**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Not Reportable

Case no: JR1070/12

In the matter between:

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| **DUDU PHILLIPS** | **Applicant** |
| **and** | |
| **COMMISSIONER PRAKASH RHOPA** | **First Respondent** |
| **COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION** | **Second Respondent** |
| **TLOKWE CITY COUNCIL** | **Third Respondent** |

**Heard: 10 March 2016**

**Delivered: 29 November 2016**

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**JUDGMENT**

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TLHOTLHALEMAJE, J.

***Introduction:***

[1] The Applicant (Phillips) seeks to review and set aside the arbitration award issued under the auspices of the Second Respondent (CCMA) by the First Respondent, (Commissioner) on 15 April 2013. In the award, the Commissioner had found that

the dismissal of Phillips by the Third Respondent (Municipality) on the grounds of various allegations of misconduct was procedurally and substantively fair.

***Preliminary points:***

[2] The preliminary points raised pertains to issues surrounding whether Phillips' application is properly before the Court, and further whether there is a need for condonation in respect of the Municipality's late filing of its answering affidavit. The Municipality's contention is essentially that it was not aware of the review application, and further that Phillips had failed to serve or file a Rule 7A (8) (a) and (b) notice in terms of the Rules of the Court to inform the Municipality that she stood by her founding affidavit, nor had she filed any supplementary affidavit. The Municipality's contention is that the review application should be deemed to have been withdrawn because of these lapses.

[3] Phillips' Notice of Motion was filed on 6 June 2012. On 5 March 2013, she filed her Notice in compliance with Rule 7A (8) (a) and (b) of the Rules of the Court, and had also on 15 October 2014, filed an amended Notice of Compliance in terms of which the Municipality was advised that she stood by her Notice of Motion. The matter initially came before the court on the unopposed roll on 2 February 2015, and Kuhn AJ had issued an order postponing it to the opposed roll. The Municipality was ordered to file its opposing affidavit within 15 court days from the date of the order and Phillips was required to file her replying affidavit within 10 days after receipt of the opposing affidavit. Both parties were further ordered to file heads of argument within 10 days after the filing of the replying affidavit.

[4] The Municipality's answering affidavit in compliance with the above court order was filed on 5 March 2015 together with an application for condonation. Its contention as per the founding affidavit of its Acting Senior Legal Officer, Claasen, is that it only became aware of the review application during January 2015, and that its answering affidavit in terms of Rule 7A (9) of the Rules of this Court had not become due in terms of that rule. It was further submitted that Phillips had failed to serve her Rule 7A (8) (a) and (b) notice on it, and that the ten-day period referred to in Rule 7A (9) has therefore not commenced.

[5] Claasen further submitted that Phillips' review application was never served on the Municipality as can be gleaned from the fact that upon a search by the Municipality's attorneys of record, the court file did not include an affidavit of service by Phillips, and the there was no indication that a Rule 7A (8) (a) and (b) notice had been served. If there was any such notice, service was only effected on 5 March 2013. However, no supplementary affidavit been filed. It was submitted that to the extent that Phillips had not complied with Rule 7A (8) (a) and (b) notices after the record of proceedings was made available, and had not indicated that she stood by her notice of motion and founding affidavit, no application for condonation was sought in that regard, and further that the Municipality's answering affidavit had not been due.

[6] Phillips' response to the preliminary issues raised was that the Municipality was aware of her review application as far back as 4 June 2012 after her attorneys of record had faxed through documents, correspondence and proof of service in that regard. On 3 April 2013, her attorneys of record had faxed an index to the bundle of document to the Municipality, and proof of service was attached to her

response in that regard. Again, on 10 September 2013, her attorneys of record had telephonically contacted the Municipality about the matter, and on 14 October 2014, she had through her attorneys, sent through her amended rule 7A (8) (a) and (b) notices as well as proof of service in this regard. To this end, she contended that it was not correct that the Municipality could not have known of her application.

[7] It is common cause that at the time that the matter came before Kuhn AJ on 2 February 2015, it remained unopposed. Thus, between 6 June 2012 and 2 February 2015, the review application remained unopposed. In terms of paragraph 11.2.3 of the Practice Manual of this Court, if the applicant fails to file a record within the prescribed period, the application for review will be deemed to have withdrawn unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given. If consent is refused, the applicant may, on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time.

[8] In this case, the record was filed out of time, and there is no indication that any extension from the Municipality was sought or that there was any application to the Judge President of this court for an extension. Phillips has explained the circumstances under which the record of proceedings was not filed on time. This cannot by any account be construed as an application contemplated in paragraph 11.2.3 of the Practice Manual. Ordinarily, and in terms of the provisions of this paragraph, the review application ought to be deemed to have been withdrawn.

[9] I have further had regard to Phillips' contentions insofar as the service of her review application, her amended notice in terms of Rule 7A (8) (a) and (b) and

other documents pertaining to the application are concerned. To that end, even if it needs to be stated that Phillips had been lackadaisical in prosecuting the application, no purpose would be served in declaring the matter as having been deemed withdrawn in the light of its long sorry history.

[10] Phillips was dismissed in October 2009, and there is a need to find finality in this protracted dispute. In my view, for the Municipality to also seek any declaratory order deeming the matter as having been withdrawn is opportunistic in the extreme, especially in the light of the contentions made as to how the review application and other documents related to that application were filed and served on it, and its explanation as to how it had however not received any documentation until January 2015.

[11] I have further had regard to the application for condonation in respect of the late filing of the Municipality's answering affidavit, which Phillips has elected not to oppose. I am satisfied from the averments made by Phillips that the review application was served on it, and that the Rule 7A (8) (a) and (b) notice was also served on it, *albeit* belatedly, on 15 October 2014. To the extent that its opposing papers were only filed on or about 23 February 2015, there was indeed a need to seek condonation.

[12] The principles applicable in considering applications for condonation are well known, and include a consideration of the degree of lateness, the explanation thereof, the parties' prospects of success on the merits of the main case, the prejudice to the parties and most importantly, the requirements of fairness. Accordingly, I have had regard to the Municipality's application, and I am of the

view that the averments of Claasen on behalf of the Municipality in regards to these considerations are compelling enough to grant condonation.

***The review application:***

[13] Phillips was employed as a Manager: Corporate Services in terms of a five years' fixed term contract which commenced on 1 July 2007. Her services were terminated on 29 October 2009 following upon a disciplinary enquiry into 29 allegations of misconduct. At the disciplinary enquiry, she was found guilty of 16 of those charges. She had lodged an appeal on 2 November 2009. Before the appeal hearing could be convened, she had referred a dispute to the CCMA, resulting in the matter being conciliated on 17 December 2009. When conciliation failed, the dispute was then referred for arbitration. When an appeal hearing was subsequently convened, seven of the charges against her were upheld, and her dismissal was confirmed.

***The arbitration proceedings:***

[14] The arbitration proceedings took place between 24 November 2011 and 16 April 2012. By agreement between the parties, no oral evidence was led at those proceedings. The parties had agreed that the record of the disciplinary proceedings constituted an accurate record of the evidence led at those proceedings, and that it would serve as a record of the arbitration proceedings, and upon which the Commissioner could rely in determining the issues in dispute.

The parties further agreed to submit written heads of argument in support of their respective cases.

[15] Phillips challenged both the procedural and substantive fairness of her dismissal. The procedural fairness was challenged on the basis that the Municipal Manager lacked the power to suspend or discipline her without a Council Resolution as she was a section 57 employee. Her case was also that she was appointed subject to the provisions of section 57 of the Local Government: Municipal Systems Act[1] (The Systems Act). She had submitted that in terms of the provisions thereof, the Municipal Manager lacked the power to discipline her, for it was only the Municipal Council that was empowered to discipline her unless the Municipal Manager was delegated to do so. She contended that the Municipal Manager had not been delegated, and therefore the chairperson of the disciplinary enquiry erred in making a contrary finding.

[16] Phillips further contended that that the Municipality had suspended her on 10 April 2008 whilst the disciplinary enquiry commenced on 4 July 2008 in contravention of clauses 15.2 and 15.3 of her employment contract. Accordingly, the Municipality was obliged to conduct a disciplinary hearing within 60 days, unless the Chairperson of the enquiry had extended the period, which was not the case in this matter. The Municipality had however brought the charges against her in terms of the provisions of the Collective Agreement when that agreement was not applicable to her.

[17] In regards to the substantive fairness of the dismissal, from the original charges preferred against Phillips, only Charges 8, and 20 – 25 were pursued by the

[1] Act 32 of 2000

Municipality at the arbitration proceedings. Charge 8 was however abandoned midstream the arbitration proceedings. The Commissioner also found that the misconduct under Charge 20 had not been proven. There is no application for a cross-review, and no purpose will be served in dealing with this charge in the determination of this review application.

[18] The allegations of misconduct for consideration before the Commissioner were as follows;

**Charge 21:**

'You are charged with gross negligence in that you accepted fraudulent quotations submitted to the Municipality. You were aware, or ought reasonably to have been aware that the Municipality did not request the quotes from Waltons and @Office respectively however; you failed and/or neglected to verify the fraudulent quotations submitted to the Municipality'

**Charge 22:**

**Splitting of quotations**

'You are charged with misconduct in that you circumvented the limit of thirty thousand (R30 000.00) in procuring twelve boardroom chairs using separate Quotations. The two quotes combined exceeded the threshold and in the execution of your misconduct you obliterated dictates of the limit mentioned above by splitting the quotes.'

**Charge 23**

'**Failure to obtain three proper quotations**

'You are charged with misconduct and violation of Council Resolution in that you failed to protect the interest of the Municipality enshrined in the Council resolution

which requires you to obtain three proper quotations. In procuring boardroom chairs and tables from Ontlhametse service provider, you failed to comply with afore-mentioned council resolution. Your conduct constitutes gross insubordination.'

**Charge 24**

Bringing the name of the Municipality into disrepute

'In failing to execute your duties properly as mentioned above, the Municipality received bad publicity emanating from the conduct. As a result, this brought the name of the institution into disrepute. You therefore charged with bringing the municipality into disrepute'

**Charge 25**

'In your capacity as Manager Corporate Services you are entrusted with *inter alia*, a duty to protect the interest of the Municipality. You failed in this duty when procuring boardroom chairs without proper quotations. In the purchase of chairs, you committed wasteful expenditure in the purchase of the above-mentioned chairs the amount thereof was double the actual price and had you to obtained proper quotations from other service providers as per the Council resolution, the wasteful expenditure would not have ensued' (Sic)

[19] The evidence as presented on behalf of the Municipality in regards to the charges was that Phillips was employed as a section 56 manager, and that prior to the amendments to the Systems Act, managers were previously described as 'directors'. As a senior manager, Philips exercised financial management responsibilities. Accordingly, she was authorised to procure goods or services, and authorise the payment thereof to the value of R30 000.00. Prior to purchasing any goods or services, Phillips was also required to ensure that at least three written quotations were obtained from suppliers/service providers.

[20] The evidence as presented by the Municipality's Gayle Van den Berg, its Chief Audit Executive was that she had investigated certain allegations levelled against Phillips on the instructions of the Municipal Manager in regards to certain payments made by her department and authorised by her. Van den Berg had after her investigations submitted a report to the Municipal Manager on 28 May 2008.

[21] Van den Berg's investigations had revealed that three requests for furniture and a subsequent order were placed at a service provider, Ontlhametse in respect of furniture. The quality of the furniture delivered did not reflect the price paid by the Municipality. She had then approached other service providers, viz, Waltons and @Office for prices on the furniture in question. She was provided with unit prices that differed substantially from the purported quotes provided by Phillips' department, from the very same service providers. A copy of the Waltons' quotation provided by the department during investigation was also appeared to be photo-stated.

[22] Further enquiries were made with Waltons and @Office about the quotations purportedly received from them, and it was discovered that in fact, no official quotation for the furniture items in question had been requested by any official from the Municipality and/or provided to the Municipality by these entities. A witness, Thys Smit from @Office had testified and confirmed that the quotation purportedly issued by his company was fraudulent. According to Smit, the only individual who had requested a quotation on the same furniture items from @Office was the owner of Ontlhametse, a Mr David Mokwena. Even then, the prices given to Mokwena were much lower than those reflected on the purported

quotation from @Office which was presented as part of the documentary evidence.

[23] Ultimately, it was discovered that the purported quotations from Waltons and @Office, which were in the amounts of R31 863 and R32 598. 00 respectively were fraudulent. Ontlhametse's invoice on the other hand was in the amount of R29 184.00, just below Phillips' delegated payment authority limit, and this was the only official quotation that was received, contrary to the Council resolution.

[24] In regards to Charge 22, Phillips was required to not deliberately split goods or services into parts of a lesser value merely to avoid complying with the supply chain management policy. Accordingly, she was not entitled to source services or goods in a piecemeal fashion to ensure that the quotation was below the threshold. In this case, the department had procured 2 Zoom chairs and 10 Titan Stacker chairs from the same supplier, on the same date, out of the same vote number. All the items were chairs and thus one quotation should have been obtained for all the 12 chairs. The evidence pointed to a quotation having been split to ensure that the amount remained below R30 000,00 for Phillips to have the authority to approve payment. The items were ordered separately when they should have been in one order. The payment for the 12 chairs totalled R36 480.00, and should in any event have been approved by the Municipal Manager. The splitting of quotations was prohibited, and such conduct amounted to gross negligence, and was meant merely to circumvent the regulations.

[25] Charge 25 related to fruitless and wasteful expenditure, and related to the purchasing of chairs and a boardroom table. It was common cause that the initial order for a boardroom table was subsequently cancelled because of the

investigations. Van den Berg's testimony however was that reasonable steps should have been taken to ensure that three valid quotations were obtained. Had this been done, the Municipality would have procured the furniture items for an amount substantially less than for what was paid to Ontlhametse.

[26] Van der Berg had pointed out that instead of paying R28 500.00 for 10 stacker chairs, the Municipality could have paid R5 500.00; 2 Zoom chairs could have cost R2 200.00 instead of R7 980.00; the oval boardroom table would have cost R12 000.00 instead of R29 000.00. To the extent that the Municipality paid a higher amount for these items to Ontlhametse, when the other suppliers in the area charged less for the same items, there was fruitless and wasteful expenditure. These payments according to Van den Berg were approved and signed off by Phillips on 4 March 2008. It was her responsibility to ensure that goods were procured at market related and reasonable prices. Thus, the wasteful expenditure would not have occurred had she taken reasonable steps to obtain three valid quotations

[27] Phillips' response to the above charges was that she did not source the quotations personally, and that once she was presented with respective quotations, she had merely authorised payments for the cheapest quotation. Her department's training room had required furniture, and the Municipality's SCMU brought catalogues to her to choose the furniture items her department required. She contended that it was the responsibility of the SCMU to source the quotations on her behalf and that she did not do so personally.

[28] Phillips's testimony was that she was unaware that the quotations sourced were fraudulent as she did not handle them herself, and further that it was not her duty

to verify those quotations. The SCMU had assisted in the completion of the forms, and all that she did was to attach her signature as the manager responsible for the department. She further testified that it was the SCMU that had recommended Ontlhametse as the successful supplier, and it was the SCMU that had secured the quotations and identified the preferred supplier without her involvement.

[29] In regards to Charge 22 relating to the splitting of quotations, Phillips' contention was that if indeed there was a splitting of quotations, the responsibility was that of the SCMU. Since it was the SCMU that sourced the quotations, it had identified the service provider Ontlhametse, and completed the necessary forms which were then submitted to her for her signature. She had merely signed the documents to confirm that her department needed the furniture. As with the previous charge, Phillips laid the blame squarely on James Edimetse of the SCMU.

[30] In regards to Charge 23 relating to the failure to secure three quotations, Phillips' contention was that she was not responsible for procurement of goods and services, and in any event, the resolution relied upon by the Municipality was out-dated and not in line with Government Gazette No. 27636, which provides that the SCMU should be responsible for the procurement of goods and services. She contended that herself and Edimetse had no knowledge of that resolution, and that to the extent that this was the case, she could not have been found guilty of insubordination as she was unaware of the instruction. She had denied that the conduct of procuring the goods had resulted in wasteful expenditure as she had in 'good faith', approached the SCMU to assist her in getting the quotations, and that as far as she knew, the furniture was bought from the lowest bidder.

[31] James Edibetse's testimony in chief was as follows; He was employed in the Municipality's SCMU. Where goods or services were required, his task was to contact suppliers, get catalogues from them, send these to the department that required those goods or services and for them to choose the items required. He would then get quotations from the suppliers, forward them to the relevant department to get requisitions and once processed by either the Municipal Manager or the Deputy Finance or CFO, the requisition would then be sent back to the SCMU for orders to be processed. When referred to a supply chain forms/ and quotations from Ontlhametsi, @Office and Waltons, he could not say who had completed the 'recommendation part', although he thought that it might have been Phillips. He testified that he had assisted in sourcing all three quotations.

[32] When it was put to Edibetse that Van den Berg's evidence was that when she initially confronted him, he had disputed having sourced the quotations from the suppliers, his responses ranged from agreeing that he had indeed denied knowledge, to having no knowledge of being confronted by Van den Berg or that he could not remember whether he had admitted to Van den Berg or not. His ultimate response to this simple question was; *"Yes, I think so, I am not sure. I did"*[2]. In the same vein, he admitted having submitted the quotations to Phillips.

[33] Under cross-examination, Edibetse was asked at length about his initial reaction when Van den Berg asked him whether he had sourced the quotation from @office. His responses also ranged from not recalling the meeting; only being asked about the format of the quotations or that he could not recall whether he was spoken to by Van den Berg or not. Ultimately, his testimony was that he had

[2] See page 491 of the transcribed record of disciplinary proceedings

not asked for quotations from the suppliers, but had only asked for catalogues and booklets.

*The Commissioner's findings:*

[34] The Commissioner's findings in regards to the alleged procedural unfairness was that Phillips' allegations that the Municipal Manager lacked the necessary authority to have charged her were bald and unsubstantiated; that the discipline of all employees serving under the Municipal Manager were his responsibility in respect of the current legislation. Furthermore, to the extent that the Municipality had abandoned some of the of the original charges, especially charge 8, which related to a failure or neglect to report to the Municipal Manager acts of gross misconduct allegedly committed by her subordinate, there was no need to consider the issue any further.

[35] Regarding the substantive fairness of the dismissal, the Commissioner made the following observations and findings in regards to the charges;

*a)* there were two conflicting/mutually destructive versions in regards to whether Phillips could be said to have had a hand in any of the charges against her. To the extent that this was the case, the Commissioner took account of the principles set out in *Lukie v Rural Alliance CC t/a Rural Development Specialist*[3] and *Sasol Mining Pty v CCMA & others*[4] in regards to the resolution of mutually destructive versions and concluded that;

[3] [2004] 8 BLLR 769 (LC)
[4] JR 1595/08) [2010] ZALC 141; [2011] 4 BLLR 404 (LC)

b) The evidence presented on behalf of the Municipality was to be preferred on the basis that there were some glaring weaknesses in the defence of Phillips as she did not dispute having signed the initial requisition. Her version that she had nothing to do with any of the processes followed in this instance except to say that she needed the furniture at the end of the process was unconvincing;

c) Phillips' argument that Mr Edibetse did not want to incriminate himself and therefore had not been candid during the disciplinary enquiry was of no assistance to her as she had called him as her own witness. Edibetse had turned out to have performed badly during his testimony, and Phillips therefore had to live with her choice of witnesses. Accordingly, calling Edibetse had in fact damaged her case considerably;

d) Phillips had been involved in the fraudulent process of acquiring the furniture which she did not dispute, and therefore the findings of guilt on the remaining charges were correct.



***Grounds of review and submissions:***

[36] Phillips relied upon a mixture of grounds in contending that the award was susceptible to a review. In this regard, she relied on the provisions of section 145 (2) of the LRA; the principles of fair administrative procedure; and the common-law grounds of review. To this end, she submitted that the Commissioner;

a) committed a gross irregularity by failing to deal with the argument that the supply chain fell under the Chief Financial Officer and therefore she could not have been involved in the sourcing of quotations;

b) concluded that because she did not dispute that she had signed the initial acquisition she was therefore involved in wrong-doing. However, the Commissioner ignored the fact that what she had signed was not a requisition. It was contended that what she had signed was simply a supply chain form which was brought to her as the responsible manager, after the SCMU had sourced all quotations and made recommendations as to which service provider to be appointed because of that quotation;

c) In regards to the issue of inconsistent application of discipline, the Commissioner committed a gross irregularity and/or committed misconduct in finding that there was no nexus between the charges preferred against her and the other employee. In this regard, it was submitted that the other employee was found guilty of 19 counts of misconduct amongst which were charges of dishonesty. Both Phillips and the other employee's charges have some element of dishonesty and to that end, because of the similarities in the two cases the commissioner's finding was absurd;

d) since the Commissioner was confronted with two conflicting versions which were mutually destructive of each other, he should have concluded that the Municipality had failed to discharge its onus of proving that she had committed any form of misconduct;

e) the Commissioner committed a gross irregularity and/or misconduct in finding that she was involved in the fraudulent process of requiring

furniture which she does not dispute. However, the Commissioner ignored the effect that she could not have been involved in the sourcing of quotations;

f) The commissioner unreasonably found, or committed a gross irregularity, and or misconduct in regards to the finding that the discipline of all employees serving under the Municipal Manager fell under the latter's responsibility, nor had the Commissioner indicated which legislation was relied upon or differentiated between section 57 employees and ordinarily employees.

[37] In summary, the Municipality's response to Phillips' grounds of review was that to the extent that she had contended that the Commissioner allegedly disregarded material evidence or ignored the facts, this would only constitute a gross irregularity if it caused the Commissioner to misconceive the nature of the enquiry or resulted in the award failing the *Sidumo* test. It was argued that Phillips had however failed to establish that this alleged irregularity had culminated in the result of the award being substantially unreasonable.

***The review test and evaluation:***

[38] A point that needs to be made in this case is that it has become common practice for parties appearing at arbitration proceedings to dictate how those proceedings should be unfold. At times, the parties, and unfortunately with the blessing of Commissioners, elect not to present oral evidence as in this case, and require the Commissioner to determine their respective dispute on the basis of voluminous documents to be presented, which are sometimes accompanied by equally prolix and incoherent written heads of argument.

[39] The above approach has received rebuke from this court, as amongst other things, it is either symptomatic of an easy and convenient way out of a potential protracted arbitration. It does not afford a commissioner an opportunity to properly canvass the issues in dispute with the parties; does not afford the parties an opportunity to properly present their respective cases; and worst still, it leaves a commissioner with the unviable and unnecessary task of having to sift through extensive documentary evidence, and to make sense of it all.

[40] In *SASSA v NEHAWU obo Malizo Punzi & 13 others*[5], this Court, per Rabkin-Nacker J lamented the fact that it is difficult to comprehend how a dispute which hinges on the fairness of the conduct of an employer can be decided (in the absence of a stated case) without parties giving oral evidence. The learned Judge further stated that in the absence of such a stated case, oral evidence should be led on the material facts in dispute at arbitrations in terms of the LRA. Thus Commissioners and arbitrators should not condone an agreement between parties that no oral evidence be led unless such a stated case has been agreed, and on which they may draw legal conclusions[6]. This is even more pertinent in cases involving alleged unfair dismissal disputes, where the question of onus is crucial, and also, where material disputes of facts are either glaring or at most, should have been foreseen by the parties and the Arbitrator[7].



[5] C233/14 at para [5] Delivered on 30 April 2015
[6] At para [8]
[7] See C Arends & Others v SALGBC & Others 4 [2015] 1 BLLR 23 (LAC) at para [15] where the LAC held that;

> *"The appellants are to some extent the authors of their own misfortune. They placed the matter before the arbitrator as if there was a simple, single issue capable of resolution with the barest minimum of factual matter. Their approach was neither prudent nor correct. When parties desire to proceed without oral evidence in the form of a special case, it is imperative that there should be a written statement of the facts agreed by the parties, akin to a pleading. Otherwise, the presiding officer may not be in a position to answer the legal question put to him. Alternatively, without such a statement, the question put is in danger of being abstract or academic. Courts of law and arbitration tribunals dealing with disputes of*

[41] It is understandable that there are certain types of disputes like those brought in terms of section 24 of the LRA that may call for such an approach, as those disputes can at times be easily disposed of on the documents submitted without the necessity of oral evidence. However, in alleged unfair dismissal disputes, or other disputes that invariably raises disputes of fact, this approach can never be wise nor convenient.

[42] The above is further raised within the context of the role of a Commissioner in arbitration proceedings, especially as in this case where if award are to be reviewed, it is expected of this Court to ask and answer the following pertinent questions, viz, "(i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employ give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence.) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision maker could reasonably have arrived at based on the evidence?"[8]



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*right exist for the settlement of concrete controversies and not to pronounce upon abstract questions or to give advice upon differing contentions about the meaning of an agreement. Where a question of legal interpretation is submitted to an arbitrator, the parties must set out in the stated case a factual substratum which shows what has arisen and how it has arisen. The stated case must set out agreed facts, not assumptions. The purpose of the rule is to enable a case to be determined without the necessity of hearing the evidence. An oral stated case predicated upon poorly ventilated and potentially unshared assumptions as to the facts defeats the purpose of the requirements of a stated case and, as this case shows, will lead to problematic results'* (Authorities omitted)

[8] See Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others (2014) 35 ILJ 943 (LAC) at paragraph 20

[43] The standard of review within the meaning of section 145 of the LRA, is that the decision sought to be reviewed and set aside must be one falling within the range of decisions which a reasonable decision-maker could not have come to in the light of the evidence presented[9]. In *Herholdt*[10], the Supreme Court of Appeal restated the *Sidumo* test as follows;

> *'[W]hile the evidence must necessarily be scrutinised to determine whether the outcome was reasonable, the reviewing court must always be alert to remind itself that it must avoid "judicial overzealousness in setting aside administrative decisions that do not coincide with the judge's own opinions". ... A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'* [Footnote omitted]

[44] In regards to the findings made by the Commissioner pertaining to the substantive fairness of the dismissal, the starting point is to look at Phillips' responsibilities and level of authority, to the extent that she had denied any wrong-doing. Notwithstanding her contentions, it should be accepted that Phillips by virtue of her position as Director: Corporate Services, was bound and guided by a document titled *'Powers Delegated to Directors and Officials'*. This document constituted delegations by the Municipality to various officials and directors.

[45] Signing powers in respect of requisitions, work orders, and invoice payments are delegated to directors. Significant with these delegated functions is that directors are authorised to deal with amounts between R10 000.00 and R30 000.00 in

[9] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC) at para 110
[10] Herholdt v Nedbank Bank (COSATU as amicus curiae) 2013 (6) SA 224 (SCA) At paras [13] and [25]

monetary value subject to obtaining at least three quotations on a rotation basis from a list of accredited suppliers for submissions to and approval of the quotation by the SCMU.

[46] It was not in dispute that the delegation of powers flows from the Municipal Management Act 56 of 2003, and in terms of its regulations dealing with supply chain management, goods or services may not be split into part or items of a lessor value in order to avoid complying with the requirements of policies. Phillips by virtue of the delegated authority was therefore bound by these policies and prescripts. Her contention therefore that the process was such that it was the SCMU that sourced quotations and that she had merely signed documents as the responsible manager of the department lacks any sense or logic. In my view, her contentions were a lame attempt at abdicating her responsibilities.

[47] The evidence, which the Commissioner had correctly accepted, was that Phillips was responsible for sourcing quotations. It should therefore be concluded that Phillips was aware of these policies and procedures, including her responsibilities and mandate in regards to the purchase of goods or services. Thus, she knew that in respect of the items requested, she had to follow certain procedures, including getting three legitimate quotations from service providers prior to confirming or placing orders. The evidence of Van Den Berg based on her investigations reveal a flouting of all the rules applicable at every turn, and there is clearly no merit in Phillips' contentions that every blame should be attributed to the conduct of Edibetse, whose evidence, as correctly pointed out by the Commissioner, exposed weaknesses in Phillips' case.

[48] Edibetse's evidence as can be gleaned from the record of proceedings can at best be described as shockingly woeful, wishy-washy, incoherent and contradictory in the extreme. A reading of the record in regards to his testimony reveals a witness who was gifted at prevarication, and who ultimately did not know what he was saying. Both his examination-in-chief and cross-examination proved to be excruciating, and ultimately portrayed an individual who was prepared to present numerous conflicting versions in one sentence in respect of simple questions posed to him. It is no surprise that Phillips sought to disavow, and discredit his testimony, even though she had called him as her witness.

[49] For what it is worth, and to further illustrate the point, the following exchanges in the disciplinary proceedings between Edibetse and the parties' representatives are significant;

***Examination in chief***

Mr. Gaanyago (Phillips' representative): *There was evidence which was led by Gayle van den Berg that you were confronted with these quotations on page 86 and 87 and she was present and then you denied that you ever requested these quotations and you also promised to make an affidavit?*

Mr. Edibetse: *Yes, I did, but now if I see these quotations, to my knowledge, right, a quote can be quoted, I don't know how your format stands on the system, it change or it cannot change, I don't know, that what I told her first, and I did promise to write that affidavit, but to myself then I was waiting for Gayle to come back to me to ask for that affidavit, but she never came there. (Sic)*

*Mr. Gaanyago:* *Did you admit to her that you at no stage requested these quotations?*

*Mr. Edibetse:* *I don't remember Sir.*

*Mr. Gaanyago:* *Can you talk louder for the record?*

*Mr. Edibetse:* *Yes, I think so, I am not sure. I am not sure. I did*[11]

***Cross-examination:***

*Mr. Pambane (Municipality's representative):* *Okay, earlier the Manager, or the owner of @Office, Mr. Thuys Smit, testified that no-one contacted them from the Municipality for a quotation and then during the evidence of Miss Gayle van den Berg, together with Mr. Mafolo, Gayle testified that the Municipal Manager called you to ascertain whether you indeed obtained this quotation and you said no, you are not the one who actually called for this quotation. Can you explain that?*

*Mr. Edibetse:* *As I explained before that this quotation was faxed, I did ask for catalogues, right, and they know me at these companies, so they fax it to me, because its me who was the first one the Director here did ask me "Help me, assist me with this and this and this'. (Sic)*

*Mr. Pambane:* *So what you are saying is that Miss van den Berg was lying when she said that when they called you to verify, indeed you are the one who called for this quotation, and you said you were not the one who called. What you are saying is that she did lie?*

*Mr. Edibetse:* *I can't say a personal lie, a person can lie with many ways, but only thing is I never said she lied.*

Following upon on the same question, and upon being asked again whether van den Berg had lied or not, the responses ranged from '*Maybe, maybe not'; 'I can't remember'.* On being asked countless times about whether he had called the owner of @Office, Smit for a quotation, and after unsuccessful attempts at avoiding a direct answer, his response was; *"You know what, I did not call*

[11] Pages 491-492

*for a quotation, sorry. Not for a quotation. Just hear me out. I asked for a booklet, a catalogue, not a quotation"*

[50] Significant with Edibetse's convoluted and contradictory responses is that they came against the background of the following evidence;

a) Phillips exercised financial management responsibilities, and despite her denials, was bound by the prevailing policies and prescripts, which she and Edibetse had alleged that they did not know about or which they thought were outdated;

b) She was responsible for *inter alia*, ensuring that she had to get three quotations in respect of any services or goods her department required;

c) The quotations purportedly received from Waltons and @Office were clearly fraudulent, and only Ontlhametse had approached @Office for quotations in respect of items required by the Municipality. Edibetse's contentions that she had sourced these quotations from the service providers, and Phillips' false assertions that she had nothing to do with sourcing of quotations were therefore correctly rejected by the Commissioner;

d) It is apparent that upon receipt of the quotations from Waltons and @Office, by Otlhametse, they were then 'doctored', photo-stated, inflated and then presented to SCMU as genuine valid quotations when they were not. As to who was responsible for this elaborate scheme and clear fraud is anybody's guess. It would however not be far-fetched to believe that Ontlhametse, Phillips or Edibetse had a hand in it;

e) Effectively then, the only 'valid' quotation presented was that of Ontlhametse, which conveniently happened to be just under R30 000.00, to enable Phillips to process and approve it. Even then, the prices charged for the items were far more inflated that their market value, as compared to other suppliers.

f) Evidence further showed that in respect of the 12 chairs required, orders in that regard were split into two, contrary to established policies. These orders and the prices therein were inflated as compared to what other suppliers were charging, and this was clearly designed to enable the price range to be within Phillips' mandate;

g) Ultimately, the Municipality ended up paying more than it should have for the items required, particularly in the light of Smit's evidence which showed that his company provided those items at a far lesser price than as charged by Ontlhametse. This had indeed resulted in wasteful and fruitless expenditure;

h) To the extent that Phillips as the responsible manager had flouted established rules and policies; had condoned, and in fact was complicit in fraudulent activities, there was good cause to charge, discipline and dismiss her for misconduct.

[51] In the light of the above, I fail to appreciate any basis for the contention that the Commissioner failed to take into account some material evidence, or came to an unreasonable conclusion on the facts. There is no basis for any conclusion to be reached that the Commissioner's decision did not fall within a band of reasonableness.

[52] It is appreciated that the Commissioner paid scant regard to issues surrounding the appropriateness of the sanction of dismissal. One however needs to look at the nature of the misconduct in question, and the invariable conclusion to be reached is that it was indeed serious as it contained elements of fraud, dishonesty and downright corruption.

[53] Phillips was not specifically charged with fraud or dishonesty. However, she was responsible for ensuring that policies and procedures were adhered to, and to act in the best interests of the Municipality. Where she had failed to do so by allowing a flagrant disregard of those policies and procedures, and thus resulting in the Municipality having been prejudiced financially, there can be no sense in calling for a lesser sanction.

[54] Acts of fraud, and deliberate flouting of rules, regulations and policies, especially those falling within the realm of the PFMA, and general malfeasance are common practice within the public service. According to the Auditor General's report for 2016, irregular expenditure in provincial and national governments has increased by almost 40% since 2013/14, costing the country and the economy a mouth watering amount of R46,36-billion[12]. Local municipalities have not spared hard working, honest tax paying citizens either. In a report released on 01 June 2016, irregular expenditure has according to the Auditor General, more than doubled since 2010-11 to R14,75 billion. Further according to this report, municipalities in the North West, Mpumalanga, the Eastern Cape and Limpopo were the main contributors to the significant increase in irregular expenditure over the past five

[12] See Auditor General's report for 2016 as released on 16 November 2016.

years, and the reason for the increase was continued non-compliance with Supply Chain Management legislation.

[55] Public servants like Phillips are contributors to this unmitigated waste and cancer, which is making our dream of a better society especially for the poorest even more elusive. Individuals like these and all others within the public service who appear not to be satisfied with their normal salaries and are prepared to flout all financial regulations and rules for whatever reason should be ashamed of themselves.

[56] The misconduct committed by Phillips was so gross, that evidence to the effect that a trust relationship between her and the Municipality was broken was not even necessary to be led. The type of misconduct on its own invariably broke any trust relationship between her and the Municipality. This is even more apposite in circumstances where Phillips has throughout, refused to take any responsibility for her actions, falsely blamed Edibetse for everything, and by all accounts, failed to show any iota of contrition. The public service can do without individuals like her.

***The issue surrounding consistency in application of discipline:***

[57] Phillips' contention was that the Municipality had not acted consistently in application of its rules and policies on the basis that another employee, Mr. Joy Seeqela, was dismissed for 19 counts of misconduct which included dishonesty. This individual was nevertheless reinstated at a later stage.

[58] It was common cause that the events in respect of Seeqela took place after Phillips was dismissed. These issues were obviously only raised at arbitration

proceedings, and in line with the parties' approach at those proceedings, no oral evidence was led in that regard. However, as appears from the record and submissions made by their representations before the Commissioner, the issue of inconsistency and additional documents in that regards only arose on 14 March 2012, long after the proceedings had commenced. The Commissioner had then asked the parties to file further written heads of argument in respect of that issue, as it had not formed part of the original agreement in terms of the process would unfold.

[59] The Commissioner in the award however disposed of the issue of inconsistency on the basis that he could not find any nexus between the charges preferred against Phillips and Seeqela. Flowing from the decision in *SACCAWU & Others v Irvin Johnson Limited*[13], and a long line of subsequent judgments, the issue of inconsistent application of discipline or the 'parity principle' as commonly referred to can thus be summarised as follows;

a) The Courts have distinguished between two forms of inconsistency, viz, historical and contemporaneous inconsistency. The former requires that an employer must apply the penalty of dismissal consistently with the way in which the penalty has been applied to other employees in the past; whilst the latter requires that the penalty be applied consistently as between two or more employees who commit the same misconduct[14].

[13] (1999) ILJ 2303 (LAC) at paragraph [29]
[14] Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (2010) 31 ILJ 452 (LC) at para [10]

b) The concept of parity, in the juristic sense, denotes a sense of fairness and equality before the law, which are fundamental pillars of administration of justice[15].

c) Employees must be measured against the same standards, i.e. like cases should be treated alike[16], and in determining sanction in respect of employees involved in the same misconduct, the employer must not be capricious, or act arbitrarily or be influenced by improper motives or discriminatory policies;[17]. Thus a value judgment must always be exercised, and the principle should neither be applied rigidly[18], nor willy-nilly without any measure of caution[19].

[60] In this case, the allegations of inconsistent application of discipline arose in circumstances where oral evidence was not presented. Phillips sought to rely on documents, and local newspaper clips presented during the last stages of oral argument before the Commissioner, and it was common cause that the disciplinary enquiry in respect of Seeqela took place some time after Phillips was dismissed. Confronted with not so-dissimilar facts, the Labour Appeal Court in



[15] ABSA Bank Limited v Naidu ibid

[16] National Union of Metalworkers of SA and Others v Henred Fruehauf Trailers (Pty) Ltd (1994) 15 ILJ 1257 (A) at 1264A-D. See also NUM and another v Amcoal Colliery t/a Arnot Colliery and Another [2000] 8 BLLR 869(LAC)

> "The parity principle was designed to prevent unjustified selective punishment or dismissal and to ensure that like cases are treated alike. It was 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".

[17] See National Union of Mineworkers, obo Botsane v Anglo Platinum Mine (Rustenburg Section) (JA2013/42) [2014] ZALAC 24 (15 May 2014) at para 25 where the LAC held that:

> 'The idea of inconsistency in employee discipline derives from the notion that it is unfair that like are not treated alike. The core of this 'factor' in the application of employee discipline (it would be a misconception to call it a principle) is the rejection of capricious or arbitrary conduct by an employer.'

[18] SACCAWU and Others v Irvin and Johnson (Pty) Ltd at 2313C-J where Conradie held that;

> "…Consistency is therefore not a rule unto itself, but rather an element of fairness that must be determined in the circumstances of each case....

[19] ABSA Bank Limited v Naidu at para [36]

*National Union Of Mineworkers, obo Botsane v Anglo Platinum Mine (Rustenburg Section)*[20] held that;

> *"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"*[21]*.* (References omitted)

[61] In the light of the context within which the issue of inconsistency was raised, and notwithstanding the constraints that the Commissioner was confronted with, he cannot in my view be said to have reached a decision which no reasonable commissioner could have reached in the light of what was presented to him. On the arguments presented on behalf of the Municipality, the charges preferred against Seeqela had nothing to do with requisitions, quotations or financial misconduct. To the extent that the parties chose to present their respective cases to the Commissioner in the manner that they did, there is no basis for any conclusion to be reached that the Commissioner's findings in regards to the issue inconsistency was not reasonable.

***Alleged procedural unfairness:***



[20] (2014) 35 ILJ 2406 (LAC)
[21] At para [39]

[62] Three issues raised in this regard were whether the Municipal Manager lacked the requisite power to suspend or discipline Phillips without a Council Resolution; whether there was contravention of clause 15.2 and 15.3 of Phillips' contract of employment, and whether the Municipality was correct in charging her in terms of the provisions of the Main Collective Agreement.

[63] The Municipal Manager is authorised to appoint staff members other than those identified under section 56 (a) of the Systems Act. As a manager, Phillips was directly accountable to the Municipal Manager in terms of sections 56 and 57 of the Systems Act. I did not understand it to be in dispute that Phillips was suspended with pay following a Council resolution. Be that as it may, to the extent that Phillips contended that the Municipal Manager required a council resolution to discipline her, it is unclear on which provisions or policies she relied upon. The Municipal Manager by virtue of the provisions of section 55 (1) (g) of the Systems Act as head of the administration is responsible for the maintenance of discipline of staff.

[64] Phillips had also complained that she was suspended on 10 April 2008 and the disciplinary enquiry only took place on 4 July 2008, contrary to the provisions of the Main Collective agreement. A related complaint is that she was charged in terms of the provisions of the collective agreement when those provisions were not applicable to her.

[65] The difficulty with the above contentions is that Phillips seeks to rely on the provisions of the Collective agreement whilst at the same time seeking to disavow them. To the extent that Phillips sought to rely on these provisions, nothing prevented her from approaching the SALGBC with a claim of unfair labour

practice or alternatively a claim in terms of section 24 of the LRA. It nevertheless appears that as is always the case, that she was content to be on placed on paid suspension for as long as it took, without raising any issues about procedural unfairness until the disciplinary enquiry took place. However, to the extent that she seeks to rely on the provisions of her contract of employment, it is not stated in her founding or replying affidavits what those relevant provisions are or where they are to be found. It is not the function of this court to sift through material contained in four arch-lever files to find out where these provisions are located. The duty is upon a party to make out its case on the papers.

[66] In the light of the provisions of the Systems Act referred to, and to the extent that Phillips had not indicated which policy or regulations she had relied upon in contending that the Municipal Manager had no authority to discipline her, or that her contract of employment was applicable to her discipline, the Commissioner's findings on the issue of procedural fairness cannot be faulted.

[67] Having had regard to the conclusions reached, it follows that the Commissioner's award is unassailable, and there is no basis upon which it can be interfered with or set aside. I have further had regard to the requirements of law and fairness in regards to the issue of costs. This application was ill-considered in the light of the circumstances that led to Phillips' dismissal. Be that as it may, and having had regard to the relevant considerations, I am of the view that any cost order should not be made.

***Order:***

i. The late filing of the record of arbitration proceedings by the Applicant is condoned.

ii. The late filing of the answering affidavit by the Third Respondent is condoned.

iii. The application to review and set aside the arbitration award issued by the First Respondent is dismissed.

iv. There is no order as to costs.

**Tlhotlhalemaje, J**

Judge of the Labour Court of South Africa

**Appearances:**

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|---|---|
| For the Applicant: | Mr. MF Kganyago of Maake Kganyago Attorneys |
| For the Third Respondent: | Mr. H Wissing of Henk Wissing Incorporated |