ARBITRATION AWARD

Panellist : Mr. THABE PHALANE
Case No : GPBC 1998/2018
Date of Award : 23 OCTOBER 2020

In the ARBITRATION between:

M. Matlou
(Union / Applicant)

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and

Department of Justice and Constitutional Development
Respondent

Union/Applicant's representative: Mr Maurice Makatu-Official, NUPSAW
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Arbitration Award

DETAILS OF THE HEARING AND REPRESENTATION:

1. This matter was set down as Arbitration and was heard on 17 and 18 February 2020, 02 September 2020, 11 September 2020 and 26 September 2020.
2. The Arbitration was held at the GPSSBC building situated at 260 Basden Avenue, Lyttleton, Centurion, at the Respondents' premises situated at 245 Pretorius Street, Momentum Building, Pretoria, and also at the Respondents' representatives premises situated at Club Advocates Chambers, 30 Pinaster Avenue, Hazelwood, Menlopark.
3. The Applicant attended and was represented by Mr Maurice Makatu, a Union Official from NUPSAW, and the Respondent was represented by Advocate Keatlaretse Magano
4. The matter was digitally recorded. The dispute relates to alleged unfair dismissal of the Applicant.
5. The Respondent called 4 witnesses who testified and were cross examined. They also submitted bundles of documents marked bundles 'R1, R2 and R3'.
6. The Applicant also testified and submitted a bundle of documents marked bundle "A".
7. The parties also agreed to submit written arguments on or before 05 October 2020, and replies, if any on or before 09 October 2020.
8. Both parties submitted their arguments on 05 October 2020 and they also replied on 09 October 2020.

ISSUE TO BE DECIDED:

9. I am required to determine whether the Respondent committed an unfair labour practice related to benefits against the Applicant or not, and consequent thereon, to issue the appropriate relief.

HISTORICAL BACKGROUND:

10. The Applicant was employed as a State Attorney Clerk by the Department of Justice and Constitutional Development from 2010.
11. She was charged with 3 charges of corruption, alternatively failing to disclose the reward she received from a member of the public, further alternatively with bringing the Department into disrepute.
12. There was a disciplinary hearing held but the Applicant was not in attendance and she was found guilty in absentia and a sanction of dismissal was issued and confirmed on appeal on 15 August 2018.
13. The Applicant challenged the procedural and substantive fairness of her dismissal and wanted reinstatement as a relief.

14. Dismissal was not in dispute and the respondent had a duty to begin presenting evidence.

Summary of Evidence and Arguments by the Respondent:

1st Witness, Mr Sipho Nkosi

15. The witness is the Employment relations officer of the Department of Justice and Constitutional Development.
16. He was the employer representative at the disciplinary hearing of the Applicant.
17. The notice to attend the disciplinary hearing on 19 April 2017 was served on the Applicant by the Sheriff. The Applicant called in sick and another date for 05 September 2017 was set for the hearing.
18. On the agreed date the Applicant attended and was represented by an Attorney, Mr Mashao. The Applicant applied for a postponement which was granted, and the matter was postponed to 04 December 2017.
19. The Applicant attended but was represented by another Attorney, Mr Sambo, who applied for a postponement because he was new and wanted to consult. The matter was postponed to 12 December 2017.
20. On 12 December 2017 the Applicant did not attend and but Mr Sambo was in attendance and he said the Applicant was sick, but there was no medical certificate and he could therefore not fully explain the whereabouts of the Applicant.
21. The Attorney then withdrew from the matter after being given a short adjournment to contact the Applicant. He was then recused.
22. The witness then addressed the chairperson of the hearing about proceeding with the matter and the chairperson ruled that they can proceed, as the matter ws postponed at the instance of the employee and there was no medical certificate submitted if indeed the employee was sick.
23. The Applicant was given adequate time to attend and defend herself against the charges but she failed to do so.
24. She was allowed postponements on more than one occasion which both the employer and the chairperson of the disciplinary hearing agreed to.
25. After the chairperson pronounced the sanction, the Applicant was given an opportunity to submit mitigation and she came with a white Attorney to present her mitigation.
26. The witness submitted that the disciplinary process was therefore fair.

Under cross examination

27. The witness submitted that the matter was postponed by the chairperson on four occasions.
28. The first sitting the Applicant was not present and the matter was postponed.
29. The second sitting she attended with Mr Mashao and the matter was postponed.
30. The third sitting the Applicant attended with Mr Sambo and the matter was postponed.
31. The fourth sitting the Applicant did not attend but Mr Sambo attended, and he then withdrew and was excused.
32. The witness asked Mr Sambo before the hearing where was the Applicant and he said he did not know. During the hearing Mr Sambo submitted that the Applicant was sick and the chairperson adjourned to establish the correct whereabouts of the Applicant.
33. When Mr Sambo returned he said that he was withdrawing and wanted to be recused.
34. He is not certain that Mr Sambo knew the Applicants whereabouts.
35. The matter then proceeded due to the provision of clause 7(3)(g) of Resolution I of 2003, the Disciplinary Code and Procedures for the Public Service.
36. The witness reiterated that the Applicant came with a white lady during mitigation and she also came with her daughter who testified. He does not have the meeting record but he took notes.
37. The medical certificate of the Applicant was presented on 20 December 2017. The certificate stated that the applicant was unable to attend work from 12 December 2017 up to 18 December 2018.

38. The witness sent the Applicant an email on 19 December 2017 and that is when the Applicant replied and attached the medical certificate. It is probable that the Applicant could not present the medical certificate had he not sent her the email.
39. He denied that there was an application for postponement made by Mr Sambo on 12 December 2017.
40. The email he wrote on 19 December 2017 asked the Applicant to give reasons why she should not be found guilty. The Applicant was therefore not left out but given an opportunity to present her case,
41. He was not the relevant person to be addressed and she should have addressed the chairperson as he could not do anything at that stage as the matter was concluded. He only told her of the next step and he does not know if she submitted the medical certificate or not.
42. There were two other individuals charged with the Applicant.
43. Mr Collins Seroto pleaded guilty and was still working.
44. Mr Nyiko Baloyi's disciplinary hearing was parked as the witness was not co-operating and the matter can be reinstated.
45. The Respondent has not acted inconsistently as the acts of misconduct resulted in all the employees being charged. The merits of the three charges are not the same, and the sanction cannot be the same.
46. Not all employees were charged with corruption and Mr Seroto's case was different.

2nd witness. Mr Pandelani Sengakana

47. The witness is the Assistant Director-Forensic Audit, in the Department of Justice based in Pretoria.
48. He has been employed for 8 years and his duties include conducting investigations into fraud, corruption and maladministration.
49. He submitted that his role in this matter started around 2016 when he received a task from his Director-Forensic Investigations, to investigate allegations of corruption at the office of the State Attorney, made by a member of the public.
50. The allegation was that the officials of the Department were requesting bribery money from a service provider.
51. There were 3 officials, The Applicant, Mr Collins Seroto and Mr Nyiko Baloyi.
52. He knew the Applicant because they attended the same church, ZCC.
53. The complainant was Mr Mnguni, the owner of Translation Agency (pty) Ltd.
54. He went through the complaint, called the complainant to elaborate and provide any evidence that he had.
55. He and his supervisor, Mr Paul Nel, met the complainant who mentioned that he was providing the Department with interpretation services at the Courts.
56. The complainant said the procedure was that he would receive a call from the Applicant or Mr Baloyi, and he would then provide the service. He would then invoice the Department at a rate of R 2 500 per person.
57. The Applicant and Mr Baloyi would then request R 500 from that amount he invoiced.
58. This occurred for some time and it was crippling his business and he was no longer making any money.
59. He was introduced to Mr Seroto by the Applicant. Mr Seroto was working in finance and his role was to ensure that the invoices were processed for payment as soon as possible.
60. The complainant also provided a deposit slip of deposits he made to the Applicant and the other two members.
61. He produced copies of deposits to the Applicant of R 4 000, made on 14 May 2014, R 1 000 made on 07 November 2014, and R 800 made on 28 November 2014.
62. He then requested a 'BAS' payment record from the finance department of all payments made to his company for services rendered.
63. He found out that the company was paid R 20 000 on 14 May 2014, R 10 000 paid on 06 November 2014, and R 7 500 paid on 27 November 2014.

64. He also confirmed that the deposits were made to the Applicants bank account, as she was paid on the 15th of every month.
65. They then interviewed the Applicant to get her side and to respond in an affidavit. The Applicant never produced a statement or affidavit.
66. He then prepared a report with recommendations to Management, that disciplinary steps be taken against the officials concerned.
67. He also interviewed Mr Seroto, who confirmed that he requested and received money from Mr Mnguni.
68. Mr Baloyi did not issue a statement.
69. They also opened a criminal case against the officials.
70. He did not testify at the disciplinary hearing as it continued in her absence.
71. He disagreed that the money was lent to Mr Mnguni as Mr Mnguni said that they demanded money from him for the services he provided.

Under cross examination

72. The witness has a degree in auditing and a diploma in forensic investigations
73. Mr Mnguni reported the matter by a letter to Mr Nel, who then forwarded it to him. Mr Nel then called him to his office and instructed him to investigate the matter.
74. He does not have the letter from Mr Mnguni or from Mr Nel instructing him to investigate.
75. He did not know the Applicant before the investigation.
76. He did not interview the Applicant because she refused, and he denied that it was not because he did not have the letter of instruction. The Applicant did not say that she refused to meet them because they did not have an official appointment
77. It was also incorrect that he did not have an instruction because there is a Circular no 2 of 2014, which states that any forensic investigator appointed by the Department may interview and seize any document within the Department, and that gives him a right to interrogate any official appointed by the Department.
78. They used to have challenges with officials not co-operating, so now the circular instructs the officials to obey. All officials should be familiar with the circular. It is her issue if she is not familiar with the circular.
79. He submitted that the procedure was to prepare a report to Mr Nel, who then signs it if he is satisfied, or would send him to obtain more information if he was not satisfied.
80. Mr Nel does not do the field work and the report submitted, although signed by Mr Nel, was prepared by him.
81. He believes that the Applicant and Mr Mnguni knew each other from church.
82. Mr Mngni however did not say that he used to borrow money from the Applicant.
83. He said they started talking about money when he provided services for the Department.
84. He does not know if Mr Seroto and Mr Baloyi are still working for the Respondent.
85. He denied that he was part of the agenda at the Respondent to dismiss the Applicant.

3rd witness. Mr Ernest Thabo Mnguni

86. The witness is a service provider for the Respondent and was the complainant in the case against the Applicant.
87. He worked as an interpreter for the Department of Justice for 27 years before he resigned. He then formed his company and it provides language services in civil cases from 2013.
88. In civil cases the work of an interpreter is in the hands of the Attorney. They book you, then you issue an invoice, which invoice is handed back to the Attorney.
89. There was an agreement to charge a fee of R 2 500 per side, per case.

90. He worked with the Applicant on cases for a period of 23 months starting from 17 April 2013 to 17 March 2015. He worked a total of 17 cases and the Applicant was the prosecuting Attorney.
91. He did not know the Applicant prior to 17 April 2013. He worked on the first case and was paid. The Applicant did not get anything from the fee.
92. After this case there was a period of 8 months that passed without the Applicant giving him work.
93. He saw the Applicant at the courts but he was utilising the services of other interpreters. He became worried and asked around the interpreters, and the response was that some Attorneys expect something in return for work provided.
94. Someone said to the witness that like a man he must thank them and give them something. One even said 'put in money and you will see'.
95. After 8 months he met the Applicant at the High Court and asked her a favour. He had completed a case given to him by another interpreter coming from another Attorney but the invoice was not paid.
96. The Applicant took the invoice and then asked him if he was paid for the case they did together. He replied yes and the Applicant asked why he did no tell him that he was paid.
97. He does not remember if he apologised or not. The Applicant then said she will take the invoice straight to Mr Seroto in finance section to process it quickly, but he expected something.
98. He was happy that his invoice would be processed faster. As he was still new, the invoices took four to six weeks to be paid, but he later learned that if one pays something, they took five to ten days to be paid.
99. If one did not pay something, they will be told many excuses that the invoice is lost, or misplaced, or he must resend it again or that it does not show on the system.
100. He was paid for the second invoice and he did not want to keep quiet like the first and told the Applicant that he was paid. He had to phone so that Mr Seroto could get something.
101. He got hold of Mr Seroto's number and he said the Applicant had explained everything, and he has received payment, but he did not know how to give him something or a cold drink.
102. Both the Applicant sent their banking details via sms. He knew that Collen had to get something but he did not know his face.
103. He gave Mr Seroto R 500 and the amounts became less and less. The smallest amount he gave to the Applicant was R 500. The Applicant was paid per invoice processed, but not the same with Mr Seroto.
104. The Attorneys were becoming greedy. If the case was more than two days, the Attorneys would expect R 500 for each day.
105. He was no longer exited to get paid and he had to pay them before he could do anything. This happened for the 17 cases and he finally send an sms to Mr Seroto and the Applicant that this payments were affecting his marriage.
106. He lodged a complaint against the tree officials, but he worked with Mr Baloyi for 11 months out of the twenty three months in question.
107. The same style of operation was the same as that of the Applicant as they were both State attorneys. Mr Seroto was in finance.
108. All the invoices that he sent to Mr Baloyi were also handed to Mr Seroto same as that he sent to the Applicant.
109. There were times when all three officials would call him after payments using the same phone he saved as that of the Applicant.
110. He and his family then decided to report the matter. He wrote a letter to Ms Monama (deceased), and a meeting was arranged to come in person.
111. The letter was headed 'some Attorneys expect payment from the interpreters for work provided'.
112. The meeting was held immediately after the 17th case he did with the Applicant. Msr Monama delegated the case to Mr Issac Chowe, the Deputy Director.

113. Mr Chowe interviewed him and he presented him with a list of cases done with the applicant and with Mr Baloyi. He also presented the banking details of all three officials.

114. Mr Chowe said he had to testify and the case was referred for forensic investigations.

115. The period of 23 months refers to the period he was actively doing cases with the Applicant.

116. He exchanged money with the Applicant from the 2nd case to the 17th case. All monies were deposited into her bank account.

117. He borrowed money from the Applicant on two occasions. One loan was for church activities in Mamelodi and the other was for a trip to Polokwane.

118. He denied that he also loaned money for a trip to Johannesburg. Each loan was R 500, and it was deposited not paid in cash.

119. He denied that he was introduced to the Applicant through Ms Mohlala, who was a judges' clerk. He conceded that it was possible that the Applicant might have known him from church because the role he played in church, even as a translator at church. This is where the title reverend comes from.

120. One Saturday afternoon his wife came from choir practice and said she met the Applicant, who was attending the same church as they were. She was introduced to his wife by a fellow church member who was with the Applicant and she said this is the Applicant, who was working with Mr Mnguni.

121. He denied that he lost the Applicants account so the Applicant texted him her banking details.

122. He also denied that there were unprofessional intentions between him and the Applicant. He relied on the Applicant for work.

123. He instead rejected an invitation to go to Polokwane when the Applicant told him there was no work around Pretoria but in Polokwane.

124. He also denied that the applicant tried to report him to the offices in Polokwane or to his wife.

125. The Applicant was generally a good person and respectful and he never had any romantic intentions towards her.

126. He attended the hearing of Mr Baloyi but the matter was postponed a lot and he could not handle the postponements. He is now ready to testify in that case as well.

127. The motivation to report these incidents was that his family was suffering. He could not receive all the money he worked for. The more he payed the more they demanded money from him.

128. His children would contemptuously tell him 'go and pay your people first', as if it was a normal thing to do.

129. Somebody had to report, and he was the person to do so. His colleagues are not prepared to come forward.

130. This came with consequences. His business took a nosedive for about two years.

131. He wised up and realised that there are private firms that also require interpretation services.

Under cross examination

132. The witness admitted that he was the complainant in the case. He works as a freelancer.

133. When he started the agreed fee was R 2000, and now it is R 3000.

134. He first relied on his colleagues to give him work when they were double-booked.

135. When the business relationship developed, he would receive a direct call from the Applicant to meet in the High Court. She would also call to enquire if he was available for the following day or not.

136. He worked with other State Attorneys besides the Applicant.

137. He worked with Mr Baloyi 13 months after he started with the Applicant.

138. He was surprised that the second case he worked with the Applicant came after 8 months. The Applicant would just come to Court, greet him and proceed to his colleagues.

139. More than 10 of his colleagues said some State Attorneys expected something. He accepted that it how work was secured, hence the absence of work for him.

140. The Applicant took the invoice that he worked with another State Attorney and also indicated that Mr Seroto expected something. He was given their banking details after he had invoiced and the Applicant said she will take the invoice to Mr Seroto.

141. He also told Mr Seroto that that the Applicant told him everything, meaning the issue of the cold drink.

142. All the invoiced he wrote and gave to the Applicant and Mr Baloyi ended up with Mr Seroto.

143. He gave the Applicant money on all the cases he did with her except on the 1st case.

144. It is difficult to say that it was payment as a 'token of appreciation' because if he paid there was a noticeable benefit of more work and no issue of the invoices getting lost or missing or not showing up on the system.

145. He felt the punishment of not paying by not receiving work.

146. He confirmed that he borrowed money from the Applicant on two occasions. The money was R 5 00 and was deposited into his bank account.

147. He denied that he had borrowed R 4 000 from the Applicant.

148. At one stage he was paid R 20 000 and then he paid R 4 000. It was payment for a few cases he did with the Applicant and also because the Applicant intervened for him to get paid.

149. The R 800 was a unique payment as the amounts paid would be R 500, R 1 000 and the R 4 000.

150. His family was affected, and his children would say 'pay your people first and we will come later'.

151. They agreed as a family to report the issue. He reported on 17 July 2015. It was four months after he did a case with the applicant and two months after he worked with Mr Baloyi.

152. The interview was agreed for 21 July 2015 and a Senior official took the list of cases he presented. He also complained about Mr Seroto.

153. He did not report the matter because it was only affecting his family. He had a verbal clash with Mr Baloyi. He had done a case with Mr Baloyi, but he did not want the witness to submit a claim, alleging that the witness owed him.

154. Mr Baloyi even alleged that the witness made him to have a bad Christmas period.

155. He would still have reported the issue but this incident was the last straw.

156. He conceded that if one paid, there would be benefits. When he stopped, he would be victimised, and it affected work from other agencies as well.

157. One State Attorney even complained that he was phoning her too much, and if he continued, she would stop giving him work. The invoice resurfaced after he begged.

158. The witness submitted that he had a wonderful relationship with the Applicant and denied the charges of him harbouring romantic intentions.

159. He even borrowed money from the Applicant and at no stage did the Applicant threaten to report him to the church or to his wife.

160. She called him reverend and he called her choir girl.

161. He denied threatening the Applicant and the only verbal clash he had was with Mr Baloyi.

162. It was also pointless to report Mr Baloyi alone as the situation applied to the Applicant as well as Mr Seroto.

163. He still receives work from the State Attorneys but only if a colleague is double booked. It seems as if he has been blacklisted, as some people do at least 5 cases in a month and he does at least 5 cases in a year.

164. He knew there are other finance officers but only Mr Seroto processed his invoices.

4th witness, Ms Moyahabo Rebecca Mnguni.

165. The witness is the wife of the complainant. He knew the Applicant as an employee of the State Attorney office.

166. She also saw the Applicant at church as a lady who knew both of them introduced her to the Applicant.

167. Her involvement was to pay the money into the Applicants' bank account as they would sometimes go together to make the payments.

168. The money was paid after her husband worked and was paid.

169. Mr Mnguni explained that he was paying so that he could get work.

170. She described the money paid was a form of bribery for work provided.

171. She deposited R 800 when she was with Mr Mnguni.

172. She denied that the money paid was the money the Applicant loaned to Mr Mnguni.

173. She only knows of two occasions where the Applicant loaned money to Mr Mnguni.

174. They had financial problems and discussed the payments and then decided to report the matter.

175. They had no food, electricity and even owed SARS.

176. There was also a heated argument with Mr Baloyi and Mr Mnguni sent the three officials an sms message that he could no longer do business with them.

177. She is not aware of allegations that the Applicant was making romantic advances towards the Applicant.

Under cross examination

178. The witness submitted that Mr Mnguni was benefiting by paying the three officials, and not as a token of appreciation.

179. The money was paid as a bribe, called cold drink. The bribe opened doors, because if you did not pay you would not get work.

180. If Mr Mnguni wanted his invoices to be paid quickly he had to pay Mr Seroto as well.

181. She denied that the Applicant borrowed Mr mnguni R 4 000. The Applicant only loaned money on two occasions, R 500 during October 2014 and around February 2015.

182. The money was deposited into the business account. Mr Mnguni would themn work and pay the money back.

183. The Applicant was getting more money because she was giving more work.

184. There are no other officials that Mr Mnguni paid except the three officials.

185. The argument with Mr Baloyi was that he accused Mr Mnguni of making him have a bad Christmas.

186. She only spoke to Mr Baloyi and not the other officials about the money exchanging hands for work provided.

<u>Summary of Evidence and Argument by the Applicant:</u>

<u>Ms Minah Matlou</u>

187. The Applicant started working as a Candidate Attorney from 2008 and was appointed State Attorney on 01 May 2010.

188. She was earning a salary of R 33 523 per month at the time of her dismissal on 15 August 2018.

189. The Applicant challenged the procedural and substantive fairness of her dismissal and wanted reinstatement as a remedy.

190. She submitted that there were allegations by Mr Mnguni that he gave her money in order to do work for the State Attorney.

191. She submitted that she knew Mr Mnguni from 2011 when he was introduced by a clerk of a judge, Ms Mohlala (now deceased).

192. The Applicant was working at the Department of Justice as an interpreter.

193. Mr Mnguni told Ms Mohlala in 2013 that he resigned and opened his company, and Ms Mohlala told him that the Applicant worked at the State Attorney and could give him work.

194. The Applicant later met Mr Mnguni at the High Court and he gave her business cards to keep an distribute some at her office.

195. She told Mr Mnguni that she will give him work when she had some. The Applicant worked with Mr Mnguni once, and he was charging R 2 500 instead of R 2 000 like other interpreters.

196. During 2014 Mr Mnguni called the Applicant and asked that she lent him money because he was going to Moria with other pastors.

197. He texted his bank account and the Applicant deposited R 500 into his bank account.

198. They worked together until around May 2014 whenMr Mnguni asked to borrow R 4 000 from the Applicant.

199. They met at the High Court and she lent him R 4 000.

200. Their relationship was alright and they did not have issues or problems. She used to call him reverend and they would talk about church.

201. During October 2014 Mr Mnguni again asked the Applicant to lent him R 500. She gave Mr Mnguni the R 500 in the High Court.

202. He again asked the Applicant in November 2014 to lent him R 500 because he had a 5 day case to attend to. The Applicant deposited the money through an ATM , assisted by Adv. Choene

203. The same month of November, Mrs Mnguni phoned her and asked to lend R 1 000, The Applicant told her that she can only do R 800 and Mrs Mnguni said it was fine, and she can give it to Mr Mnguni.

204. Towards the end of November however there was an incident with Mr Mnguni. She was at Court and Mr Mnguni was there and he called her over.

205. They sat on a bench outside the court and Mr Mnguni tried to brush her. He held her hand and was rubbing it. He also said that he would like to come over for the weekend.

206. The Applicant did not like this and felt uncomfortable. She then stood up and left.

207. That was the last time she worked with Mr Mnguni. She does not remember working with Mr Mnguni in 2015.

208. Mr Mnguni knew Mr Seroto, the accounting officer, from the time he gave him a BAS form to register with the State Attorneys' office system.

209. Around July 2015, Mrs Mnguni called her and she was cursing her saying that Mr Mnguni was not getting work because of the Applicant.

210. Mr Mnguni then send a sms message that he does not want to work with the Applicant, Mr Baloyi and Mr Seroto.

211. The Applicant knows Mr Seroto, only captures invoices and he does not authorise them. He does not know Mr Baloyi.

212. Towards the end of October 2015 a Mr Senokwane and two other individuals came to her office and said there was a service provider who alleged that the Applicant gave him work so that he can give money to the Applicant.

213. She thought it was an Advocate she worked with a lot. The Applicant however said she knew nothing about the allegation.

214. They left and came back the following week, but on the day they arrived, the Applicant fell coming to work and left early.

215. They then came the following day and repeated the allegation that the service provider said the Applicant was giving work expecting something.

216. The Applicant denied knowledge of the allegations. She was given a phone number to call if she remembered something.

217. The Applicant then remembered Mr Mnguni, and called a Ms Lebo and said she recalled that she used to lend money to Mr Mnguni.

218. Ms Lebo said she can write an email and there was no need to come to their offices. The Applicant then responded to the allegation

219. The Applicant was previously given allegations during August 2015 to respond to by 12 September 2015.

220. She responded on 04 September 2015 to Ms Nhlaise, the Acting State Attorney. She also copied Ms Lebo and their Supervisor, Mr Pandelani Sengakana. They never came back to her.

221. The Police then came to the workplace and arrested her and Mr Seroto on 29/30 June 2016. They were accompanied home to change and slept in the holding cells.

222. Mr Baloyi joined them when they went to Court and were granted bail. The matter was postponed sine die.

223. They stayed at home for a month and then the sheriff served her with the charges for the disciplinary hearing.

224. She was also transferred to a different building. She worked there until she took maternity leave and returned during May 2017.

225. During April 2017 she received a notice to attend on 19 April 2017. She send a sms message to Mr Nkosi and said she had a medical appointment and the matter was rescheduled.

226. When she came to work early May 2017 she received notice to attend the disciplinary hearing but she had already send an email to Mr Nkosi that she was in Court and not available.

227. Mr Nkosi send another notice for the hearing and she said she had leave days that she did not want to forfeit.

228. When she returned from leave Mr Nkosi called her and asked why she was nit at the hearing. The Applicant said the notice did not reach her.

229. They called her supervisor and she apologised for not forwarding the notice to the Applicant.

230. The hearing was scheduled for September and she went to request legal representation and was accompanied by Mr Mashao, an Attorney. The matter was postponed to 04 December 2017.

231. On 04 December 2017 she was accompanied by Mr Sambo, a different Attorney. The matter was postponed to 12 December 2017 because Mr Mashao was not available.

232. On 11 December 2017 she left work early because she was not feeling well.

233. On 12 December 2017 she told Mr Sambo that she was sick and going to a doctor.

234. Mr Sambo told her that they did not believe her, and that she was not sick but was employing delaying tactics.

235. A postponement was denied and she told Mr Sambo to withdraw as Attorney of record.

236. The Applicant was given 5 days' leave and when she returned she emailed Mr Nkosi, attaching her medical certificate, and asking to present her case, but Mr Nkosi never came back to her. He said she must attend for mitigation.

237. When she arrived, they said they were continuing, they had already closed the case and the stage was for arguments.

238. The matter was postponed to late January 2018 and she presented her case and explained a little bit what happened.

239. Mr Nkosi presented written arguments and asked for a dismissal.

240. The Applicant was given a letter of dismissal on 09 March 2018.

241. She appealed on 28 March 2018 and she was dismissed 15 August 2018.

242. The Applicant was arrested with Mr Seroto and Mr Baloyi (who only came to Court and was not arrested), and they were charged together and their charges at the Commercial Crimes Court were similar.

243. Their cases were however separated at the disciplinary hearing.

244. Mr Seroto was suspended for 2 months and Mr Baloyis' case was withdrawn as the witness was not coming to his case.

245. The Applicant feels it was unfair that she was dismissed in her absence even though she had a valid reason not to attend the disciplinary hearing.

246. The facts of their cases are the same but one employee is given 2 months suspension and the other is left alone.

247. The money deposited into her bank account was money she loaned to Mr Mnguni, who deposited into her account.

248. If it was a bribe, it was not going to be wise to give him a personal bank account.

249. She loaned Mr Mnguni money on 5 occasions. He only agrees to the amounts she deposited into his account on 2 occasions.

Under cross examination

250. The Applicant obtained a LLB degree in 2005. She attended Practical Legal raining from 2005 and served Articles in 2006.

251. She was admitted as Attorney in 2009 and worked as an intern in the office of State Attorney until 201 when she was appointed permanently.

252. Her duties as Assistant State Attorney include appearance and consultations in civil matters heard in Magistrates and High Courts, legal costs and drafting of opinions.

253. The matter was first set down for 19 April 2017. The matter was postponed because she was on maternity leave and had an appointment so she did not attend.

254. The next sitting was on 09 June 2017. She did not attend because she send Mr Nkosi an email that she will be in Court in a criminal matter. He did not respond.

255. They called her whilst she was in court and she said she did not know as the notice was sent to her supervisor. They also called her supervisor to verify if indeed she was in court.

256. The next sitting was on 26/27 June 2017. She called the employer representative and told him that she had 10 days leave which she could forfeit if not taken.

257. The next date of the sitting was 28 July 2017. She was on leave and when she returned the supervisor was also on leave and had forgotten to give the Applicant the notice.

258. The Applicant does not remember the date of the next sitting. She attended with a legal representative, Mr Mashao, who was representing her in the criminal matter. The matter was postponed to 04 December 2017. She attended with another Attorney, Mr Sambo, who asked for a postponement because he was not ready

259. The matter was then postponed to 12 December 2017. The Applicant did not attend because she fell ill on 11 December 2017 and went to a doctor.

260. She did not think of asking for an adjournment in order to send the medical certificate through because she was on a queue.

261. She was booked off for 5 days. She went back to work on 19 December 2017.

262. The Applicant denied that he was evading the disciplinary hearing. All the postponements were reasonable.

263. On the question of inconsistency the Applicant conceded that all 3 employees were charged.

264. The Applicant did not dispute that the sanction does not have to be the same, but insisted that the difference was that Mr Seroto attended and pleaded guilty.

265. With Mr Baloyi, he was not called or his case sat but did not proceed. He went back to work. His case should have finished. She was however dismissed because she did not attend.

266. The Applicant does not know and has no comment on the submission by the Respondent that the charges against Mr Baloyi have not been withdrawn.

267. The amounts paid into her account were loans paid back by Mr Mnguni.

268. On the R 4000 loan, the Applicant was not sure what the circumstances were, or if it was for a funeral, and does not also remember if she asked Mr Mnguni the question.

269. She conceded that she does not have proof that she gave Mr Mnguni the money.

270. The Applicant denied that the loan amounted to a corrupt activity.

271. She also denies that she ought to have known that to exchange money with a service provider is corruption, because she used her own money, and corruption is committed by hiding the exchanges.

272. The Applicant denies that because all the payments were made after Mr Mnguni was paid, and that he has proof thereof, his version is more probable.

273. The Applicant also denies that Mr Mnguni paid in order to get work and for his invoices processed because she does not process claims.

274. The Applicant does not believe that a loan to a service provider by the employer created a perception of corruption, and also does not believe that there was a benefit that she had to declare as the money exchanged was her money that was returned to her.

275. She is not sure why it was not put to Mr Mnguni that he wanted a romantic relationship and touched her inappropriately. However at the time of the incident she respected him.

276. The Applicant does not know what the term 'token of appreciation' means when it was put to Mr Mnguni.

277. She also denies that her versions keep changing, one being that the money was a loan, and the other being that Mr Mnguni paid as a token of appreciation, means that she is not a credible witness.

278. Mr Mnguni admitted that she loaned him money. That was after 9 months she worked with him.

279. He regarded his as a family friend, they attended the same church and he said the money was for church purposes.

280. The Applicant said she did not know that she was not supposed to lend money to a service provider. She did not comment on whether it is ignorant of a State attorney not to know.

281. The Applicant argued that employees facing the same charges must receive the same outcome.

<u>ANALYSIS OF THE EVIDENCE AND ARGUMENT:</u>

282. I have considered the parties evidence, bundles, as well as written submissions when arriving at this award.

283. I have also considered the provisions of section 188, 191 (1) (a) and (5) (a) (i) of the Labor Relations Act 66 of 1995, (LRA), as well as the Code of Good Practice, Dismissals.

284. A dismissal is fair if it is a dismissal for a fair reason and was also effected in accordance with a fair procedure.

285. In ***Sidumo and Another v Rustenburg Platinum Mines Ltd and Others**, **(2007) 28 ILJ 2405 (CC)**, the court held that in the light of the constitutional requirement (in s 33 (1) of the Constitution) that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, 'the reasonableness standard should now suffuse s 145 of*

the LRA'. The majority of the Constitutional Court set the threshold test for the reasonableness of an award or ruling as the following: 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?.

286. In the matter ***CUSA v Tao Ying Metal Industries and Others 2008) 29 ILJ 2461 (CC)*** , the court held: *'It is clear... that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.'*

287. The Labour Appeal Court in *Herholdt v Nedbank Ltd* (2012) 33 ILJ 1789 (LAC) , held as follows: *'…Where a commissioner fails to have regard to material facts, this will constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner would have unreasonably failed to perform his or her mandate and thereby have prevented the aggrieved party from having its case fully and fairly determined. Proper consideration of all the relevant and material facts and issues is indispensable to a reasonable decision and if a decision maker fails to take account of a relevant factor which he or she is bound to consider, the resulting decision will not be reasonable in a dialectical sense. Likewise, where a commissioner does not apply his or her mind to the issues in a case the decision will not be reasonable…*

…. Whether or not an arbitration award or decision or finding of a commissioner is reasonable must be determined objectively with due regard to all the evidence that was before him or her and what the issues were. There is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of enquiry. The threshold for interference is lower than that; it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different. This standard recognizes that dialectical and substantive reasonableness are intrinsically interlinked and that latent process irregularities carry the inherent risk of causing an unreasonable substantive outcome.'

288. Reference is also made to the Prevention and Combating of Corrupt Activities Act 12 of 2004, (PCCA), which is the basis of the charges against the Applicant.

289. The charges were corruption, alternatively failing to disclose a benefit, further alternatively bringing the Department into disrepute.

290. The PCCA provides amongst others, for the strengthening of measures to prevent and combat corruption and corrupt activities; to provide for the offence of corruption and offences relating to corrupt activities

291. It also defines gratification to include; *(a) money whether in cash or otherwise;*

(b) any donation, gift, loan, fee, reward, …, or any other similar advantage;

292. The PCCA states in section 3 (a) that *'Any person who. directly or indirectly; (a) accepts or agrees or offers to accept any' gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person,…, is guilty of the offence of corruption'*.

293. It further states that in respect of corrupt activities relating to public officers, 4(1) *Any (a) public officer who, directly or indirectly. accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person, …, is guilty of the offence of corrupt activities relating to public officers'*.

294. In the Interpretation for purposes of this Act (PCCA) a person is regarded as having knowledge of a fact if-

(a) that person has actual knowledge of the fact, …, and "knowing" shall be construed accordingly., and

(2) For the purposes of this Act a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both-

(a) the general knowledge. skill, training and experience that may reasonably be expected of a person in his/her position
(b) the general knowledge. skill, training and experience that he or she in fact has.
(3) (b) A reference in this Act to accept or agree or offer to accept any gratitication from a person in his or her position includes to-- ,…
(i) promise. lend, grant. confer or procure:
(ii) agree to lend, grant. confer or procure: or
(iii) offer to lend, grant. confer or procure, such gratification.

295. The extracts quoted above are relevant to the Applicants case as she submits that the exchange of money with Mr Mnguni was a loan.
296. Having accepted the above, it is my finding that the Applicant committed an act of corruption and the fact that she was not aware serves not as a defence.
297. I therefore also find that the Respondent has succeeded in proving that it has a fair reason to dismiss the Applicant.
298. The next requirement for a fair dismissal is in effecting the dismissal in accordance with a fair procedure.
299. The Applicant was dismissed in *absentia*. The matter was postponed several times, all at the request of the Applicant. I have no issue with the postponements as they appear justified.
300. At the last sitting however the Applicant send her representative to ask for a postponement because she was consulting a doctor.
301. What becomes curious is however that after the postponement is refused, she instructs her representative to withdraw from the process.
302. This step was akin to abandoning the process. In the appeal case ***Old Mutual life Assurance Co SA Ltd v Gumbi (211/20060[2007] ZASCA 52; [2007] 4 SA 866 (SCA); [2007] 8 BLLR 699(SCA)*** the Court held that the employees deliberate absence from a disciplinary enquiry does not affect the procedural fairness of such dismissal.
303. She could, in this proceedings, have called upon her representative to explain whether he did ask for an adjournment in order to retrieve and forward the medical certificate after she has consulted the doctor or not.
304. In addition, having returned from her leave, the Applicant failed to enquire about the outcomes of the hearing she failed to attend and look for a way forward.
305. She only responded after receiving an email requesting her to submit reasons why she should not be found guilty.
306. The most logical step would have then be to apply for the reopening of her case after the Respondent has closed its case, and since the procedure would be to then move to the evidence of the employee after the employer has led its witnesses, and further that a decision had not yet been taken on her guilt or otherwise.
307. The belief by the Respondent that the Applicant was evading the hearing was therefore not misplaced.
308. I further find therefore that the dismissal of the Applicant was procedurally fair.
309. The next challenge to fairness comes in the form of a charge that the Respondent is inconsistent in its application of discipline. This is often referred to as the parity principle, a basic tenant of fairness that requires like cases to be treated alike.
310. In the judgment ***Absa Bank Ltd v Naidu and others (2015) 36 ILJ 602 (LAC)*** the Court held that the parity principle should be handled with caution. Each case should be decided on its own facts and circumstances and the parity principle is not intended to profit or benefit employees who commit serious acts of misconduct.
311. There are two types of inconsistency, historical inconsistency and contemporaneous inconsistency. Historical inconsistency applies to the penalty of

dismissal being applied like it was applied to other employees in the past. The latter applies to a penalty being applied consistently between two employees who commit the same misconduct.

312. In the matter ***Masubelele v Public Health and Social Development Sectoral Bargaining Council and Others (JR 1151/2008) [2013] ZALCJHB 3 (17 January 2013),*** the following principles were held to apply, as stated in the **Irvin and Johnson** case, to the determination of the issue of inconsistency so as to ensure inconsistency is not found to exist in the case of dismissal of employees:

(1) Employees must be measured against the same standards (like for like comparison);

(2) The chairperson of the disciplinary enquiry must conscientiously and honestly determine the misconduct;

(3) The decision by the employer not to dismiss other employees involved in the same misconduct must not be capricious, or induced by improper motives or by a discriminating management policy (this conduct must be bona fide);

(4) A value judgment must always be exercised.

313. As to the relevant legal principles at stake, the principle of inconsistency is also referred to in law as the so-called "parity principle".

314. The judgment in ***SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd (1999) 20 ILJ 2302 (LAC),*** determined the principles applicable, as follows:

'In my view too great an emphasis is quite frequently sought to be placed on the 'principle' of disciplinary consistency, also called the 'parity principle' (as to which see eg Grogan Workplace Law (4 ed) at 145 and Le Roux and Van Niekerk The SA Law of Unfair Dismissal at 110). There is really no separate 'principle' involved. Consistency is simply an element of disciplinary fairness (M S M Brassey 'The Dismissal of Strikers' (1990) 11 ILJ 213 at 229). Every employee must be measured by the same standards ***(Reckitt and Colman (SA) (Pty) Ltd v Chemical Workers Industrial Union and others (1991) 12 ILJ 806 (LAC) at 813H-I****). Discipline must not be capricious. It is really the perception of bias inherent in selective discipline which makes it unfair. Where, however, one is faced with a large number of offending employees, the best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of a plurality of dismissals, a wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy.... Even then I dare say that it might not be so unfair as to undo the outcome of other disciplinary enquiries. If, for example, one member of a group of employees who committed a serious offence against the employer is, for improper motives, not dismissed, it would not, in my view, necessarily mean that the other miscreants should escape. Fairness is a value judgment. It might or might not in the circumstances be fair to reinstate the other offenders. The point is that consistency is not a rule unto itself.'*

315. The judgment in ***Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (2010) 31 ILJ 452 (LC)***, where the Court said the following:

'The courts have distinguished two forms of inconsistency- historical and contemporaneous inconsistency. The former requires that an employer apply the penalty of dismissal consistently with the way in which the penalty has been applied to other employees in the past; the latter requires that the penalty be applied consistently as between two or more employees who commit the same misconduct.

A claim of inconsistency (in either historical or contemporaneous terms) must satisfy a subjective element – an inconsistency challenge will fail where the employer did not know of the misconduct allegedly committed by the employee used as a comparator (see, for example, **Gcwensha v CCMA and Others** ***[2006] 3 BLLR 234 (LAC) at paras 37-38****).*

The objective element of the test to be applied is a comparator in the form of a similarly circumstanced employee subjected to different treatment, usually in the form of a disciplinary penalty less severe than that *imposed on the claimant.* ***(See Shoprite Checkers (Pty) Ltd v CCMA and Others [2001] 7 BLLR 840 (LC) at para 3).***

Similarity of circumstance is inevitably the most controversial component of this test.

An inconsistency challenge will fail where the employer is able to differentiate between employees who have 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.

Further, the Labour Appeal Court has held that employees cannot profit from an employer's manifestly wrong decision in the name of inconsistency'.

316. Of particular relevance to this matter is the Case ***Mphigalale v Safety and Security Sectoral Bargaining Council and Others, (2012) 33 ILJ 1464 (LC) at para 22***, and the following extract from the judgment is apposite;

'*The evidence before the commissioner was that the chairperson's decision in respect of the two previous instances of corruption by police officers had been made in error. Applying the judgment in SACCAWU, the SAPS is not required to repeat a decision made in error or one which is patently wrong. This is all the more so given the nature of the misconduct committed. In* ***S v Shaik and Others*** *the Constitutional Court warned that corruption is 'antithetical to the founding values of our constitutional order'.*

Similarly, in ***SA Association of Personal Injury Lawyers v Heath and others [2000] ZACC 22; 2001 (1) SA 883 (CC)*** *this court held that: 'Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State.'*

317. In applying the principles above, all the employees mentioned in the allegations were charged. There was therefore no case of arbitrary or subjective selection by the Respondent not to dismiss the employees referred to, but only the Applicant.

318. The fact is that even if the Respondent was wrong in not dismissing the other employees referred to, there is no case or evidence that the Respondent was still not acting *bona fide vis-à-vis* the Applicant.

319. There is simply no case or reason why the Applicant should profit from any such failure on the part of the Respondent, should it even exist.

320. The Respondent did not discriminate against the Applicant when issuing a sanction of dismissal as opposed to 3 months suspension without pay issued to one employee.

321. This employee was a relatively junior employee in position as compared to the Applicant.

322. He was also not exposed to and negotiating with the service providers as opposed to what the Applicant and the other employee, Mr Baloyi, who is also the State Attorney, were engaged with the service providers.

323. This employee also showed remorse and did not want to unnecessarily prolong the matter.

324. I do accept that Mr Baloyis' case been suspended, and not abandoned.

325. The Applicant may have to, in this regard, seek and apply for disclosure as to when his case will resume and/ or the outcome of the hearing against him.

326. The Respondent has been informed that the witness is now ready to testify, and the reason he did not testify earlier was that the matter was postponed too much, instead of saying that he did not wasn't to testify.

327. In conclusion, the Applicant did not show any remorse, even in the face of overwhelming evidence to the contrary, she continued to insist that the exchange of money was a loan, an act that the PCCA specifically classes as corruption.

328. The relevant case dealing with the absence of any remorse in this instance, is the ***De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others, (2000) 21 ILJ 1051 (LAC) at para 25*** *, which held*

'This brings me to remorse. It would in my view be difficult for an employer to re employ an employee who has shown no remorse. Acknowledgment of wrongdoing is the first step towards rehabilitation. In the absence of a recommitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he himself has broken. Where, as in this case, an employee, over and above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly where a high degree of trust is reposed in an employee, be legitimately entitled to say to itself that the risk of continuing to employ the offender is unacceptably great.'

329. When coming to the appropriateness of dismissal as a sanction, the court held in ***De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others [2000] 9 BLLR 995 (LAC) at para 22.***

'*Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.'*

330. The Applicant clearly did not act with the necessary fiduciary duty as required by law, especially having regard to her position, status and seniority, and the interests of the she was required to serve the Respondent. Her conduct and attempts to justify her wrong behavior demonstrated that she lacked judgment and cannot be trusted to act appropriately in the best interest of her employer.

331. Her conduct resulted in a member of the public painting all State Attorneys with the same corrupt brush and consequently brought the name of the Respondent into disrepute.

332. It is therefore my finding that the Respondent has succeeded in establishing that the dismissal of the Applicant was substantively and procedurally fair.

In the premises, I make the following award

AWARD:

333. The dismissal of the Applicant as substantively and procedurally fair.

334. The referral made by the Applicant is accordingly dismissed.

335. There is no order to costs.

THABE PHALANE……………………………………..
(GPSSBC) Arbitrator