



**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD IN DURBAN)**

Case no: D 597/2021
Not Reportable

In the matter between:

THABISWA TRUEMAN MBOKAZI

Applicant

and

MTUBATUBA LOCAL MUNICIPALITY

First Respondent

**COMMISSIONER K GOVENDER N.O
SOUTH AFRICAN LOCAL GOVERNMENT**

Second Respondent

BARGAINING COUNCIL

Third Respondent

Heard: 20 September 2025

Judgment delivered: 15 August 2025

JUDGMENT

WINFRED AJ

Introduction

[1] The Applicant's notice of motion, prefixed to the review application, records that he seeks an order that "the ruling published by the Second Respondent under the auspices of the Third Respondent on 22 July 2020 (case number: KPD092003) be reviewed and set aside".

[2] The said ruling, referred to above is not an award that was issued by the Second Respondent but is rather a sanction of the internal disciplinary hearing that was convened by the First Respondent, which, in these circumstances, cannot constitute the subject matter of these review proceedings.

[3] It is the Second Respondent's award or his conduct that must be the subject matter of this review application.

[4] After hearing the evidence during the arbitration proceedings, the Second Respondent issued an award specifically on the merits, dated 29th July 2021 and later, after requesting the parties to address him in writing on an appropriate sanction and on any remedies that would be fair and just, rendered a separate award on sanction, dated 15th August 2021.

[5] From a reading of the Applicant's founding affidavit, it appears that he had intended to review the Second Respondent's award as it relates to the sanction.

[6] To this end, the Applicant attached the said award, as annexure "A", to his founding affidavit and made such submissions therein that *"the commissioner erred and failed to apply himself to the facts of the matter and the evidence presented"*.

[7] However in his supplementary affidavit, the Applicant specifically states that it is the findings in relations to count one that he seeks an order to review and set aside.

[8] Although it is not expressly stated, I shall presume that the Applicant takes issue with both the Second Respondent's awards on the merits and on the sanction.

[9] It seems to me, therefore, that the Applicant also intended to proceed with an application to review the Second Respondent's award on the merits, dated 29th July 2021 wherein he found, amongst other things, that the Applicant's conduct constituted corruption and dishonesty in the workplace.

[10] Further, in respect of the arguments that were before me and from the papers, it is evident that the Applicant intended to seek an order to review and set aside both the Second Respondent's awards.

[11] Even if I am incorrect on this approach for the sake of completeness, the findings of the Second Respondent on the merits and on the sanction shall be dealt with, despite the tardiness with the Applicant's papers.

[12] The Applicant further seeks an order condoning the late filing of his supplementary affidavit in terms of Rule 7A (8) of the Labour Court Rules.

[13] The application is opposed by the First Respondent.

Condonation

[14] The Applicant seeks condonation for the late filing of his supplementary affidavit, which he submitted, was seventy four days late.

[15] As correctly pointed out by the First Respondent, the Applicant has not provided details relating to dates on which the Registrar was approached to uplift the record nor does he set out details of his financial constraints.

[16] However, I am satisfied that after the Applicant uplifted the record on 24 January 2022, he has provided some explanation for the delay (as opposed to no explanation at all) though the explanation lacks in-depth detail.

[17] Likewise, as the First Respondent's answering affidavit has also been delivered thirty one days late, there was an explanation for the delay.

[18] The court in *Academic and Professional Staff Association v Pretorius NO and Others*¹ summarized the principles for condonation which must be taken into account as follows:

“The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with time frame; (c) prospects of success or bona fide defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. It is trite law that these factors are [6] not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay”.

[19] This matter is important in so far as it relates to the background of the corruption and maleficence that existed within the municipality, and which continues to be a feature in our society.

[20] It is also important to the extent that there must be a final pronouncement on the correctness of the Second Respondent's finding that the Applicant had participated in an unlawful enterprise.

[21] This court must also consider whether or not there was an unnecessary delay in the administration of justice.

[22] In *Foster v Stewart Scott Inc*², the court commented as follows:

¹ (2008) 29 ILJ 318 (LC) at paras 17 – 18

“It is well settled that in considering applications for condonation the court has a discretion, to be exercised judicially upon a consideration of all the facts. Relevant considerations may include the degree of non-compliance with the rules, the explanation therefore, the prospects of success on appeal, the importance of a case, the respondent's interest in the finality of the judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice, but the list is not exhaustive.

These factors are not individually decisive but are interrelated and must be weighed one against the other. A slight delay and good explanation for the delay may help to compensate for prospects of success which are not strong. Conversely, very good prospects of success on appeal may compensate for an otherwise perhaps inadequate explanation and long delay. See, in general, Erasmus Superior Court Practice at 360 366A”.

[23] In applying the principles of both cases, I am satisfied that the periods of delay is not too excessive and there was some explanation for the delay as opposed to no explanation.

[24] Having regard to the importance of this case and having regard to the parties' interests in the finality of a judgment, I am of the view that condonation application by the Applicant and the First Respondent be granted for the purposes of properly considering the prospects of success.

Background

[25] The Applicant was employed by the First Respondent as an Information Technology (IT) Officer and during his tenure as an IT Officer, he applied for and was appointed to the post as a Manager in the Information and Communication Technology (ICT) department.

² (1997) 18 ILJ 367 (LAC) at para 369

[26] The minimum requirements for the post of manager, as contained in the advertisement were, amongst other things, that an incumbent must have an appropriate diploma or bachelor's degree.

[27] It was common cause that the Applicant did not satisfy the minimum requirement in that he did not have the relevant diploma or bachelor's degree when he applied for the post.

[28] Despite not meeting the minimum requirements, the Applicant was shortlisted and interviewed by the selection committee and was duly appointed by the First Respondent on 1 August 2018.

[29] The Applicant held the position of Manager: ICT until his dismissal in July 2020.

[30] During a forensic investigation by an entity known as Laltersad Incorporated ("Laltersad") it was found that there was widespread corruption and malfeasance that was rooted within the First Respondent's various departments.

[31] The Laltersad report, which was tendered as evidence during the arbitration proceedings, contained evidence of irregular appointments and irregular payments that were made to certain employees of the First Respondent.

[32] Against this background, it was discovered that the Applicant's appointment to the post of Manager: ICT was flawed, and possibly related to corruption and dishonesty.

[33] It is for this reason that the First Respondent charged the Applicant for misconduct, the charges being the following:

"Count 1 – Gross Dishonesty

That on or about July 2018 and at the Mtubatuba Local Municipality you knowingly entered into an unlawful employment agreement with the council, whilst you did not qualify for the position and did not meet the minimum

requirements for the position. This deed constituted corruption and dishonesty at your work place and the employer considers that to be an act of gross misconduct worthy of dismissal.

Count 2 – Gross Negligence

That on or about 8th July 2018 and at the Mtubatuba Local Municipality you participated in an interview for the appointment of the Manager: ICT, in which interview, you failed or neglected to disclose that one of the references in your CV was part of the panel, and further failed to ask for her recusal and prevent (a) conflict of interest. This deed constituted dishonesty (sic) at your work place and the employer considers that to be an act of misconduct worthy of dismissal.

Count 3 – Wrongful disclosure of Privileged Information

That during the month of February 2020 and at the Mtubatuba Local Municipality offices, you committed (a) crime, and also contravened clause 2.7.8 of the DPCA, in that, you obtained unapproved council minutes and wrongfully disclosed them to the union SAMWU to use against the municipality at the High Court. This deed constituted gross negligence and the employer considers that to be a serious misconduct”.

[34] During the internal disciplinary enquiry, the Applicant was found guilty of the 3 charges and dismissed.

[35] The Applicant was unhappy with his dismissal and referred the dispute to the Third Respondent for conciliation.

[36] When the conciliation failed, the dispute was referred for arbitration and came before the Second Respondent, which resulted in the awards that are the subject matter of this application.

[37] I do not intend to go into the reasons for the Second Respondent’s findings in respect of counts 2 and 3, save to state that he correctly found that the Applicant was not guilty thereof.

[38] As it relates to count 1, much of the evidence at the arbitration hearing was common cause.

[39] In this regard, the minimum requirements of the post of Manager: ICT was that an incumbent must have a matric plus a diploma or bachelor's degree in IT, with three to four years of IT work experience and optional product or system certification.

[40] It was not disputed that the Applicant did not possess a diploma or a bachelor's degree, but he possessed a certificate in IT.

[41] At the time that the Applicant applied for the post, he had enrolled for a Bachelor of Commerce Degree in IT Management at the private University, MANCOSA.

[42] The Applicant, despite not having the minimum academic requirements, which other candidates had, was appointed as Manager: ICT and enjoyed an increased salary together with a car allowance until he was dismissed in July 2020.

[43] The Applicant's case before the Second Respondent was that he was not dishonest, had not engaged in corruption but simply took a chance in applying for the post despite the fact that he did not possess the required academic qualifications.

[44] It was the Applicant's contention that he did not deceive the selection panels, as he had fully disclosed, in his CV, that he did not possess a diploma or a bachelor's degree when he applied for the post.

[45] The Applicant reasoned that nothing in the advertisement stated that a person should not apply for the position if he/she failed to meet the minimum requirements and nothing forbade him from taking a chance to apply for the post.

[46] The First Respondent's case was that the Applicant was guilty of misconduct in that he applied for the post despite being fully aware that he did not meet the

minimum requirements and in keeping with the Lalpersad findings, the Applicant's appointment was not above board.

[47] It was suggested by the First Respondent's witness Mr T V Mkhize, the Senior Manager: Corporate Services, that the Applicant was one of a number of employees who were identified during the Lalpersad investigation to have been improperly appointed.

[48] Mr S Ngcobo, the Labour Relations Specialist for the First Respondent, testified that consequent to the investigation, other employees who had been irregularly appointed had been dismissed and that there was a pattern of appointing persons to senior positions who were not qualified.

[49] Mr Ngcobo suggested that there may have been collusion between members of selection panels and the candidates who applied for posts, which ultimately resulted in unlawful appointments.

[50] The Applicant however argued that he did not misrepresent his qualifications and had made it abundantly clear to the selection panels that he did not possess the minimum requirements, in that he did not have a diploma or bachelor's degree.

[51] If anything, the Applicant argued, he should not have been charged for gross dishonesty but rather that the First Respondent should have approached the court to set aside his appointment, as no dishonesty could be attributed to him.

[52] If members of the selection panels had committed any wrongdoing, by for example, not following policy in appointing him, the Applicant suggested that he had not done anything untoward to warrant his dismissal and that blame must be placed at the door of those panels.

[53] At the very least, in these circumstances, it was argued on the Applicant's behalf that he should rather have been demoted.

The grounds for review

[54] In his founding affidavit, the Applicant suggested that he had openly disclosed not meeting the minimum requirements and that he was, at the time, still pursuing a relevant bachelor's degree, which he contended, was a demonstration of an absence of dishonesty and that his appointment was not a decision of his own making, but rather the outcome of his performance in the interview and the related documents attached to his CV.

[55] In this regard, the Applicant suggested that the Second Respondent had failed to apply his mind to the facts as it related the selection process and in particular did not have due regard that it was the First Respondent that short-listed and appointed him, yet the Second Respondent found him to be dishonest when was no evidence that suggested that he had a hand in his appointment, particularly in circumstances where he had never deceived the First Respondent and there being no evidence to suggest that he had bribed panellists to appoint him to his post.

[56] The Applicant stated that no blame could have been apportioned to him regarding his appointment, suggesting that he did nothing untoward to influence his appointment.

[57] The Applicant further submitted that the Second Respondent did not make any finding on how he committed a fraud or an offence and in making such adverse findings against him without any proof of the allegations constituted an error on the part of the Second Respondent.

[58] The Applicant, in his supplementary affidavit, also suggested that the sanction ought to have been short of dismissal and that in these circumstances another commissioner in the same position would have arrived at a different decision.

[59] The Applicant further stated that several other employees were disciplined and dismissed by the First Respondent for reasons similar to the misconduct that he was charged for but have been reinstated.

[60] Accordingly, the Applicant was of the view that the Second Respondent committed a misconduct of a gross nature that led to an unreasonable decision as his findings were divorced from the evidence that was before him.

[61] The First Respondent however, contended that by his own admission the Applicant did not qualify for the position but applied for the position, attended interviews, was appointed and occupied the position for a period of approximately 22 months earning in excess of R 30 000-00 per month from a salary that was previously R 10 000-00 per month.

[62] According to the First Respondent it was reasonable to infer that there was corruption that resulted in the Applicant's appointment if one has regard to the Lalpersad report.

[63] The First Respondent argued that the advertisement had invited suitably qualified person(s) to apply and that despite not being suitably qualified, the Applicant applied for the position, when in the first instance, he ought not to have even been shortlisted.

[64] The only reason that he was eventually appointed could only be linked to the findings of the Lalpersad investigation, so it was argued by the First Respondent's representative.

[65] The First Respondent argued that the Second Respondent made his findings that the Applicant had been dishonest and had colluded with the selection panels by drawing an inference from the facts of the case, which was the only reasonable inference that could have been drawn from the objective facts.

[66] The First Respondent therefore argued that the Second Respondent's award was an award that any reasonable arbitrator would have made, based on the objective facts that was before him.

Evaluation of the submissions

[67] The established test to be used in reviewing awards made by commissioners is set out in *Sidumo and Others v Rustenburg Platinum Mines Ltd and Others*³.

[68] According to the Constitutional Court in the above case, the question to be asked is whether the decision reached by the arbitrator was one that a reasonable decision maker could not reach.

[69] In this case, the question is how one could possibly determine whether a reasonable decision maker would not have reached a decision that the Second Respondent had made?

[70] Broadly put, the Applicant suggests that the Second Respondent failed to apply himself to the facts and made adverse findings against him without any proof of the allegations.

[71] In *Herholdt v Nedbank Ltd*⁴, the court expanded on the review test set out in *Sidumo* and stated that the reviewing court must determine whether the outcome reached by the commissioner is not one that is reasonably reached on the evidence and other material that was before him.

[72] The court must consider the reasons provided by the commissioner for reaching his decision.

[73] In the event that the court finds that the reasons, as provided by the commissioner, to be erroneous and do not assist the court in determining whether the decision reached is one a reasonable decision would reach, then the court would still consider whether apart from those reasons, the decision is one that could be reasonably reached having regard to the issues and the evidence.

[74] The effect of the above, is that even if the reasons given by a commissioner is clearly wrong and there has been some irregularity, such a decision may not be necessarily set aside if the outcome was a reasonable one.

³ [2007] 12 BLLR 1097 (CC)

⁴ (2013) 34 ILJ 2795 (SCA)

[75] In determining whether the Second Respondent's award is reasonable, or whether there are grounds of review, the court must ascertain whether the Second Respondent considered the principal issue before him, evaluated the evidence and came to a conclusion that was reasonable to justify his decision⁵.

[76] In applying the test for review to this case, I understand the Applicant's case to be primarily that the Second Respondent failed to give due consideration that he was not dishonest and made full disclosure in his CV.

[77] Despite no direct evidence that the Applicant had colluded or bribed the selection or interview panel, the Second Respondent made adverse findings against the Applicant which constituted an error, as the argument goes.

[78] Essentially, the complaint appears to be related to the inferential reasoning of the Second Respondent, from the facts that was before him, which the Applicant contends was flawed.

[79] Having found the Applicant not guilty of counts 2 and 3, for which there is no cross review, the focus of this application is on count 1.

[80] Count 1 relates to the allegation of corruption and dishonesty in the workplace which the First Respondent considered to be an act of gross misconduct worthy of dismissal.

[81] In applying the principles as set out in the relevant case law aforementioned, the enquiry is whether in the absence of direct evidence, the Applicant had committed the misconduct by when he "knowingly entered into an unlawful employment agreement with the council" knowing full well that he did not qualify with position in that he did not meet the minimum requirements.

⁵ Gold Fields Mining South Africa (Pty) Ltd v CCMA and Others (2014) 35 ILJ (LAC)

[82] On the facts that was before him, I must identify a defect in the conduct of the proceedings that amounted to gross irregularity as contemplated by Section 145(2)(a)(ii) of the LRA if the award is to be set aside or I must find that the Second Respondent arrived at an unreasonable result.

[83] Much of the facts before the Second Respondent were common cause.

[84] The Applicant did not possess a diploma or a bachelor's degree in IT.

[85] The Applicant made full disclosure in his CV that he did indeed not possess such minimum academic qualifications.

[86] Despite not possessing these academic qualifications as a minimum requirement, the Applicant was shortlisted, appointed to the post and enjoyed an increased salary together with a car allowance from the date of his appointment on 1 August 2018 until his dismissal in July 2020.

[87] On the face of it, it appears that the Applicant was not dishonest if it is accepted that he made full disclosure of his lack of the minimum qualifications, without having regard to the wider issues.

[88] The Applicant's case was that he had not made any misrepresentations to the selection panels and simply took a chance to apply for the position.

[89] It was odd that the Applicant, had applied for the position with full knowledge that there were other person(s) who like him, would have desired to have applied for the position but did not do so because they did not meet the requirements as set out in the advertisement.

[90] An employer is always permitted to set an educational standard which it believes to be reasonable for the requirements of a post.

[91] In this case, the First Respondent would have properly evaluated the requirements of the post and set appropriate selection criteria to ensure that it meets the objectives its policies.

[92] The objective of the policy would have been to ensure that the candidate who best meets the selection criteria is eventually appointed.

[93] Despite his disclosure in his CV, the Applicant, based on the requirements of the post, was not the best candidate to be appointed.

[94] The evidence before the Second Respondent was that there were other candidates who qualified for the position, having met the minimum academic requirements, but were not selected.

[95] In *KwaDukuza Municipality v Rajamoney and Others*⁶ the Labour Court held that:

“for the requirements of an advertised post to be met therefore, cognisance must be taken of the objective of the policy to ensure that the candidate who best meets the selection criteria is appointed. The short listing of a candidate who least meets the set selection criteria will ordinarily fly on the clear face of the objective of the policy. Such short listing would then be arbitrary as contrary to the selection criteria. The applicant set out requirements to be met for the contested post. The fairness of the selection process lay in the screening of all candidates against the set requirements in a similar approach. It has to be borne in mind that there would be people who desired to apply for the contested post but did not submit their applications merely because they did not meet the set requirements. It would also be unfair to set all candidates who met all requirements against any candidates who lack any of the requirements”.

⁶ (D880/10) [2013] ZALCD 17 (13 June 2013) at para 15

[96] Having regard to the above, it was not unreasonable for the First Respondent to have reasonable belief that something was amiss regarding the shortlisting and the appointment of the Applicant especially after Lalpersad found evidence of wide scale corruption and maleficence in the appointments of many other employees.

[97] There existed a reasonable apprehension that the Applicant was also part of the corruption having regard to the findings of Lalpersad who specifically found that the Applicant's appointment was unlawful.

[98] On the face of it, the Applicant's appointment to the position falls to be set aside if the principles set out in *KwaDukuza* (supra) are applied because, in the first instance, the selection panel could not, on its own, amend the requirements for the advertised post to ensure that the Applicant was shortlisted in circumstances where he did not meet the prescribed academic requirements.

[99] It therefore follows that the selection panel had acted unlawfully and without authority in ignoring the requirements for the advertised position when they shortlisted the Applicant, if regard is had to Clause C.1.1 of the Public Service Regulations.

[100] The question that arises is why would a reasonable selection panel and the Municipal Manager act unlawfully and without authority in these circumstances?

[101] The Applicants argument that nothing in the advertisement precluded a person who failed to meet the minimum requirements from applying, suggests that any person(s) from any level of employment may apply for a position that they are not suitably qualified for.

[102] This could not have been the intention of an employer, as the act of setting down specific minimum requirements also constitutes a shortlisting process.

[103] The Applicant, as a senior employee would have known, in no uncertain terms that there were other suitably qualified individuals who were more qualified would have applied.

[104] It would have been unreasonable for him to have the belief that he stood a chance at the position.

[105] The Second Respondent was unpersuaded by the argument as he found that the advertisement was unambiguous with the first line inviting

“committed suitably qualified, experienced, innovative individuals to apply for the following positions”.

[106] The Second Respondent further stated in his award:

“It is clear that the advert by inviting suitably qualified persons to apply was by necessary implication only inviting those who met the minimum requirement to apply. The applicant quite clearly was not a suitably qualified person and that was obvious not just to himself but ought to have been obvious to the shortlisting committee, interviewing panel and to then municipal manager (MM)”.

[107] The Applicant could not have relied on Section 20(3) of the Employment Equity Act 55 of 1998 on the basis of his prior learning, relevant experience and capacity to acquire the ability to do the job because as correctly pointed out by the Second Respondent Section 20(3) of the Act was not relevant because after a proper assessment (that being an evaluation of the post) a diploma or bachelor's degree was a bare essential of appointment.

[108] In any event, the advertisement did not set out any criteria based on Section 20(3) of the Act.

[109] It is therefore clear, as pointed out by the Second Respondent, that the selection committee unlawfully favoured the Applicant.

[110] The Second Respondent reasoned that:

“It is also a matter of concern that then municipal manager (MM) sanctioned the appointment. Thus a shortlisting panel, interviewing panel and the MM on different occasions all agreed on the appointment of the applicant and proceeded to appoint the applicant even though he was patently unqualified for post. All of them did this knowing that he was not qualified or at the very least ought to have known that he was not qualified if a modicum diligence was exercised. The fact that the applicant’s candidature was endorsed on at least 3 occasions is adequate proof that the decision to appoint the applicant was not an inadvertent error. These were conscious and deliberate decisions to appoint a patently unqualified person to the post”.

[111] The Second Respondent reasoned that it was difficult to see on what basis the Applicant’s appointment could have been sanctioned if the accounting officer had performed his duties as required by law.

[112] The reasonable inference that could be drawn was that something was amiss and that despite the Applicant not having middle managerial experience to supervise subordinates or him possessing any major skill or capacity, there was nothing to justify his appointment.

[113] It is shocking that the shortlisting panel, the interviewing panel and the municipal manager (MM) could have made a conscious and deliberate decision to appoint the Applicant knowing that he was patently unqualified especially in light of other available candidates who were more than qualified than the Applicant.

[114] The Applicant seemed to have accepted that his appointment was indeed unlawful, but in his view it was not at his doing.

[115] To this end, the Applicant suggested that it was not his fault that he was appointed and accordingly suggested that the First Respondent had acted unfairly by dismissing him, but should rather have demoted him.

[116] The Applicant suggested that his hands were clean as there was no direct evidence that he bribed the selection and interviewing panels.

[117] I am of the view that the selection committee, interviewing panel and the municipal manager (MM) had knowingly conducted themselves unlawfully and based on the Lalpersad report, which was not contested, the only reasonable inference to be drawn is that there was some element of unsuitable collusion.

[118] I therefore agree with the Second Respondent when he found that, on a balance of probability, based on the evidence, the selection committee, interviewing panel and the municipal manager (MM) did not act lawfully and honestly when they appointed the Applicant.

[119] In assessing the Applicant's case that was before him, the Second Respondent questioned whether the Applicant was part and parcel of the unlawful enterprise.

[120] The findings of the Lalpersad investigation, largely, were that there was evidence of corruption, which was linked to unlawful appointments.

[121] The Second Respondent correctly found that the shortlisting and interviewing panels did not discharge their duties lawfully.

[122] The Second Respondent linked the unlawful conduct of the municipal manager (MM) and the shortlisting and interviewing panels to that of the Applicant's appointment, and found no rational or legitimate basis to appoint the Applicant to the post, based on an inference that he made.

[123] The Second Respondent reasoned that had there been a rational or legitimate basis for the appointment, the Applicant might have been able to argue that he was justifiably appointed.

[124] However, in this case, there was no legitimate basis for the Applicant to have been appointed to the post.

[125] In attempting to exclude all other reasonable inferences, the Second Respondent found it improbable that the panels and the municipal manager (MM) would act unlawfully and dishonestly in appointing the Applicant, with a significant salary increase without him being included in the process.

[126] The Second Respondent found it unreasonable that the Applicant had been bestowed with such increase in salary and benefits without him being aware of the unlawfulness of his appointment.

[127] Much of the findings of the Second Respondent was based on his inferential reasoning and crucial to this review application is whether the inferential reasoning, from the substantial evidence, had led the Second Respondent to finding that the Applicant's appointment was linked to the unlawful enterprise that Lalpersad uncovered.

[128] The general rule regarding the drawing of inferences is that the inference that is sought to be drawn must be consistent with all the proved facts; if it is not, then the inference cannot be drawn⁷.

[129] In *SA Post Office v Delacy and Another*⁸ it was said that:

"The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be "consistent with all the proved facts. If it is not, then the inference cannot be drawn" and it must be the "more natural or plausible, conclusion from among several conceivable ones" when measured against the probabilities".

[130] It has also been stated that, where one or more inferences are possible, a court must satisfy itself that the inference sought to be drawn is the most plausible or probable, even if that conclusion may not be the only one⁹.

⁷ SA Post Office v Delacy and Another 2009 (5) SA 255 (SCA) at para 35

⁸ SA Post Office v Delacy and Another at para 35

⁹ AA Onderlinge Assuransie-Associaasie Bpk v De Beer 1982 (2) SA 603 (A)

[131] If there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture¹⁰.

[132] If there are facts that permit more than one inference, then in that event the Second Respondent was enjoined to select the most plausible inference¹¹.

[133] Plausible in this context means acceptable, credible, and suitable¹².

[134] The Second Respondent correctly referred to the approach in *National Union of Mineworkers and Another v CCMA and Others*¹³ where the legal principles were summarised as follows:

“[16] In criminal cases the approach to be adopted in dealing with circumstantial evidence was formulated by Watermeyer JA R v Blom 1939 AD 288 at 302-3 as follows:

(a) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

(b) The true facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct”.

[135] An inference must therefore be distinguished from conjecture or speculation and any inference must be based on objective facts, from which to infer the other facts which it is sought to establish¹⁴.

[136] It is evident that the Second Respondent based his findings to a great extent on inferences that he made, based on the facts that were before him.

¹⁰ S v Essack & Another 1974 (1) SA 1 (A) at 16C-E

¹¹ Cooper and Another NNO v Merchant Trade Finance Ltd 2000 (3) SA 1009 (SCA)

¹² Ocean Accident and Guarantee Corporation Ltd v Koch 1963 (4) SA 147 (A) at 159B – D

¹³ JR 1439/06

¹⁴ AA Onderlinge Assuransie-Associaasie Bpk v De Beer (supra)

[137] The Applicant takes exception to the Second Respondent's award in that, amongst other things, he contends that despite being charged for gross dishonesty, he had never deceived the First Respondent and that "he did not appoint himself nor did he misrepresent his qualifications, nor did he bribe the panellists", which are issues that the Second Respondent did not consider, and although he recognized these common cause facts, it was argued that he divorced himself from the evidence that was before him which constituted a misconduct of a gross nature.

[138] The undisputed facts were that the Applicant did not meet the minimum criteria to have applied for the post and that there were other individuals who had met such requirements who were highly qualified candidates who were not interviewed.

[139] The Lalpersad report found that the Applicant's appointment was indeed unlawful.

[140] The Lalpersad report also found large scale corruption which related to unlawful appointments of others.

[141] Three different agencies, that is the selection committee, interview panel and the municipal manager (MM) each independently endorsed the Applicant's appointment.

[142] Against this background, the Second Respondent found that it was obvious to the Applicant and the panels that selected him that he was not a suitable candidate.

[143] The Second Respondent found that the Applicant's repeated contention that he had been taking a chance was unpersuasive and that more persuasive that the inference that the Applicant was in cahoots with members of the various committees.

[144] It is not a reasonable proposition for the Applicant to be appointed to a senior position, with him being so underqualified and with others being significantly competent and better qualified for them to be excluded from the shortlisting process.

[145] Why would a candidate with no academic qualification be included at the shortlisting process and a suitably qualified person be excluded therefrom?

[146] Against the background of the Lalpersad investigation and the findings therefrom, the only inference that can be drawn from the objectively proven facts was that something was amiss, which implied corruption.

[147] I agree with the Second Respondent that if other suitably qualified candidates were excluded, the only reasonable inference was that there was a concerted effort to appoint the Applicant to the exclusion of others.

[148] It is unlikely that the panels and the municipal manager (MM) would have made such an effort to appoint the Applicant without him having knowledge of their true intentions.

[149] There was nothing to suggest that the Applicant despite, not having the minimum qualifications, stood head and shoulders over the other candidates to warrant his argument that even if he did not possess the minimum qualifications, he was the suitable person for the appointment.

[150] It seems to me that after being shortlisted, the interview panel and the municipal manager ought to have acted as a safety net to have recognized that the Applicant did not qualify to be interviewed, yet alone be appointed.

[151] Equally so, the municipal manager (MM) also seemed to have overlooked the Applicant's lack of academic qualifications, which could only point in one direction, that all and sundry who were involved in the Applicant's appointment had participated in what the Second Respondent referred to as a "wrongful enterprise".

[152] There is only one inference that can be drawn from the objective facts as it relates to the Applicant's appointment, that being he had knowingly and wilfully participated in "this wrongful enterprise" and had acted grossly dishonestly in entering into the employment contract with the First Respondent.

[153] In this instance, the dishonesty on the part of the Applicant involves deception.

[154] Employers place a premium on honesty because any conduct involving impropriety by employees damages the trust relationship on which the employment contract is founded¹⁵.

[155] In this case, the Applicant was at pains to state that he had been candid and honest in disclosing that he did not possess the minimum education qualification and for this reason he was honest.

[156] The issue however goes much deeper if one considers the Lalpersad report as it constantly raises the question as to why would the Applicant, being so underqualified, apply to be appointed and surprisingly gets appointed when there are other more suitably qualified candidates who have been excluded.

[157] It can only point in the direction that the Applicant being in cahoots with the panels and the municipal manager (MM) and as such, he displayed a willingness to cheat and act fraudulently with those who sought to appoint him.

[158] I therefore cannot accept that the Applicant had acted with an honest intention against the background of him being accepted by two panels and the municipal manager (MM) despite being so underqualified.

[159] I am satisfied that the Applicant acted with the intent to deceive.

[160] In the circumstances, the trust relationship has been eroded beyond repair.

[161] I therefore agree with the Second Respondent that demotion as a sanction, in these circumstances, cannot be an option because the employment relationship has broken down.

¹⁵ Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry & Others 2003 (3) BLLR 241 (LC) at para 42

[162] The Applicant also raised the issue that the First Respondent, in dismissing him did not apply the sanction consistently in that other employees who also participated in a similar misconduct were not dismissed.

[163] It was not in dispute that one Ms Mdletshe had applied for and was appointed to the post of Manager: Administration and Secretariat in July 2018.

[164] It was a minimum requirement that a candidate must possess a diploma or a bachelor's degree for the post, and it was common cause, that at the time she applied for the post, Ms Mdletshe did not possess these qualifications.

[165] Ms Mdletshe was not disciplined but in April 2020, she was served with a notice of intention to terminate her contract but was offered an opportunity to make submissions to the First Respondent on reasons why she should not be terminated.

[166] The Applicant was also given the opportunity to make such representations after being served with such notice but unlike Ms Mdletshe, he was disciplined and dismissed.

[167] Similarly, one Mr G M Mkhwanazi, the manager of youth affairs was also appointed to a post that required post grade 12 qualifications in public administration as a minimum requirement, which he did not possess.

[168] Mr Mkhwanazi was not disciplined.

[169] The Second Respondent was of the view that the circumstances that related to Ms Mdletshe not being disciplined related to the content of her representations that she had made to the First Respondent setting out reasons why her employment should not be terminated.

[170] Ms Mdletshe indicated that at the time that she was being interviewed, she was in the process of completing her University degree and that she also had a certificate in office administration with eight years' experience in local government.

[171] Ms Mdletshe has since completed her degree.

[172] The Second Respondent reasoned that the First Respondent had indeed contemplated terminating her employment as it also did against the Applicant.

[173] Both submitted representations and the First Respondent had more compelling reasons for not instituting disciplinary proceedings against Ms Mdletshe as opposed to that of the Applicant.

[174] At the time when they were requested to make representations, the Applicant had not yet met the minimum requirements whereas Ms Mdletshe did.

[175] It is for this reason that the Second Respondent found that Ms Mdletshe and the Applicant's situations were very different.

[176] The Second Respondent was unable to assess whether Mr Mkhwanazi's case was similar to that of the Applicant as insufficient details were placed before him for him to have made a finding of inconsistency in applying the penalty of dismissal.

[177] Item 3(6) of the Code of Practice Dismissal¹⁶ (Code) outlines that the employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past and consistently as between two or more employees who participate in the misconduct under consideration.

[178] The Second Respondent referred to this issue as the parity principle which is a basic principle of fairness that requires that similar matters should be treated alike.

[179] In this case, the Second Respondent was required to assess if the penalty of dismissal was applied consistently as between two or more employees who committed the same misconduct.

¹⁶ Schedule 8 of the LRA

[180] If it is found that an employer had differentiated between employees who had committed similar misconduct on the basis of differences in personal circumstances, the severity of the misconduct or on the basis of other material factors, then it cannot be said that consistency was not applied by the employer.

[181] Furthermore, it has been held by the Labour Appeal Court (LAC) that an employee cannot profit from an employer's wrong decision in the name of the inconsistency.

[182] In *SA Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd*¹⁷, the Labour Appeal Court commented that the principle of parity includes

“The best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. ... [A] wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy”.

[183] The parity principle was not intended to force an employer to apply the same sanction to employees with different personal circumstances just because they committed the same misconduct¹⁸.

[184] The Second Respondent considered the personal circumstances of Ms Mdletshe and her commitment to achieving a university degree as being different to that of the Applicant who, in these circumstances, did not achieve such qualification during the time period of his appointment until he was charged.

¹⁷ [1999] ZALAC 17; (1999) 20 ILJ 2302 (LAC) at para 29

¹⁸ *NUM and Another v Amcoal Colliery t/a Arnot Colliery and Another* [2000] 8 BLLR 869 (LAC) para 19

[185] Further, the Second Respondent concluded that there was a large number of persons implicated in the wrongdoing and that Mkhwanazi not being disciplined was possibly because the process of disciplining implicated employees was an ongoing process and that not everyone could be disciplined in one fell swoop.

[186] The Second Respondent therefore had regard for these differences and circumstances in applying the parity principle.

[187] In any event, the Applicant's misconduct, on its own merit, was serious enough to warrant dismissal and the parity principle could not have been the only factor to have determined whether the dismissal was fair or unfair.

[188] I can find nothing in the Second Respondent's assessment of the facts as it related to the parity principle, to be reviewable.

[189] In conclusion, I am satisfied that the Second Respondent understood the nature of the enquiry that was before him and had correctly evaluated the evidentiary material which resulted in a conclusion that any reasonable decision maker could have made.

Noel Gonasagaran Winfred

Acting Judge of the Labour Court of South Africa

APPEARANCES:

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For the First Respondent: Advocate W S Kuboni instructed by Zuma and Partners Incorporated