IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 2211/12

In the matter between:

ORPA WESSELS **Applicant**

and

THE GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL **First Respondent**

PIETER VENTER N.O **Second Respondent**

NATIONAL PROSECUTING AUTHORITY **Third Respondent**

Heard: **14 June 2019**

Delivered: **19 December 2019**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] The applicant was employed the third respondent, the National Prosecuting Authority (NPA) as a Regional Court Control Prosecutor at the Kroonstad Magistrate's Court since 1996. Having initially been suspended on 20 September 2008, she was subsequently called to an internal disciplinary enquiry to answer to seven charges of misconduct. She was found guilty and was dismissed on 21 July 2011. An appeal hearing upheld the dismissal based on five of the seven charges.

[2] A dispute referred to the first respondent (GPSSBC) could not be resolved at the conciliation proceedings and was referred for arbitration. The matter came

before the second respondent (Arbitrator) for determination, and an arbitration award was issued on 21 June 2011, in terms of which the dismissal of the applicant was found to be procedurally and substantively fair. It is this arbitration award that the applicant seeks to have reviewed and set aside. The review application is opposed by the NPA.

[3] The review application was launched outside of the statutory time periods. The NPA did not oppose the condonation application in that regard. Having had regard to the period of the delay, which is about six weeks, the explanation tendered in that regard, the importance of this case and the overall interests of justice, it is deemed appropriate that condonation be granted.

[4] At the arbitration proceedings, the NPA had only relied on two allegations of misconduct in seeking that the dismissal of the applicant be confirmed. These were;

> "Count 6:
>
> That you made yourself guilty of committing the common law offence of perjury in that on or about 7 July 2008 and at or near Kroonstad, you unlawfully and intentionally made a false declaration whilst under oath in case number: SH106/2006.
>
> Count 7:
>
> That you made yourself guilty of committing the common law offence of defeating or obstructing the course of justice or an attempt thereto in that on or about 7 July 2008 and at or near Kroonstad, you on your own and/or in conjunction with other State Witnesses in case number 106/2006 fabricated false evidence and/or allowed false evidence to be presented"

The evidence:

[5] The allegations against the applicant related to criminal proceedings that were before the Free State Regional Court in Kroonstad in the matter of the *State v Phakashe and 2 Others under Case Number: SH106/2006.* The accused

persons in that case *viz*, Messrs Fanyane Phakashe, Amos Machabela and Amos Madondo (The Accused) were charged with theft of copper cables.

[6] In a separate and unrelated matter, a certain Dr Mofokeng had laid a complaint of armed robbery with the South African Police Service (SAPS) after being robbed of his cellular phone.

[7] As part of the SAPS investigations into any crime, a subpoena in terms of section 205 of the Criminal Procedure Act[1], compelling cell phone service providers to discover certain cell phone records can be obtained from a Magistrate. In order to obtain a section 205 subpoena, the investigating officer must furnish a Senior or Control Prosecutor with an affidavit, detailing the reasons why the subpoena should be issued. The Senior or Control Prosecutor would then complete a section 205 statement/summons, which would then, together with the affidavit, be submitted to the Magistrate to sign and authorise the subpoena. Once authorised, the subpoena would then be handed over to the investigating officer, who would in turn will hand it over to the SAPS' technical support unit to approach the cell phone service providers to discover relevant cellular phone records.

[8] It was common cause that a Magistrate, Mr Claasen, was approached by the applicant in November 2005 with a request to issue a section 205 subpoena to compel cell phone service providers to discover certain cell phone records. The relevant statement/summons was completed and signed by the applicant as Control Prosecutor on 29 November 2005, and was further signed and date stamped by Mr Claasen on 30 November 2005.

[9] The criminal trial in the copper cable theft matter commenced before another Magistrate, Mr Aucamp. The Accused at those proceedings contested the legality of the section 205 subpoena, contending that the cellular phone records obtained in linking them to the alleged criminal activities were illegally obtained. This had necessitated that the matter be referred to a trial within a trial in order to ascertain the admissibility of the section 205 subpoena as well as the relevant cellular phone records. This also implied that the applicant had

[1] Act 51 of 1977

to withdraw from the matter as prosecutor, as she was involved in obtaining the subpoena, and further since she was required to be a witness in the trial within the trial. The applicant was replaced by another prosecutor, Mr Jan Heinrich Wiegand, who reported directly to her.

[10] Central to the enquiry in the trial within a trial proceedings was whether or not the cell phone data discovered by cell phone providers was admissible evidence or not. Wiegand had called upon Senior Superintendent, GB Van Deventer to testify as the investigating officer. His evidence however was that there was not any founding affidavit in the docket in support of the subpoena, and he had no knowledge of where that affidavit was. The proceedings were then postponed to 7 July 2008.

[11] When the proceedings resumed on 7 July 2008, Van Deventer had produced an affidavit in support of the issuing of the subpoena, which was purportedly deposed to on 7 November 2005 by Mr Jan Mynhardt Wolmarans (An erstwhile police officer who held the rank of Lieutenant Colonel) before him[2].

[12] The applicant, Van Deventer and Wolmarans testified in the trial within a trial proceedings in regards to the veracity of the affidavit and legitimacy of the section 205 subpoena. However, the Magistrate, Mr Aucamp was unimpressed with their evidence, and had disallowed the evidence obtained as a result of that subpoena. This had resulted in the acquittal of the Accused.

[13] The NPA's case against the applicant is that the affidavit (exhibit "K") did not exist on 7 November 2005 on the date on which it was purportedly created, but was typed by her on her computer on the morning of 7 July 2008 before the trial within the trial commenced. It was alleged that the applicant had also not advised Wiegand as the new prosecutor to the case that exhibit 'K" was in fact created on 7 July 2008. According to the NPA, the affidavit submitted in Court before Mr Aucamp was a fabrication.

[14] Wiegand's testimony at the arbitration proceedings was that the Accused's main objection was that the cell phone data implicating them was obtained as

[2] Discovered at the arbitration proceedings as exhibit "K"

a result of a section 205 subpoena issued in a different case number (177/9/2005) related to an armed robbery. She further testified that;

14.1 Investigations had revealed that there were three applications for section 205 subpoenas in respect of the same case number, one of which was signed by the Magistrate, Mr Claasen, but none of these subpoenas related to the criminal matter of the Accused.

14.2 At the trial within the trial on 7 July 2008, Van Deventer had submitted a copy of an affidavit ("Annexure J") which was deposed to by Wolmarans. Wiegand on the other hand had not seen a copy of that affidavit prior to it being handed in Court. Van Deventer had explained in Court that he had obtained a copy of the affidavit through Wolmarans who had assisted with the investigations.

14.3 The applicant was also called as a witness in the trial within a trial, and had testified that the relevant affidavit deposed to by Wolmarans was used in support of the section 205 subpoena in 2005, which was also the same copy presented in Court on 7 July 2008.

14.4 It had however transpired that the copy of the affidavit that was produced in Court was reproduced by the applicant, and that she had not when handing over the case to him, informed him of that fact, nor was the Magistrate or counsel for the Accused informed.

14.5 Wiegand's contention was that the applicant was dishonest when she testified in Court that the affidavit was previously available and thus misled the Court. His further contention was that the applicant was a party to the fabrication of the affidavit submitted in Court on 8 July 2008, and that she had therefore defeated the ends of justice and committed perjury.

14.6 According to Wiegand, the Accused in the copper cable theft case were acquitted because they were arrested as a result of data or cell phone information obtained before their arrest in respect of another matter, which was procedurally incorrect. It would have been proper for

the applicant to have had a new section 205 subpoena issued if there was a different case number in respect of which the cellular phone data was sought.

[15] The applicant's testimony was that;

15.1 There was no requirement for the request of a section 205 subpoena to be accompanied by an affidavit of the investigating officer, and the common practice was to approach Magistrates in an informal manner, who in certain instances had signed the summons without even reading the contents thereof or requesting a docket.

15.2 After a docket was opened in respect of the theft of Dr Mofokeng's cellular phone, she had obtained a section 205 subpoena. The relevant cellular phone data from the service providers had revealed that the cellular phone in question was used in Hillbrow in Johannesburg. In obtaining the information in question and the subpoena, she had utilised case number 177/9/2005 which related to the armed robbery of Dr Mofokeng.

15.3 Some of the data discovered implicated the Accused who were already arrested in the theft of copper cable matter, even though their case was unrelated. As far as she was concerned, it was not uncommon in certain instances, to use the same cell phone data obtained under a different case number for the purposes of another case number, as this curtailed costs. She further contended that the same cell phone data would in any event be obtained irrespective of the case numbers which had been used, especially if the data was confirmed by the cell phone service providers.

15.4 At some point after the trial within the trial was postponed, Van Deventer had showed her an affidavit deposed to by Wolmarans. Certain telephone numbers identified in the affidavit were linked to other crimes, and it was at that point that a section 205 subpoena was issued in order to investigate the other cell numbers as provided by Wolmarans. Investigations led were unable to locate the suspects in

the armed robbery matter, but had led to the discovery that some of the telephone numbers were used in the committal of copper cables theft. This had led to the arrest of one of the Accused, Mr Phakashe.

15.5 In the morning of 7 July 2008 before the trial within a trial commenced and whilst in her office, Wolmarans came with Van Deventer, and had produced an affidavit which he had deposed to in support of the section 205 subpoena in 2005. A copy of the affidavit could however not be made in time, as the photocopy machine in the office was out of order due to a lack of toner.

15.6 Since there was nowhere else she could make a copy, Van Deventer had then asked her to type and reproduce an identical affidavit and she had done so by using her computer. The produced copy was identical to the 2005 affidavit (other than the font size), and copies were printed and given to Wiegand.

15.7 The applicant contended that the evidence and the affidavit were not fabricated, and what she had done was to simply re-type the affidavit that was already in existence to be used in the criminal proceedings. Her further testimony was that the initial affidavit deposed to by Wolmarans was discovered in one other docket that was already closed after the verdict in respect of the Accused, and she did not know how that had happened.

15.8 She had confirmed under cross-examination that Van Deventer had commissioned the reproduced copy of the affidavit, which was also signed by Wolmarans, even though it was not necessary for the reproduced copy to have been signed.

[16] Van Deventer's testimony on behalf of the applicant was that;

16.1 He was the Investigating Officer in both the theft of Dr Mofokeng's cellular phone and the copper cable theft matters. He confirmed that the Accused were arrested after the section 205 subpoena was issued under the case number related to the armed robbery case. He had

been under the impression that a separate section 205 subpoena was authorised in the copper cable theft.

16.2 Wolmarans had approached him at some stage during investigations and showed him an affidavit which did not have a list with phone numbers attached to it, and informed him that the only evidence that linked the Accused to copper cable theft was the cell phone data obtained in the armed robbery case.

16.3 He confirmed having been called as a witness in the trial within a trial hearing and contended that his testimony had '*mistakes*' as he could not remember the facts correctly. He had confirmed in that trial that he did not know where the affidavit of Wolmarans was despite insisting that it existed.

16.4 He further confirmed the testimony of the applicant in regard to the reproduction of the affidavit on 7 July 2008, and further confirmed that he was the one that had asked her to re-type the affidavit which she did. Only one copy was printed by the applicant as he wanted to keep it in the docket.

16.5 The original copy according to Van Deventer was then kept by Wolmarans to give to Wiegand in Court as an exhibit. He thereafter went back to his base to affirm the reproduced affidavit.

[17] Wolmarans' testimony was that;

17.1 He was a police officer and at the time of the incidents in question, he was a Director of Combined Private Investigations (CPI). He had deposed to an affidavit in order to apply for a summons in terms of section 205. The said affidavit was typed in his private office in Germiston and he had given a copy to Van Deventer and other members of SAPS whilst he kept the original.

17.2 The affidavit according to Wolmarans was signed in Kroonstad and attached to it was a list of certain cell phone numbers he had obtained from an informer.

17.3 Before 07 July 2008, Van Deventer had called him to enquire about copies of his affidavit. He had kept the original in a duplicate docket and had brought it with him on the day of the trial within the trial. He then gave the original copy to Wiegand. The applicant had then re-typed the affidavit as they could not photocopy the original. He then went with Van Deventer to the police station to have the re-typed copy commissioned. He was not sure whether a copy in that regard was given to Wiegand by him or Van Deventer

The Arbitrator's findings:

[18] The Arbitrator in confirming the substantive fairness of the applicant's dismissal appreciated that there were two mutually destructive versions presented by the evidence of Wiegand and that of the applicant and her witnesses. This required a determination on a balance of probabilities, as to which version was the most probable. The probabilities however according to the Arbitrator were stacked against the applicant's version on the grounds that;

18.1 It was extremely improbable that on 7 July 2008 when the affidavit was reproduced, that all the photocopy machines at all the Magistrate Court's Offices would be out of order on the same day. Furthermore, there were discrepancies in Van Deventer's version in regards to how the affidavit could not be photocopied;

18.2 It was odd that Van Deventer and Wolmarans did not make copies at the police station or at the latter's offices. Wolmarans had conceded that he could have simply called his office to have his affidavit emailed to the applicant's office at the time;

18.3 Over a protracted period whilst the trial within the trial was adjourned, Wolmarans did not deem it necessary to provide the affidavit in

question or a copy thereof to Van Deventer or any of the State Prosecutors, and only did so on the morning of the hearing;

18.4 Even though the affidavit was signed at a police station according to Van Deventer, a copy in that regard did not bear a stamp other than a signature. In any event, since Van Deventer was no longer employed by SAPS at the time he could not have acted as Commissioner of Oaths, and was therefore not in a position to affirm the statement;

18.5 There were contradictions between the applicant's version, which was that the affidavit could not be found as Wolmarans had relocated offices, whilst the latter's version was that the affidavit was in his office;

18.6 The reproduced affidavit was backdated and thus suspicious. The applicant therefore had a duty to disclose that fact to the Court, and it was for the Magistrate to decide whether or not the affidavit was authentic or not;

18.7 The applicant was party to the creation of the affidavit in her office on 8 July 2008. The affidavit was not deposed to in 2005 and was only created in the course of the hearing, and she had failed to advise the Magistrate or Wiegand of that fact;

18.8 In regards to the appropriateness of the sanction, the Arbitrator stated that a State Prosecutor as an official of the Court should act with the highest degree of integrity and honesty. The misconduct committed by the applicant was serious as attested to by Mr Swanepoel on behalf of the NPA, and the latter could thus not be faulted in deciding on the sanction of dismissal.

The grounds of review:

[19] Various grounds were relied upon by the applicant in contending that the award was reviewable. She submitted that the Arbitrator committed a material irregularity by concluding that the purported 2005 affidavit did not exist, and that the 2008 affidavit was fabricated. In this regard, it was submitted on her

behalf that the Arbitrator failed to properly consider the evidence of Wiegand, who had conceded that this affidavit could have been with the relevant cell phone provider, or that it could have been in the possession of Adv. Potgieter who represented the Accused. She further contended that in any event, the 2005 affidavit was found in a skeleton docket as testified by Captain Els on her behalf.

[20] The Arbitrator according to the applicant, also failed to take into account the evidence of Wolmarans that he had deposed to the 2005 affidavit, which he had brought on 7 July 2008; the evidence of Van Deventer, that he had relied on the 2005 affidavit in seeking the subpoena, and that Wolmarans had handed him that affidavit on 7 July 2005. The applicant took issue with the fact that the NPA did not call the Magistrate who had issued the subpoena as a witness, as he would have been in a position to clarify the existence or otherwise of the 2005 affidavit.

[21] The applicant further criticised the Arbitrator's award on the basis that an evaluation of the facts and evidence was limited to her version of the circumstances under which the 2008 affidavit was reproduced and had thus disregarded the facts and evidence that pointed to the fact that the 2005 affidavit did exist.

The legal framework:

[22] The test on review is trite. An arbitration award will be assessed against the standard of reasonableness, irrespective of any defects that may be complained of in the award. As was stated in *Goldfields*, the review court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decisions he or she arrived at.[3]

[23] In *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and Others*[4] (*Stokwe*), the Constitutional Court reiterated that in

[3] *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para [16]
[4] (2019) 40 ILJ 773 (CC); 2019 (4) BCLR 506 (CC); [2019] 6 BLLR 524 (CC) at para 57 & 62

determining whether the arbitrator's award is reviewable, the substantive fairness of the applicant's dismissal is pertinent, and it is necessary to have regard to what the essence of the charges proffered against the applicant entailed. This was recently reiterated by the Labour Appeal Court in *South African Police Service v Magwaxaza and Others*[5], where it was held that the true enquiry had to be about determining, in a manner which was not unduly formalistic, whether the employee's dismissal was fair, taking into account the allegations made against the employee and the standard of conduct required of him or her.

Evaluation:

[24] The starting point as correctly pointed out by counsel for the NPA, Mr Hulley, is to examine the obligations of any Prosecutor in the performance of his or her functions. Section 32 (1)(a) of the National Prosecuting Authority Act[6] (NPA Act) sets the tone in this regard by providing that;

> 'A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law'.

[25] In accordance with the provisions of section 22(6) of the NPA Act, the National Director of Public Prosecutions[7] has formulated a Code of Conduct which is to be complied with by the prosecuting authority. Under clause C (Impartiality) of the Code of Conduct[8], Prosecutors are required to perform their duties without fear, favour or prejudice. In particular, they should *inter alia*, act with objectivity and pay due attention to the constitutional right to equality; take into account all relevant circumstances and ensure that reasonable enquiries are made about evidence, irrespective of whether these enquiries are to the advantage or disadvantage of the alleged offender; be sensitive to the needs of victims and do justice between the victim, the

[5] (PA10/2017) [2019] ZALAC 66 (5 November 2019) at para 40
[6] Act 32 of 1998
[7] In consultation with the Minister and after consultation with Deputy National Directors and Directors)
[8] Code of Conduct for Members of the National Prosecuting Author; Published by GN R1257 in GG 33907 of 29 December 2010.

accused and the community, according to the law and the dictates of fairness and equity; and to assist the courts to arrive at a just verdict and, in the event of a conviction, an appropriate sentence based on the evidence presented.

[26] Flowing from the Code and a host of other authorities[9], it is apparent that individuals within the NPA are held to high standards of integrity and care, and must be and perceived to be honest, sincere and truthful in the execution of their functions. When presenting evidence on behalf of the state, prosecutors are expected to do so with scrupulous fairness, and must not attempt to obtain a conviction by all means at their disposal. Thus, they should ensure that all relevant evidence, even if detrimental to the State's case, is placed before the court. In the end, a prosecutor is personally responsible and accountable for the presentation of his/her case in court, and must accept this responsibility by acknowledging any shortcomings[10].

[27] It is within the context of the above prescripts and expectations, that a determination has to be made as to whether the applicant's dismissal was substantively fair as found by the Arbitrator, taking into account the allegations made against her and the standard of conduct required of her. In a nutshell, if it were to be found that the evidence before the Arbitrator demonstrated that the applicant's conduct was in compliance with these prescripts, then there would be reason to interfere with the arbitration award, as it would not have fallen within the bounds of reasonableness.

[28] The Arbitrator appreciated that the applicant was fully aware of what conduct was expected of her. The essence of the charges proffered against the applicant entailed that she had committed the common law offence of perjury

[9] *Smyth v Ushewonkunze and Another* 1998 (3) (SA) 1125 (ZSC); *S v Nteeo* (2004) 1 SACR 79 (NC); *Malala Geophry Ledwaba v The State* Case No. A96/2016 (A decision of the High Court, South Gauteng Division, delivered on 8 January 2018 (Unreported) at paragraphs 54 and 56

[10] See also *Porritt and Another v National Director of Public Prosecutions and Other* [2015] 1 All SA 169 (SCA); 2015 (1) SACR 533 (SCA) at para 11, where it was held that;

> :There is a fundamental difference between the role and functions of a prosecutor as opposed to those of a magistrate or a judge. The judiciary is held to the highest standards of independence and impartiality because they are the decision-makers in an adversarial judicial system. Prosecutors neither make the final decision on whether to acquit or convict, nor on whether evidence is admissible or not. Their function is to place before a court what the prosecution considers to be credible evidence relevant to what is alleged to be a crime. Their role excludes any notion of winning or losing. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings."

in that she had made a false declaration whilst under oath in case number: SH106/2006. In simple terms, the allegation is that the applicant lied in her testimony before the Magistrate, Mr Aucamp in the trial within a trial on 7 July 2008, when she said that Wolmarans' affidavit existed at the time the section 205 subpoena was issued in 2005. Related to that charge was that the applicant had defeated or obstructed the course of justice in that she, in conjunction with other State witnesses (Wolmarans and Van Deventer) in case number 106/2006, had fabricated false evidence and/or allowed false evidence to be presented. This charge pertained to the production of the reproduced affidavit in court on 7 July 2008.

[29] Having had regard to the facts of this case as presented before the Arbitrator, and further having had regard to the allegations levelled against the applicant, the only invariable conclusion to be reached is that there is no basis to interfere with the Arbitrator's award, as the evidence clearly points to the applicant having failed on all fronts in her duties as a prosecutor, to live up to the principles embodied in the NPA's Code of Conduct.

[30] The applicant failed miserably to live to the cardinal rules as an officer of the Court, failed to assist the Court in its quest to be effective in upholding the rule of law, in dispensing justice, failed to take all reasonable steps to set the record straight and assist the Court when called upon to do so in regard to the existence of the affidavit in question, and worst of all, failed to take responsibility and accountability when the State's case against the Accused was dismissed. Through these monumental failures, the applicant disqualified herself as an officer of the Court, and clearly the Arbitrator's conclusions that her dismissal was appropriate fell within a band of reasonableness. My conclusions in this regard are further fortified by the following observations;

30.1 The events of 07 July 2008 prior to the trial within the trial before the Magistrate, Mr Aucamp are in my view dispositive of this case. It was common cause that the successful prosecution of the Accused in the copper cable theft case depended solely on the admission of the evidence in respect of the cell phone data, and that without the affidavit

supporting the section 205 subpoena in respect of that matter, the State's case would fail.

30.2 The applicant's contention that an affidavit was not necessary for the purposes of obtaining a section 205 subpoena is belied by the fact that the State's case failed simply because it could not produce an affidavit that was allegedly submitted in support of the subpoena issued in November 2005. Furthermore, if the applicant believed that an affidavit was not necessary, this raises questions about whether in fact the affidavit existed in the first place as she had alleged. This is so in that on the evidence of Wiegand, the docket in question only contained the relevant statement/summons completed and signed by the applicant as Control Prosecutor on 29 November 2005, and further signed and date stamped by Mr Claasen on 30 November 2005. Everything required of the authorisation of the subpoena was in the docket except the purported affidavit of Wolmarans.

30.3 When the trial within a trial was initially postponed as Van Deventer could not explain where the affidavit in support of the section 205 subpoena was, and why it was not in the docket, and to the extent that the applicant was aware that this affidavit was important for a successful prosecution, there appears to have been no steps taken from the date of the postponement until on the morning of the trial within the trial, to either find the original affidavit if indeed it did exist, or at most to advise Wiegand, the Court or the Accused's counsel that this affidavit did not exist. It would then have been up to the NPA to have decided on what steps to take in regards to the Accused' case in the light of the dilemma faced by the State.

30.4 The applicant's conduct however on the morning of 7 July 2008 is clearly inexcusable. She knew that herself, Wolmarans and Van Deventer were due to testify in the trial within a trial. Wolmarans together with Van Deventer then approached her with an affidavit before the trial. If indeed this was the original affidavit, the various excuses she came up with as to the reason copies could not have

been made in her office or anywhere else are ridiculous and lacking in logic. It is improbable as the Arbitrator had correctly found, that the applicant could not have found one photocopy machine that worked in the whole NPA office, the Court or anywhere else in order to make copies prior to going to Court.

30.5 What is however more worrisome is that the applicant knew that she was no longer the prosecutor in the trial within a trial and was to be a witness instead. With this knowledge, it however never occurred to her to call in Wiegand, and to advise and appraise him on what their dilemma was insofar as securing the important original affidavit.

30.6 Without even considering the consequences of their actions, the applicant together with Wolmarans and Van Deventer clearly created an affidavit that did not exist. It is said that the affidavit in question did not exist as the Arbitrator had correctly found, on the basis that if indeed it did, there was nothing that prevented the applicant from giving that original copy to Wiegand as the prosecutor in the matter prior to going to Court rather than reproducing it. If Wolmarans and Van Deventer wanted to keep a copy of that original, for whatever reason, they could have done so after the trial was finalised.

30.7 The applicant sought to wash her hands off the recreation of the alleged original affidavit on the basis that she simply did what Wolmarans and Van Deventer asked her to do by re-typing the document on her computer. As a member of the NPA and a prosecutor, common sense should have prevailed upon her that only original documents were permissible in Court unless a plausible explanation could be proffered as to the reason the original could not be produced. She was clearly an intrinsical part of the reproduction of the alleged original affidavit, and not merely a typist following orders.

30.8 Having presented a copy in Court, it is however apparent that the Magistrate was not convinced that the copy produced in Court was a legitimate copy. It did not assist applicant's case as submitted on her

behalf, that she believed that the copy given to her by Wolmarans and Van Deventer was an original, or that she did not know the reason the reproduced copy was backdated, signed and commissioned by both Wolmarans and Van Deventer.

30.9 Even if there was any element of truth in her version that she believed that the copy was an original, it is her subsequent conduct in not disclosing the fact that the affidavit was reproduced by her that makes the misconduct in question gross. The applicant is an officer of the Court. Common courtesy required of her to have informed Wiegand of the fact that a copy of the alleged original affidavit was reproduced. She instead chose to conceal the truth and let Wiegand on a wild goose chase.

30.10 The requirements of transparency and accountability also demanded that the applicant disclose the fact that the alleged original affidavit was reproduced to both the Magistrate and the Accused's counsel. She failed to do so, and instead, testified before the Court that the relevant affidavit deposed to by Wolmarans was used in support of the section 205 subpoena in 2005, which was also the same copy presented in Court on 7 July 2008. This was clearly an untruth meant to mislead the Court. Such conduct constitutes a worst form of misconduct that any officer of the Court can commit in Court for that matter. In any event, it is common knowledge that copy of anything that is reproduced and backdated cannot qualify as an original, and the Arbitrator was correct in concluding that the copy presented in Court was suspicious.

30.11 It is not even necessary to deal with Wolmarans' explanation as to the existence of the affidavit, as it is lacking in logic. If he had the original affidavit all material time, as to how it ended up in another docket as established at a later stage and as attested to by Captain Nel makes no sense at all. If for some reason as put to Wiegand, the original affidavit was in the possession of the Accused's counsel or was left with the cell phone providers, it can only imply that it was never in Wolmarans' possession at any stage.

30.12 Captain Nel for her part had not properly perused the affidavit to confirm its contents. How then could she have known that the affidavit found in another docket was the one that was not in the Accused's docket when the matter came for a trial within a trial? Furthermore, Wiegand's evidence that the original affidavit could have been in the possession of the Accused's counsel or with the relevant cell phone providers does not take the applicant's case any further, as it was mere suppositions made by Wiegand rather than statements of fact in the face of certain versions being out to her.

30.13 The contention that it was the responsibility of the NPA to call the Magistrate, Mr Claasen as a witness to clarify the existence or otherwise of the 2005 affidavit further equally misses the point and misconstrues the burden of proof. The applicant was charged with having lied amongst other things, about the existence of the original affidavit. It was not for the NPA to prove that the affidavit existed. That burden was on the applicant.

[31] In conclusion, it needs to the restated that one of the fundamental principles prosecutors are held to is to operate with transparency and accountability. Furthermore, where, as was in this case, the legality of the actions taken by prosecutors was at stake, it was crucial for the applicant to neither be coy nor to play fast and loose with the truth, and to take the Court into her confidence, and fully explain the facts and circumstances in relation to the recreated affidavit, so that an informed decision could be taken by the Magistrate in the interests of administration of justice[11]. The applicant failed miserably on this score.

[32] Her overall conduct clearly constituted lying before the Magistrate under oath and in the process, by fabricating an affidavit that did not exist together with Wolmarans and Van Deventer, she had clearly defeated and obstructed the administration of justice. Such conduct is not befitting of an officer of the Court,

[11] See *Zuma v Democratic Alliance* [2014] 4 All SA 35 (SCA) at para 35; *Kalil NO v Manguang Metro Municipality* 2014 (5) SA 123 (SCA), para 30

and clearly, it was so egregious that the ultimate sanction of a dismissal was an appropriate one as properly concluded by the Arbitrator.

[33] It has repeatedly been stated that in review proceedings, arbitration awards are not to be easily interfered with unless the decision arrived at by the arbitrator was entirely disconnected with the evidence or is unsupported by any evidence and/or involves speculation on the part of the commissioner[12]. In this case, and in the light of the conclusions reached above, there is no basis for any such interference. In line with the enquiry enunciated in *Goldfields*[13], I am satisfied that the Commissioner gave the parties a full opportunity to have their say in respect of the dispute; had correctly identified the dispute he was required to arbitrate; understood the nature of the dispute he was required to arbitrate; dealt with the substantial merits of the dispute; and arrived at a decision that falls within a band of reasonableness.

[34] Section 162 of the LRA enjoins this Court to make an award of costs upon a consideration of the requirements of law and fairness. The NPA sought a costs order, including the costs consequent upon the employment of two counsel.

[35] Given the facts and the circumstances of this case, the applicant ought to have reflected deeply on the evidence that was presented to the Arbitrator *vis-à-vis* her own and that of her witnesses. She ought to have reflected on her conduct that led to her dismissal, the consequences of that conduct on the administration of justice, and the clearly well-reasoned and unassailable arbitration award issued by the Arbitrator. Clearly she did not, and it does not assist her case to simply alleged that a costs order should not be made against her as she had fallen on hard times. It is my view that she should have reflected on the consequences of persisting with this review application. The NPA was burdened with the costs of having to oppose the applicant's ill-considered review application, and I see no reason in law and fairness, why she should not be burdened with those costs.

[36] In the premises, the following order is made;

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[12] *DRS Dietrich, Voigt & Mia v Bennet CM N.O & Others*. (2019) 40 ILJ 1506 (LAC); [2019] 8 BLLR 741 (LAC) at para [30]
[13] At para [20]

Order:

1. The Applicants' application to review and set aside the arbitration award issued by the First Respondent under case number GPBC3295/2011 is dismissed.

2. The Applicant is ordered to pay the costs of this application.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Adv W.A Van Aswegen, instructed by Du Randt & Louw Attorneys
For the Third Respondent:	Adv G. Hulley SC with Adv A Mosam, instructed by the State Attorney