefe and the focus was certainly not on determining how media leakages were occurring. If that were the case, the discussions would have revolved around this aspect, which was not the case on the Applicant's own version. However, in his letter to Prof Mosia, the Applicant stated that it was his intention to first concentrate on the aspects regarding Prof Molefe and to thereafter broaden the investigation into the general media leakages. This version was not put to Mr Condon in cross examination. It is also instructive that in a communication from D&K dated 3 August 2011, addressed to the Applicant and Prof Molefe, it is recorded that *"...it goes without saying, all invoices would be sanitised, as agreed with yourself, so as not to compromise the Vice Chancellor in any way."*¹⁴⁹

[117] In light of this and the unchallenged evidence that Prof Molefe himself had suggested that the invoices were to be sanitised there indeed appears to be substance to the Arbitrator's view that the Applicant was involved in using the resources of the First Respondent for purposes that would not have been approved by the Council. Certainly, the Arbitrator's findings in this regard are based on evidence before him. Although I am mindful that I am not sitting on appeal it is telling that the Applicant, without question, pursued the

¹⁴⁸ Part C, Supplementary Affidavit, page 122, para 5.4.6.

¹⁴⁹ Part A, page 29.

requirements of Prof Molefe which were blatantly personal to him and never paused to query the nature of the instructions, either with Prof Molefe himself or with the Audit Committee to which he reported.

[118] In considering the allegations of gross negligence and unlawful conduct, in which the employee was alleged to have allowed monitoring equipment to be installed on the premises of the First Respondent, the Arbitrator acknowledged that the First Respondent's Policy on Electronic Communications¹⁵⁰ permits the interception of email communications upon authorisation from the Director ICT. However, the conclusion reached by the Arbitrator was that the Applicant did infringe the rights to privacy by facilitating the unlawful monitoring of electronic communications, as he had not done this for a legitimate purpose. In the context of the Arbitrator's conclusion that the investigation was for the personal purposes of Prof Molefe, the Arbitrator had facts before him to justify his conclusion. Since there was no legitimate purpose, he similarly concluded that the interception of the further monitoring devices also infringed on the right to privacy. Whether the Arbitrator was right or wrong in his conclusions or assessment is largely irrelevant. What is apparent is that his findings were based on evidence before him and there is nothing to suggest that they were tainted by misconduct or gross irregularity.

[119] Regarding the contention of the Applicant that the Arbitrator did not make distinct findings in respect of the independent allegations which had been put to the Applicant,¹⁵¹ it is evident that the Arbitrator specifically found the Applicant not guilty of the fifth allegation, being that he had conspired to bring the First Respondent's reputation and standing into disrepute. He did this on the basis contended by the Applicant that no evidence had been led in this respect. While not specifically concluding that the applicant was guilty of the further allegations, it is implicit from the award and the findings made (and the very sequence of the award itself) that the Arbitrator did find the applicant guilty of all further allegations. Most importantly, the Arbitrator was not

¹⁵⁰ Part A, Bundle A, pages 88 to 101.

¹⁵¹ Part C, Founding Affidavit, page 36, para 9 19.

required by the Disciplinary Arbitration Agreement to make individual findings in respect of each of the allegations. The applicant was enjoined to:

"determine whether there are fair reasons to discipline the employee. The arbitrator must first hear the evidence and arguments of the employer and the employee and then determine whether the employee is guilty of the disciplinary charges."¹⁵²

[120] There is therefore no merit in this ground of review.

[121] The Applicant asserted that the Arbitrator incorrectly found that the trust relationship had broken down, when there was no evidence to this effect and when the matter had been reported by the Applicant to Prof Mosia in a way that showed the honesty and integrity of the Applicant.¹⁵³

[122] While the Applicant sought to create the impression that he was trustworthy as he had frankly reported the circumstances of the matter to Prof Mosia, this is not influential. I say this as the report he presented occurred after the Applicant had been requested to provide such report as there was a query in respect of the sanitised invoice. No doubt the Applicant was compelled to provide the background and an explanation for the sanitised invoice. This is not indicative of honesty but is simply the Applicant complying with an instruction by the appointed Administrator, Prof Mosia. The Applicant is also incorrect in his contention since Prof Mosia did lead evidence as to the breakdown in the trust relationship.

[123] The testimony of Prof Mosia as to his lack of trust in the Applicant was pointedly dealt with by the Applicant in the Heads of Argument that were presented to the Arbitrator.¹⁵⁴ Prof Mosia had testified that he could not trust the Applicant in carrying forward any assignments as the Applicant lacked good judgement, was unethical and performed unlawful actions and that he would not be in a position to work with him in any position of trust into the

¹⁵² Part C, Disciplinary Arbitration Agreement, page 139 at para 4.

¹⁵³ Part C, Founding Affidavit, pages 38 and 39, para 9.28.

¹⁵⁴ Counsel's File No.1, page 51, para 42 and in particular 42.1.

future¹⁵⁵. In the Applicant's Heads of Argument presented to the Arbitrator, although acknowledging that there was testimony regarding the lack of trust by Prof Mosia, the Applicant says that relying on Prof Mosia's testimony as to there being a breakdown in the trust relationship was unfounded, as he had no relationship with Prof Mosia as Prof Mosia had recently joined the First Respondent. His perspective was that a breakdown in the relationship with Prof Mosia was accordingly irrelevant and without foundation. There is no merit to this as Prof Mosia was appointed to be the Administrator of the First Respondent and as such was its most senior representative. A breakdown of trust with him brought on by the facts before him would certainly affect the relationship the Applicant ought to have with the First Respondent itself. On this evidence, the Arbitrator was validated in concluding that the dismissal of the Applicant was the appropriate sanction.

Conclusion

[124] It is not the obligation of this Court when reviewing a private arbitration to reassess the evidence. What is clear is that the Arbitrator complied with the obligations on him by making a determination, rightly or wrongly, based on evidence before him, that the Applicant should not have acted as he did. While there were some errors in the Award, the errors were not material. The errors made also did not manifest bad faith or partiality and accordingly in making his Award it cannot be construed that the Arbitrator perpetrated a gross irregularity or misconducted himself.

[125] In reviewing an arbitration award made in terms of the Arbitration Act I am to apply the strict test enumerated in the various cases cited above. Having found that there was no material error or irregularity in respect of each of the individual grounds of complaint, I cannot conclude that, taken collectively, the grounds raised by the Applicant show that the Arbitrator had misconducted himself in relation to his duties or that there was any gross irregularity in the conduct of the proceedings or that the arbitrator had exceeded his powers. I

¹⁵⁵ Part B, Transcript, 27 February 2012, page 139, lines 15 to page 140, line 9.

am therefore not required, nor do I, make a determination whether this could constitute a ground of review. There is also no basis to conclude that the award of the Arbitrator had been improperly obtained. In my view, the Arbitrator dealt with the substantial merits of the dispute in a manner that is unassailable in terms of the provision of section 33 of the Arbitration Act.

[126] In light of my findings it is unnecessary for me to determine whether there is any merit in the Applicant's submission that the Arbitrator should be considered to be a party for the purposes of costs. I accordingly make no such finding but express the view that the Arbitrator, deposing to an affidavit in support of factual aspects mentioned in the First Respondent's papers, did not constitute opposition to the review application but was for the purpose of dealing with some of the allegations made by the Applicant. Failing the Arbitrator having provided a confirmatory affidavit, the First Respondent's answer to the allegations made by the Applicant would have been hearsay in some respects.

[127] I am also aware that in this Court there is no rule that costs should follow the result but that a cost order should be made in accordance with the requirements of law and fairness.¹⁵⁶ In my view it would be fair and appropriate in this case for the costs to follow the result.

[128] In the circumstances, I make the following order:

Order

1. The application for the review is dismissed.

¹⁵⁶ Section 162 of the LRA. See: *Zungu v Premier of the Province of KwaZulu-Natal and Others* (2018) 39 ILJ 523 (CC) that endorsed the decision of *The Member of the Executive Council (MEC) for Finance: Kwazulu-Natal and Another v Dorkin NO and Another* [2008] 6 BLLR 540 (LAC)] where, Zondo JP (as he then was) held at para 19:

"In making decisions on cost orders this Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court. That is a balance that is not always easy to strike but, if the Court is to err, it should err on the side of not discouraging parties to approach these Courts with their disputes."

2. The Applicant is to pay the First Respondent's costs.

Hertog, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate IL Posthumus

Instructed by: Pule Incorporated

For the First Respondent: Advocate H Gerber

Instructed by: Welman Attorneys

LABOUR COURT