



**GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL**



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IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL

HELD AT

Nr 473 STEVE BIKO ROAD ARCADIA, PRETORIA

Commissioner : Adv. Itumeleng Kgatla

Case No : GPBC49/2023

Date of Award : 16 November 2023

PSA obo SAMUEL MOFOKENG

(Union/Applicant)

And

DEPARTMENT OF FORESTRY, FISHERIES AND ENVIRONMENT

(Respondent)

Applicant's representative : Mr. Archie Sigudla (PSA)

Respondent's representative : Adv.M.C Mabunda (State Attorney, Pretoria)

ARBITRATION AWARD

PARTICULARS OF THE PROCEEDINGS AND REPRESENTATION:

- [1] The above-mentioned matter was referred to **GPSSBC** for arbitration in terms of Section 186(2) (b) of the Labour Relations Act 66 of 1996 (LRA), as amended. The arbitration proceedings into the matter were held over several days at Nr 473 Steve Biko Road, Arcadia, Pretoria. The arbitration proceedings into the matter were concluded on the 10th of October 2023.
- [2] Closing arguments from both the Applicant and the Respondent were received on the 18th and the 23rd of October 2023 respectively.
- [3] The Applicant appeared and was represented by **Mr Archie Sigudla**, a union official from the Public Servants Association (**PSA**). The Respondent appeared and was represented by **Advocate M.C Mabunda** on brief from the State Attorney (Pretoria).
- [4] The proceedings were conducted in English without the need of a language interpreter. Digital and manual recordings were made during the process. Both parties were afforded the opportunity to present *viva voce* evidence under oath, in chief and in re-examination and to cross examine opposing testimonies. Written closing arguments were presented and considered.
- [5] In terms of Section 138(7) of the LRA, the Commissioner is required to issue a signed arbitration award with brief reasons. It is for this reasons that only salient points will be referred to in this award even though all evidence and submissions were considered.

POINT IN LIMINE

- [6] *None*

ISSUES TO BE DECIDED:

- [7] I am firstly required to decide whether or not the Respondent's decision terminate its employment relationship with the Applicant following a disciplinary hearing is substantively and procedurally fair.
- [8] Should I find that the dismissal was unfair, I must determine an appropriate remedy in terms of Section 193 (1) of the LRA.

COMMON CAUSE ISSUES

- [9] The Applicant was employed by the Respondent to the position of Assistant Director: Supply Chain Management at a monthly gross salary of **R48 951, 57**. The Applicant was dismissed following the outcomes of a disciplinary hearing.

ISSUES IN DISPUTE

- [10] The Applicant contends that his dismissal was unfair on both substance and procedure. The Respondent contends that the converse is true.
- [11] In terms of the relief sought, the Applicant is praying for retrospective reinstatement. The Respondent has recorded its prayer that the Applicant's application be dismissed.

SUMMARY OF EVIDENCE AND ARGUMENT

RESPONDENT'S EVIDENCE

- [12] **Mr. Mashele Khazamula Moolman** was sworn in and testified as the first witness in support of the Respondent's case and his evidence can be summarized as follows:
- [13] He testified that he was the Chairperson of the disciplinary hearing on the matter involving the Applicant, and that he presided on the matter on two occasions, being the 2nd March and the 19th of March 2021.
- [14] He testified that the Applicant was charged with three counts, two of which were withdrawn and thereafter, the Applicant pleaded guilty on the one remaining charge, which guilty plea made it possible for the matter to be finalized expeditiously on the 19th of March 2021.
- [15] He testified that the Applicant was charged with the following:
- Allegation 1:
"It is alleged that you falsified by fabricating and or presenting a BSC attendance register for bid E1423, dated 10 October 2017 for a BSC meeting that did not take place. This included photocopying signatures onto the purported BSC minutes from another document. In so doing you breached your duties as an employee, including the duty to at honestly, fidelity and integrity"
- [16] He testified that the parties were granted an opportunity to present mitigating and aggravating circumstances on the 26th of March 2021 and then he issued a sanction of dismissal signed on the 1st of April 2021 and emailed it on the 8th of April 2021
- [17] He testified that he exceeded the five (5) days on which the sanction of the disciplinary hearing should be submitted but is of the view that the delay is not substantial and does not cause any procedural defect of prejudice to the Applicant or any party.
- [18] He testified that he is currently employed by the Department of Agriculture in the Limpopo Province, and that, at the time of the Applicant's disciplinary hearing, he was employed by the Respondent to the position of Director: Labour Relations. He testified further that he is currently occupying the position: Labour Relations and Special Projects.
- [19] He testified that he has in the past presided over other disciplinary hearings prior to that of the Applicant, and that such hearing were conducted in line with Resolution 1 of 2003 of the PSCBC.
- [20] He testified that the proceedings are deemed to be concluded after the submission of the aggravating and mitigating factors, which in this case, was the 26th of March 2021, and that the five days ought to have begun on the 29th of March 2023, even though he ought to have submitted the sanction on the 3rd of April 2021.
- [21] He testified that the employee of the Department remains as such pending the submission of the sanction following the outcomes of the disciplinary hearing, and therefore, the Applicant was, in his view, not in any way prejudiced by the delayed communication of the sanction save the anxiety that he might have suffered owing to the uncertainty.

- [22] He testified that the Applicant was on precautionary suspension but he is not aware whether or not such a suspension was uplifted following the noting and lodging of an appeal by the Applicant.
- [23] He testified that the suspension was in effect until such time that the outcomes of the disciplinary hearing was communicated and that he is not aware as to what happened to the Applicant post communication of the sanction of the disciplinary hearing.
- [24] He testified that the Applicant has submitted as a mitigating factor that his conduct was not self-serving in that he did not derive any benefit from his conduct and in fact his actions were done to save the Respondent from potential audit query.
- [25] **Mr Witness-Lesley Moeketsi Motsepe** was sworn in and testified as the second witness in support of the Respondent's case and his evidence can be summarized as follows:
- [26] He is employed by the Respondent to the position of Deputy Director :Labour Relations ,and was involved in the matter including the appointment of the Chairperson, the initiator (Mr. Victor Mabitlela from the sister Department), giving support to the initiator and basically managing the process.
- [27] He was also involved with the Office of the State Attorney when the matter was being dealt with at the level of the appeal, liaised with the Office of the Minister for the finalization of the appeal and communication of same to the Appellant, in this case the Applicant.
- [28] The Chairperson was selected from the list and data base from the DPSA and his role is to check on the availability of the person to assist with the disciplinary hearing and that such is subject to the approval of the Director General and the same process is followed with the appointment of the initiator.
- [29] The appeal in this case was dealt with by the relevant Minister directly as such powers were not delegated to any official by then Minister. The outcomes of the appeal were communicated to the Applicant.
- [30] The sanctions of the disciplinary hearing are generally not implemented as same is to be suspended by the noting and lodging of the appeal by the Applicant. He is not sure as to whether or not the sanction against the Applicant was implemented in *tofo* but he is sure that his salary was not stopped, he continued to receive his salary.
- [31] The document on page 24 of bundle "A" speaks to the notice of appeal by the Applicant dated the 14th of April 2021.
- [32] A memo was written to the Office of the Minister on the 21st of February 2021 to indicate the number of appeals that the Respondent was receiving, and a response was received on the 22nd of February 2021 to the effect that the Minister has not delegated any appeal powers pending the sourcing of a legal opinion from legal experts, to be sourced through procurement or supply chain processes.
- [33] He testified that in 2019, the appeal authority was cascaded down to the Office of the Chief Operations Officer (COO) but same was restored back to the Office of the Minister from the year 2020.
- [34] The purpose of the supply chain process and the state attorney office was to advice the Minister on the substantive issues involved in the appeals themselves, a determination on facts and the law.

- [35] On the 14th of November 2022, they received a memo from Ms. Cindy Cronje (State Attorney) about the outcomes of various appeals including that of the Applicant. The memo was in the form of recommendations on substance to the Minister for her to apply her mind on the appeal outcomes.
- [36] The Applicant's appeal outcomes were then communicated to him on the 14th of December 2022.
- [37] He testified that he has been employed by the Public Service since 2006 and with the Respondent since 2012.
- [38] He testified that he is not sure if there was evidence led by the employer during the disciplinary process but he is sure that the Applicant pleaded guilty to one charge following the withdrawal of other charges as he was in and out of the hearing room from time to time. He submitted further that, ordinarily the employer would not lead any evidence in the case where the employee has pleaded guilty.
- [39] He testified that it is not his duty to advise line managers of employees on how to react to the sanction of the disciplinary hearing. It is incumbent on the employee to take steps in the circumstances; all correspondences are directed to the employee personally.
- [40] He testified that the Applicant was on precautionary suspension if his memory serves him well.
- [41] The Applicant's suspension was extended by the chairperson of the disciplinary hearing but he is not sure at what stage such was done, but it was on the 8th of December 2020.
- [42] He is of the view that the Applicant has not suffered any prejudice on the basis that he continued to receive remuneration and continued to work; essentially, his terms and conditions of service were not tampered with.
- [43] The fact that the Applicant could not apply for the Deputy Director position pending the delayed outcomes of the appeal cannot be attributed to the Respondent as the Applicant had pleaded guilty to the misconduct charges and exacerbated it by exercising his right to lodge an appeal.
- [44] **Mr. Vinay Bositsumune** was sworn in and testified as the third witness in support of the Respondent's case and his evidence can be summarized as follows:
- [45] He is employed by Morar incorporated as a Chartered Accountant, and that the company was appointed by the Respondent sometime in 2020 to conduct an investigation into the irregular expenditure and the report was filed in May 2020.
- [46] He testified that the document on page 65 of the bundle (**R**) is the report and its accompanying annexures, into the investigation as far as it relates to tender no E1423, as awarded to a company called Ntshangalo.
- [47] The investigation involved analysis of all the documents which were provided by the Head of Forensic Mr Henly Schoeman, interviews undertaken, digital forensic procedures and that the report had made recommendations to the Respondent on how to proceed with the matter.
- [48] The investigation was initiated in terms of the legislation and the accounting framework of the National Treasury as part of the duties of the Accounting Officer.

- [49] The Auditor General had identified certain transactions as irregular expenditure and the Accounting Officer had the responsibility to investigate same to check fraud, tender irregularities and corruption.
- [50] There was a deviation from the 21 days tender advertisement and the specifications for the tender, there was no Bid Specification Committee meeting.
- [51] It was established that the Applicant fabricated minutes and attendance register of the Bid Specification Committee to make it appear as if the meeting of such a Bid Specification Committee did take place as per page 76 and 77 of the bundle **(R)** respectively containing signatures of all the relevant officials.
- [52] The attendance register of the Bid Evaluation Committee was copied and used to show that the meeting of the Bid Specification Committee did take place
- [53] The Forensic investigation also acquired the services of the handwriting expert to assist with the comparison of the signatures and it became clear that the signatures were identical which is not normal. The computer of the Applicant was also imaged in terms of the digital forensics and the document on page 77 and shown on the screen was found from the Applicant's computer in word format, and authored by the Applicant, and the signatures were a copy and paste.
- [54] He holds a Bachelor's degree in accounting and is also a certified fraud examiner registered with the Fraud Examiners Association.
- [55] His company was appointed to conduct an investigation into irregular expenditure identified by the Office of the Auditor General. He testified further that irregular expenditure normally occurs when there is non-compliance with policy and legislation during procurement. Not all irregular expenditure leads to fruitless and wasteful expenditure.
- [56] The tender in question was both irregular and wasteful expenditure in that the delivered or procured items could not be used for the purpose they were procured for.
- [57] The Applicant is not the only person who caused the irregular and the fruitless expenditure in that there were other officials who played different roles in the tender process.
- [58] The Applicant was furnished with the written feedback on the findings of the report by email, and his comment was sought but he did not respond. He is not in a position to produce proof of the email which was sent to the Applicant.
- [59] The investigation team comprised five (5) people, and it was not possible to have a physical interview due to the Covid-19 lockdown, and the email communication regarding the findings sufficed as an interview.
- [60] The Bid Specification Committee and Bid Adjudication Committee members were the same officials as per page 69 of the bundle **(R)**.
- [61] The meeting of the Bid Evaluation Committee took place on the 2nd of November 2017 as per the attendance register on page 76 of the bundle **(R)**.
- [62] The tender was already awarded at the time of the email on page 57 of the bundle **(A)** was sent to officials requesting for the minutes. The irregular can still be investigated or audited even after the tender has been awarded.

- [63] He has not had sight of the Bid Specification Committee meeting minutes template and therefore cannot know why the template was sent to the officials. The conclusion of the investigation is that the email of page 57 is not an instruction for officials to fabricate.
- [64] The email does not make reference to tender E1423 but to various projects.
- [65] It is mentioned in the report that one of the Bid Specification Committee members that the meeting did not take place and the finding was that the minutes were fabricated.
- [66] The email of page 97 of the bundle **(R)** is merely an invitation that a meeting must take place but without the minutes of the meeting, a conclusion cannot be drawn that a meeting has taken place.
- [67] The email on page 95 of the bundle **(R)** is to the effect that **Ms Diana Louw** discussed the Terms of Reference on the 15th of September 2017. The Terms of Reference is tantamount to specification.
- [68] The report on page 74 of the bundle **(R)** para 10.1.12 is to the effect that **Ms Diana Louw** was interviewed and had confirmed that she had an informal telephonic discussion with **Ms Tetyana**, who was also the head of the Bid Specification Committee.
- [69] **Mr Maseda** was interviewed via email and confirmed that he never attended the meeting on the 15th of September 2017.
- [70] The Chairperson of the Bid Adjudication Committee was not interviewed by the investigation team on the basis that all the findings of the investigation stemmed from the Bid Specification Committee and the Bid Evaluation Committee.
- [71] The Bid Adjudication Committee heavily relies on the information and supporting documents emanating from the Bid Specification Committee and the Bid Evaluation Committee out of the trust relationship existing.
- [72] The investigation has discovered that the Bid Specification Committee and the Bid Evaluation Committee composed of the same people who colluded and ensured that Ndlangana gets the tender.
- [73] He is not aware if a criminal case was registered with South African Police Service against the Applicant but a recommendation to that effect was made in the report.
- [74] **Ms. Livhuhani Nesane** was sworn in as the fourth witness of the Respondent and her evidence can be summarized as follows:
- [75] She is employed by the Respondent to the position of Director: Asset Management, and was responsible for Supply Chain Management in 2017
- [76] She knows the Applicant as a former employee of the Respondent who was at the level of Assistant Director in her unit (Supply Chain Management)
- [77] She testified to page 25 of the bundle **(R)** para 4.2, she discussed with her team in anticipation of the audit process to have all documents in place and in the file to avoid unnecessary audit queries. She never issued an instruction but merely a discussion with her team.
- [78] Para 4.3 on page 26 of the bundle **(A)** speaks to the support that is given to the Project Managers or makes things easy for them to draft the minutes and a template was as a result developed and approved by her to guide in the drafting of the minutes.

- [79] Para 4.4 on page 26 of the bundle **(A)**, the attendance register within the SCM environment can only be signed in the meeting and not after the meeting by the members of the Committee.
- [80] Para 4.5 on page 26 of the bundle **(A)**, she is aware of tender **E1423** and that the Applicant was providing technical support to the Committee on the technical part, she is not aware of any duplication of the register by the Applicant and the duplication is generally not allowed.
- [81] Para 4.6 on page 26 of the bundle **(A)**, the Applicant did what he did to avoid negative audit findings but was not given an instruction to fabricate an attendance register and the minutes of the meeting.
- [82] The document on page 97 of the bundle **(R1)** is a code of conduct which has been signed by the Applicant.
- [83] The Applicant has decided to use the Bid Evaluation Committee to reflect the meeting of the Bid Specification Committee as it appears on paragraph 4.5 on page 26 of the bundle **(A)** and the Respondent did not benefit from the conduct of the Applicant as the tender under review is still in the annual financial statement of the department as irregular expenditure and not condoned by the National Treasury.
- [84] She was the Director: Supply Chain Management with effect from the 1st of April 2013 and got appointed to Asset Management portfolio at the same level of Director in July 2021. The Applicant at the time reported directly to **Ms Georgina Seshoene** and not to her.
- [85] She was overseeing the tender under review at the level of adjudication as secretariat but did not participate at the level of BSC and BEC but has generally participated in the BSC and BEC meetings.
- [86] The role of the Secretariat is to record on the unfolding(s) of the meeting and to draft the minutes, she actually supervised other members of the secretariat **(Samuel and Georgina)**.
- [87] She does not participate in the awarding of the tender as she is not a member of the BAC but merely as support function as the Secretariat. The tender pack which was submitted to the BAC was prepared by the Applicant.
- [88] It is the Applicant's version that the BAC will not be in a position to award a tender if not all documents are there in the tender pack. The witness elected not to comment on the version.
- [89] She is not sure if the tender was declared irregular expenditure due to the conduct or actions of the Applicant or not. It is not the only departmental tender that has been classified as irregular expenditure, there are many others.
- [90] It was the role of the Applicant to ensure that there is compliance from the BSC and BEC in terms of submitting minutes and attendance registers. The issue with regard to the minutes and the template was for the purpose of standardization.
- [91] She does not have a comprehensive comment on the document on page 57 of the bundle **(A2)** as she was not the author of the email. She is not sure as to who was the Project Manager for the tender under review but knows it was for the waste bureau.
- [92] There was a request for information **(RFI)** issued by the Office of the Auditor General in relation to the tender review. The meeting in relation to this tender was held physically as it was held before **Covid-19**.

[93] She is not sure if she was part of the BSC and BEC for the tender under review as it is possible that she may have been on leave.

APPLICANT 'S EVIDENCE

[94] The Applicant was sworn in and testified as the first witness in support of his case and his evidence can be summarized as follows:

[95] He was employed by the Respondent with effect from April 2014, to the position of Assistant Director: Supply Chain Management, with his main duty being that of management of project (tenders) from different units.

[96] The SCM is the technical advisor to the Project Managers in terms of evaluation according to the criteria stipulated in the terms of reference.

[97] He was involved in the tender under review at the stage of bid evaluation. He stated further that a BSC meeting was held by the Project Manager (**Ms. Tetyana**) and her team without the involvement of SCM but was invited to the meeting as per an email on page 97 of the bundle (**R**).

[98] The participation of the SCM in the BSC is only at the level of support (minutes and attendance register circulation) and timelines, budget availability and advertisement but the BSC members are the ones dealing with the technical aspects.

[99] The minutes during the time of the tender under review were done by the project managers personally.

[100] The packs (attendance register for both the BEC and BSC, minutes of the meeting for both BEC and BSC, terms of reference, score sheets from BEC, recommendation of the preferred bidder) to the BAC are generally prepared by the SCM.

[101] There was no outstanding information noted or flagged by the BAC to the best of his knowledge when the tender was awarded in 2017.

[102] He was found/pleaded guilty on allegation 1 as it appears on page 7 of the bundle (**A**) in relation to the fabrication of an attendance register of the BSC. The email on page 57 of the bundle (**A2**) was sent two (2) years after the tender was awarded having the template of the bid specification minutes and the BSC minutes template.

[103] The email above was written by Hector following the meeting he had with **Nesani** and **Georgina**. He was running the waste bureau projects as they did not have personnel as an institution, and the tender under review was one of them, he converted the attendance register of the BEC to reflect that of the BSC as their members are the same and pleaded guilty to the charge.

[104] His actions of making sure that the information is provided to the AG were aimed at assisting the Respondent against qualified AG outcomes and he did not derive any benefit from that.

[105] The document on page 58 of the bundle (**A2**) is a sanction in relation to the disciplinary outcomes of one employee of the Respondent (**Lovell May**) was found guilty of offences of a serious nature (failed to ensure development of internal control systems, submitted falsified travel claims) pleaded guilty, showed remorse and undertook to pay all the monies back to the Respondent.

- [106] The employee was only sanctioned in terms of page 65 of the bundle **A2** to one months punitive suspension.
- [107] The dismissal has negatively affected him in both the context of health and financial aspects.
- [108] The charges against the employee (**Lovell May**) was as per 3a, 3b and 3c of bundle (**A2**) was charged with negligence, prejudice and unethical conduct respectively but the charges are tantamount to fraud. It was put to the witness that the charges are not the same or similar to his.
- [109] He was charged or found guilty for fabricating the minutes for the meeting which took place of the 15th of September 2017 as per page 97 of the bundle (**R**).He does not have a clear recollection of the taking place of meetings and dates owing the work pressure that he was operating under.
- [110] **Mr Hector Muthabo** as sworn in and testified as the second witness in support of the Applicant's case, and his evidence can be summarized as follows:
- [111] He is employed by the Respondent to the position of Deputy Director: Acquisition Management since the 1st of September 2022 and reports to **Mr. Brian Machochi**.
- [112] He knows the Applicant since 1st of March 2018 when he joined the employ of the Respondent. He stated that the Applicant was the Assistant Director: Acquisition Management, when he (the witness) was at the time Assistant Director: Demand Management.
- [113] He is the author of the email of page 57 of the bundle (A2) dated the 1st of February 2019, and the email was directed to the project Managers as the people they evaluate in the department.
- [114] **Ms Georgina** was his supervisor who also reported directly to **Ms Nesani** who was the Director of the whole Supply Chain Management.
- [115] He wrote the email following a communication from **Ms Nesani** about the request for information from the Auditor General regarding specific tenders which have already been awarded/ finalized. There will be a person located at the finance section who will be liaising with the AG.
- [116] The committees (BSC, BEC and BAC) have their own secretary and it's the responsibility of that secretary to ensure that an attendance register is signed in the meeting.
- [117] He designed a template for the minutes (containing the sub-headings), the attendance register, bid evaluation report and terms of reference influenced after realizing/after having been informed that some project managers did not know how to do the minutes and what to write in the minutes.
- [118] Certain files relating to certain tenders did not contain the minutes to prove that indeed certain Project Managers did not know how to compile the minutes.
- [119] He is of the view that it would not be wrong to have an attendance register compiled after the fact if indeed the meeting did take place, but it would be a tough one if indeed the meeting did not take place.
- [120] The meeting can take place through a hybrid system based on the fact that other participants can join the meeting from other provinces for cost containment reasons.
- [121] The tender can be declared non-compliant by the DG if information and or supporting documents are not provided, it is for those reasons that it becomes important to have all the documents submitted as

requested by the DG. He is not sure about the findings on the tender under review but knows that certain tenders at waste bureau were declared as irregular expenditure.

- [122] He did not sit in the BAC meetings during the awarding of the tender under review, it is only now after assuming his new position (DD) that he sits in the BAC.
- [123] The date of the meeting is 15 September 2017 as per page 97 of the bundle **(R)** and the Applicant is alleged to have falsified the minutes of the meeting which took place on the 10th of October 2017.
- [124] The templates that he drafted were not as a result and instruction from anyone, he *mero-motu* became innovative and the innovation was approved by the Managers to assist the processes.
- [125] The email on page 57 of the bundle **(A2)** was authored as part of his responsibilities to ensure that all relevant information is available and it was not an instruction from any person.
- [126] The outstanding documents as requested by the AG will lead to a negative finding and that will paint both the Minister and the Director General in a bad light but there is nothing that can be done if certain documents are not there.
- [127] The BSC and the BEC registers are different in form and content and he is not sure if same is allowed in SCM practices or not, and the policy is also silent on the same issue.

EVALUATION EVIDENCE, ARGUMENT AND FINDINGS

- [128] The statutory and other framework for the determination of this dispute is provided by the provisions of Section 185 (a) of the LRA, which reads as follows:
“Every employee has the right not to be unfairly dismissed”
- [129] The other framework is provided by the provisions of item 2 (1) of Schedule 8 of the Code of Good Practice of the LRA in relation to dismissal, which reads as follows:
“A dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure”
- [130] Briefly, I am required to determine whether or not decision of the Respondent to dismiss the Applicant was fair, both substantively and procedurally, taking into account all the relevant circumstances. This entails an inquiry into the reasons and the process leading to the dismissal of the Applicant and how the Respondent has treated other employees in the circumstances of the Applicant.
- [131] It is common cause that the Applicant pleaded guilty to misconduct charges involving dishonesty, lack of fiduciary and integrity, and which pleading, led to the expeditious finalization of the matter, thus saving the Respondent time and resources.
- [132] It is correct that the sanction meted out against the Applicant was pronounced five (5) days outside of the time frames prescribed by legislation, policies and collective agreements/resolutions. The Respondent has however argued that the Applicant has suffered no prejudices he was still an employee of the Applicant with unaltered benefits, save for the uncertainty and anxiety. I find that the Respondent's explanation is plausible in the circumstances though it should not be encouraged.
- [133] It is the Applicant's argument that he has not personally derived any benefit from the fabrication of the attendance register, and, in fact, he has done so in the best interests of the Respondent to avoid a negative audit outcome, and therefore should not have been dismissed.

- [134] I find that the Applicant's argument is not different from the person who approaches the Court with dirty hands and expects lunch from it in terms of the *par delictum rule*, which is loosely translated to mean that *"because the law should discourage illegality, it would be contrary to public policy to render assistance to those who defy the law"*
- [134] It is common cause that the Applicant noted and lodged an appeal unsuccessfully in that the appeal outcome was communicated from the Office of the Minister on the 14th of December 2022 effectively dismissing him from public service.
- [135] It is correct that the tender was awarded by the Bid Adjudication Committee. The Respondent is on the one hand arguing that the meeting of the Bid Specification Committee did not take place, and it is common cause that the Applicant was charged on that basis. If it is indeed the case, one would be curious to know how such a tender was awarded with incomplete supporting documents, and further to know what happened to the members of such a Committee (the BAC).
- [136] It is correct that the Applicant took the attendance of the Bid Evaluation Committee and made it look like that of the Bid Specification Committee as the two (2) committees are comprised of the same people.
- [137] The Respondent has argued that the email about minutes and attendance registers to be in place was just a reminder that the files should be in order for the attention of the Auditor General and was not in any way an instruction to the employees/the Applicant to manufacture documents which did not exist. I have properly perused the email in question and I am inclined to believe that the Applicant was not instructed by the Applicant but merely became creative on his own accord.
- [138] The Respondent has argued that the handwritings were identical which is not normal and implies fabrication on the part of the Applicant. I find that this argument is absurd as it seeks to prove something that is not in dispute, it has always been the Applicant's submission that minutes were not original save for his insistence that the meeting did take place, and it is common cause that an invite for the BSC meeting was sent out for the 15th of September 2017. It is also not in dispute that the Applicant has signed the code of conduct and knows exactly what is required of him, especially on fiduciary issues, trust and integrity.
- [139] It is common cause that **Ms Diana Louw** (BSC member) did have a discussion with **Ms Tetyana** (Project Manager) on the 15th of September 2017 about the terms of reference which are tantamount to bid specification. It is not clear why the meeting on the said date did not take place and if it was postponed, to which date.
- [140] In the circumstances, am inclined to believe that what transpired on the 15th of September 2017 sufficed as a BSC meeting and that should explain why the tender was ultimately awarded by the Bid Adjudication Committee.
- [141] The Respondent has argued that the BEC and the BSC is composed of the same people who colluded to have the tender awarded to Ndlangana. It is not clear to me why the Applicant who is not a member of either of the two (2) committees should shoulder the blame for the actions of the members of the

committees in question, it remains unclear what steps were taken by the Respondent against the “colluders” as part consequences management.

- [142] It is common cause that the templates for both the minutes of the meeting and attendance register were issued after the fact, and it is in the same email where mention of the minutes and registers of meetings which have long taken place is made. The Respondent has argued that the templates were shared for the purposes of standardization, which to me, is accompanied by undertones of awkwardness.
- [143] It is correct that the Respondent has not reaped any benefit from the conduct of the Applicant by virtue of the fact that the tender in question is still listed as irregular and wasteful expenditure in that it has not yet been condoned by the National Treasury. It is however not clear why the tender in question was listed as such, and furthermore the role of the Applicant leading to irregular and wasteful expenditure.
- [144] It is common cause that the tender under review was awarded based on the information contained in the tender package prepared by the Applicant, and in the process, the BAC never flagged anything as incorrect or missing from the tender package, which in his view (the Applicant), was sufficient proof that the meeting of the BSC had indeed taken place.
- [145] It is correct that the Applicant is not a member of the BAC. It is not clear from the Applicant’s evidence as to whether the said documents were there in the tender package and were only lost after the tender was awarded, save for his submission that the BAC never flagged the package during the process.
- [146] It is true that **Ms. Lovell May** was found guilty as pleaded for charges relating dishonesty and negligence having failed to ensure development of internal control systems, having submitted falsified travel claims ,and was sanctioned to one (1) month punitive suspension. The employee had shown remorse and also undertook to pay back all the monies.
- [147] The Respondent has argued that the charges between the Applicant and **Ms May** were not the same. I am inclined to agree with the Respondent’s argument on the basis that the charges faced by **Ms May** inevitably led to financial prejudice on the part of the Respondent, though later cured by the pay back as per the undertaking. It is also true that **Ms May** was a member of the Senior Management Services (SMS), which to me logically implies that the employee had more duty of care than the Applicant in their distinguishable circumstances.
- [148] The fairness or otherwise of a dismissal thereof, depends on the facts of the case and the appropriateness of the dismissal as a penalty¹. It is common cause that the Applicant in this matter was dismissed for a misconduct involving dishonesty, while in the past, another employee of the same Respondent was found and or pleaded guilty for an offence involving negligence and dishonesty, which further led to the Respondent suffering reparable financial harm, and the employee was sanctioned to one (1) month punitive suspension.

¹ Item 2(1) Schedule 8 of the Code of Good Practice: Dismissal

- [149] 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 the two or more employees who participate in the misconduct under consideration².
- [150] In the case of **NUM and Another v Amcoal Colliery [2000] 8 BLLR 869 (LAC)**, the Court opined that: *"The parity principle was designed to prevent unjustified selective punishment or dismissal and to ensure that like cases are treated alike. It is not intended to force an employer to mete out the same punishment to employees with different personal circumstances just because they are guilty of the same offence"*
- [151] In the case of **Southern Sun Hotel Interests (Pty) Ltd v CCMA & Others [200] 11 BLLR 1128 (LC)**, the Court held that, inconsistency claim will fail where the employer is able to differentiate between employees who committed similar transgressions on the basis of, *inter-alia* differences in personal circumstances, the severity of the misconduct or on the basis of other material factors.
- [152] The Court in the case of **Gcwensha v CCMA & Others (2006) 3 BLLR 234 (LAC)** opined as follows: *"Disciplinary consistency is the hallmark of progressive labour relations that every employee must be measured by the same standards and care should be taken to ensure that the gravity of the misconduct is evaluated"*
- [153] In the case of **SACCAWU and Others v Irvin & Jonson (1999) 20 ILJ 1957 (LAC)**, the court found that: *"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 discretion in each individual case. If a Chairperson .09consciously 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 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 is capricious, or included by improper motive, or worse, by a discriminating management policy"*
- [154] In the case of **Early Bird Farms (Pty) Ltd v Mlambo [1997] 5 BLLR 541 (LAC)**, the Court held that like cases should be treated alike. In appropriate cases an employer may be justified in differentiating between two employees guilty of the same transgression on the basis of their personal circumstances or on merit.
- [155] In the case of **Lonmin Mine v Commission for Conciliation, Mediation and Arbitration and Others (JR1084/21) [2022] ZALAC JHB 57 (15 March 2022)**, the Court as per Deane AJ, opined thus: *"[14] The LAC in Edcon, without hesitation, followed the Sidumo approach with approval³. It is highly notable that over the years the Courts exercised caution when dealing with cases where the*

² Item 3(6) Schedule 8 of the Code of Good Practice: Dismissal

³ Sangoni JA in *Edcon* at para 22 pointed that: *"It is in fact the relevant factors and circumstances of each case objectively viewed that should inform the element of reasonableness or lack thereof"*.

inconsistent application of discipline happened to be an issue. The inconsistency issue in this matter emerged out of repeated misconduct related to non-compliance with procedures which is usually characterised as “comparing apples with apples”. It is trite that a plea of inconsistency should to a large extent be sparingly upheld by arbitrators when raised. With or without invitation, the arbitrator is required to apply a discretion that is upon consideration of all facts placed before him/her. The reason being is that the raising of inconsistency cannot automatically come as a bar to the imposition of dismissal. The Court clearly elaborated on this point in Comed Health CC v National Bargaining Council for the Chemical Industries and Others⁴ (Comed) as follows:

‘As stated previously by this court the parity rule does not take away the right of the employer to impose different sanctions on employees who were involved in the same act of misconduct. The issue when faced with the complaint that the employer has applied discipline inconsistently is to consider the fairness of such inconsistent application of discipline. In other words, the differential sanctions do not automatically lead to the conclusion that the dismissal was unfair. The fairness of the dismissal has to be determined on the basis of whether the employer, in imposing differential sanctions, acted unfairly. In assessing the fairness of a dismissal in a case involving the imposition of differential sanctions, the commissioner has to consider whether there is an objective and fair reason for imposing different sanctions for misconduct arising from the same offence.’

“[15] In *National Union of Mineworkers on behalf of Botsane v Anglo Platinum mine (Rustenburg section)*,⁵ the LAC emphasised the importance of raising the inconsistency case from the beginning of the proceedings and with relevant detail. The following was thus said:

*‘Moreover, as a matter of practice, a party, usually the aggrieved employee, who believes that a case for inconsistency can be argued, ought, at the outset of proceedings, to aver such an issue openly and unequivocally so that the employer is put on proper and fair terms to address it. A generalised allegation is never good enough. A concrete allegation identifying who the persons are who were treated differently and the basis upon which they ought not to have been treated differently must be set out clearly. Introducing such an issue in an ambush-like fashion, or as an afterthought, does not serve to produce a fair adjudication process. (See: *SACCAWU and others v Irvin and Johnson Ltd (1999) 20 ILJ 2302 (LAC)* at [29]; also see: *Masubelele v Public Health and Social Development Bargaining Council and Others [2013] ZALCJHB JR 2008/1151*] which contains an extensive survey of the case law about the idea of inconsistency in employee discipline)’.*

⁴ (2012) 33 ILJ 623 (LC) at para 8.

⁵ (2014) 35 ILJ 2406 (LAC) at para 39.

[16] In *SA Police Services v Safety and Security Sectoral Bargaining Council and Others*⁶ the Court, per Lagrange J, restated the applicable approach in matters where consistency is raised in terms of onus and the following was said:

‘Once the employee has pertinently put the issue of consistent treatment in issue, the employer has a duty to rebut such allegations. In the context of a case in which evidence was led by the employee of inconsistent treatment, Landman J held in Sappi Fine Papers (Pty) Ltd t/a Adamas Mill v Lallie and others (1999) 20 ILJ 645 (LC) at 647 para 5:

“As regards the onus, the onus of proving that the dismissal was fair, and thus of rebutting the allegation of inconsistency, is one which rests squarely on the employer”.

[156] On the strength of the above stated Court decisions, their holistic and contextual consideration, and the prevailing material circumstances in this matter, I find that the employer’s conduct in meting out the different sanction(s) between the Applicant and **Ms. May** amounts to an act of self-misdirection, improper exercise of discretion which in turn amounts to an act unexplainable act of inconsistency.

[157] When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee’s circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.⁷

[158] In the case of *Shoprite Checkers (Pty) Ltd v CCMA & Others (JA46/05) [2007] ZALAC 24*, the LAC held that, theft must be treated like all other forms of misconduct and that mitigating factors must be taken into account. The employee was caught on camera on three occasions taking and eating food belonging to the employer. The employee had worked for the employer for a period of 30 years and had a clean disciplinary record, the value of the item stolen was not high although the exact amount could not be determined. The Court found that the dismissal was substantively unfair, the Applicant was reinstated with a severe written warning but the reinstatement was not with full retrospective effect.

[159] It is clear from the case law referred to above that, a misconduct involving dishonesty does not automatically warrant a sanction of dismissal without taking into account certain factors, including the circumstances of the offence, the length of service and the disciplinary record of the employee. In the current dispute, the Applicant had worked for the Respondent for a period of Seven (7) years.

[160] In the case of *Toyota SA Motors Pty (Ltd) v Radebe and Others [2000] 3 BLLR 243 (LAC)*, the Court held that:

“Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind, one such clear act of misconduct is dishonesty”

⁶ (2011) 32 ILJ 715 (LC) at para 10.

⁷ Item 3(5) Schedule 8 of the Code of Good Practice: Dismissal

[161] This case law is in direct conflict with the case in paragraph 153 above even though they are decided by the same Court, in this case, the Labour Appeal Court, which decisions are both having a binding effect on the Commissioner for the proper determination of this dispute.

[162] The Court in the case of **Manasing Surajsingh v The State of Maharashtra (1968) 70 BOMLR 654**, the High Court of Bombay, as per Tarkude J, and drawing wisdom from Salmond⁸ concluded that:

“where authorities of equal standing are irreconcilably in conflict, a lower court has the same freedom to pick and choose between them as the schizophrenic Court itself. The lower Court may refuse to follow the later decision on the ground that it was arrived at per incuriam, or it may follow such decision on the ground that it is the latest authority. Which of these two courses the Court adopts depends, or should depend, upon its own view of what the law ought to be”

[163] The Commissioner, as already stated above, is bound by the decisions of the Labour Appeal Court in terms of hierarchy, and it appears from the above foreign case law that, in the case of conflicting judgements from courts of equal status, the lower court has got a discretion between differing with the Court decision if the lower court is of the view the decision was arrived at without paying attention to certain legislative provisions or precedent (*per incuriam*) and choose to be bound by the most recent decision. In this case, I elect to be guided by the most recent decision(s) of the Labour Court.

[164] In the circumstances, I find that the Applicant's dismissal by the Respondent was procedurally fair but substantively unfair.

REMEDY

[165] In the case of **ARB Electrical Wholesalers (Pty) Ltd v Hibbert (DA3/13) [2015] ZALAC 34**, the LAC's Wagly JP with Ndlovu JA and Coppin JA concurring, opined that, in terms of Section 193(1) of the LRA, the remedy that an employee whose dismissal is found to be unfair may be entitled to is reinstatement or re-employment or to be paid compensation. Section 193(2) then goes on to provide that the Labour Court or an arbitrator “*must*” order the employer to re-instate or re-employ an employee whose dismissal was found to be unfair unless certain exceptions set out in that sub-section apply or the reason for the unfair dismissal was only a failure by the employer to follow a fair procedure.

[166] In light of the circumstances of this case, the status of the disciplinary record of the Applicant, the gravity and circumstances under which the offence was committed, the conduct of the Respondent in meting out the sanction(s) and the prayer of the Applicant. I find that reinstatement with partial retrospective reinstatement, coupled with a final written warning is the appropriate remedy.

[167] I am alive to the fact that the Applicant is praying for reinstatement without loss of benefits, it is now trite in law that such a remedy is not available merely for taking. The Applicant's prayer in the circumstances is without proper basis and can therefore not be granted as desired.

[168] In the circumstances, I come to the following conclusion:

AWARD

⁸ Salmond on Jurisprudence, 12th ed., page 153

[169] The Respondent is therefore ordered to reinstate the Applicant with partial retrospective effective.

[170] The Applicant's dismissal is substituted with a final written warning.

[171] Respondent is ordered to pay the Applicant an amount of **R195 806, 28** (One Hundred and Ninety-Five Thousand, Eight Hundred and Six Rands and Twenty-Eight Cents) (**R48 951, 57 x 4**), being part of the monthly salaries due to the Applicant since the date of dismissal.

[172] I make no order as to costs.

Signature: 