REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: C05/2011

Not reportable

In the matter between:

THEMBALETHU JACK **Applicant**

and

CITY OF CAPE TOWN **First Respondent**

ADVOCATE SOEWYBA FLOWERS N.O. **Second Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL:

WESTERN CAPE DIVISION **Third Respondent**

JUDGMENT

STEENKAMP J:

INTRODUCTION

1. This is an application for the review and setting aside of the arbitration award handed down by the second respondent ("the arbitrator") following arbitration proceedings conducted under the auspices of the third respondent ("the bargaining council") on 20 July and 21 October 2010. The applicant seeks both reinstatement and compensation.

2. The applicant also applied for condonation for the late filing of the review application; his supplementary affidavit in terms of rule 7A(8); and his replying affidavit. Furthermore, the applicant's attorney, Mr Bulelani Mbeleni, delivered his heads of argument late. He did not apply for condonation, but I allowed him to do so from the bar and, in the interests of justice, allowed him to represent his client and to argue the case on the heads of argument that were delivered late and that I had nevertheless read and considered.

3. The applicant referred a dispute to the bargaining council after he had been dismissed from his employment with the first respondent ("the City") following an internal disciplinary hearing where he was found guilty on two charges of misconduct.

4. The misconduct complained of was that the applicant had engaged in a business called Career Mobile Services CC trading as Research and Performance Solutions ("*RAPS*"), from at least August 2008 to at least February 2009 in violation of the City's policy on private work and declaration of interests in companies and close corporations. It is common cause that the applicant was (and remains) the sole member of the close corporation (RAPS).

5. The applicant was dismissed as the evidence at the disciplinary hearing showed that RAPS's "Managing Director: Themba Jack" had invoiced the Oudtshoorn Municipality R82 627, 50 for compiling the annual report of

that Municipality. (Although it is common cause that Jack was the sole member of the cc, the letterhead indicated that he was the "managing director"; one Dr Marcus Balintulo was the "senior partner"; and another City employee, Ms Nyameki Fani, was a "consultant").

6. Compiling the annual report was the responsibility of the Municipal Manager. Mr Thembani Gutas ("Mr Gutas"), the Municipal Manager of Oudtshoorn and an ex-City employee, had outsourced this task to RAPS. It is common cause that the applicant travelled to Oudtshoorn on behalf of RAPS to pitch for the work 'to secure the job' – and he conceded at the arbitration that had he not done so the business would have been lost.

7. The main defence raised at the arbitration was that the real work was done by someone else - Dr Marcus Balintulo ("Dr Balintulo"). Thus although Oudtshoorn Municipality paid R 82 627, 00 to the close corporation of which the applicant was the sole member, in circumstances where he admitted to soliciting the contract, he still claimed not to have breached the City's "no private work" policy on the grounds that the alleged only financial beneficiary of this transaction was Dr Balintulo. Against this contention is the evidence of Dr Martin Van der Merwe ("Dr Van der Merwe") to whom the applicant had said that he was upset that he was now in trouble after driving for hours in the hot sun to Oudtshoorn for a 'lousy' R40 000, as reflected in the transcript read with the arbitration award.

8. I will deal with the condonation applications together with the merits of the main application, as I need to consider the merits in any event in order to consider the applicant's prospects of success in the main application. The matter was argued on that basis.

Applications for condonation

9. Section 145(1)(a) of the Labour Relations Act 66 of 1995 ('the LRA') requires a party wishing to review arbitration proceedings in which it alleges there is a defect, to file such application within six weeks of the date upon which the arbitration award was served on that party. Section 145(1A) however allows for the condonation of the late filing of the application.

10. In terms of Rule 7A(8) of the Rules for the Conduct of Proceedings in the Labour Court ('the Labour Court Rules), an applicant is required to file its supplementary founding affidavit, if any, within ten days of the record of the proceedings being dispatched.

11. Rule 12 provides for this Court to condone any non-compliance with a period prescribed by the Labour Court Rules, on good cause shown.

12. The requirement of good cause applies equally to the exercise of this Court's discretion in terms of s 145(1A) of the LRA.

13. The test for good cause is well established:

'The approach is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused…'[1]

14. In respect of condonation for the late filing of a review application in an individual dismissal dispute the applicant is required to provide a 'compelling' explanation and show that he has 'strong' prospects of success, such that if his case were not heard it would be a miscarriage of justice.[2]

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[1] *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at 211F - I. See also *Foster v Stewart Scott Inc* (1997) 18 *ILJ* 367 (LAC) at 369C - E; and *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532 B - F.

[2] See *Queenstown Fuel Distributors CC v Labuschagne NO and Others* (2000) 21 *ILJ* 166 (LAC) at 174E-I; and *A Hardrodt (SA) (Pty) Ltd v Behardien and Another* (2002) 23 *ILJ* 1229 (LAC) at 1231A and 1234A.

15. The applicant's grounds for condonation for failing to institute these proceedings within six weeks are set out in his founding affidavit and supplemented with further grounds for condoning the late filing of his supplementary affidavit. I shall consider those grounds in the light of the authorities cited above.

Extent of the delay

16. The applicant does not explain in any of his affidavits when he received the award and thus what the extent of the delay is. It is common cause that the application for review was delivered on 12 January 2011. The award is undated. The City says it received it on 16 November 2010. Mr Mbeleni, for the applicant, conceded from the bar that his client would have received it on the same day. The review application should therefore have been delivered by 28 December 2010. It was delivered about two weeks late.

Explanation for the delay

17. The applicant's mother passed away on 22 October 2010 – ie about a month before he received the award and two months and three weeks before he applied for review. The applicant states that he was required to see to the administration of her estate. He does not explain how long the administration of his late mother's estate took and what functions he was required to perform during this extensive period.

18. The applicant also fails to explain when he first consulted an attorney and why - given that he earned a salary of R840 000 per annum - he needed to raise funds before he could instruct an attorney. He is then silent on how he went about raising these funds or how long this took him. It is common cause that the close corporation (RAPS) paid the legal transcription services. It is not clear who paid the applicant's legal fees, but Mr Mbeleni informed me from the bar that Mr Jack and the close corporation use one and the same bank account. Mr Mbeleni also informed me from the bar that the applicant consulted him in the week of 16 December 2010. He could not explain why it took a further three weeks to deliver a simple and straightforward review

application comprising all of five pages (including the application for condonation) and setting out only the following grounds for review:[3]

'In the arbitration award the second respondent did not deal with the fact that I disclosed the activity of the Close Corporation after I came back from the sick leave.

During cross examination in arbitration proceedings, Mr Strange testified that Ms Nyameka Fani was investigated, the outcome revealed that Ms Nyameka and Dr Balintulo were the members of the Close Corporation. He further wrote a recommendation to the City Manager recommending that Ms Fani be charged.

Ms Fani Nyameki was not charged.'

19. The applicant also fails to explain why SAMWU, the trade union that assisted him at the internal disciplinary hearing and at the arbitration proceedings, was not able to assist him in instituting review proceedings. He only says that SAMWU informed him on 16 December 2010 that they would not assist him in the application for review.

20. The applicant and his attorney also argued that they could not obtain the arbitrator's details from the bargaining council, as it was closed from 16 December 2010 to 12 January 2011. Given that the arbitrator's full name and designation appear on the last page of her award, the excuse that the applicant needed to obtain her full details from the offices of the bargaining council is not persuasive. The review application was in any event, and quite obviously, delivered to her at the address of the bargaining council. Those details have always been known to the applicant, as he had referred a dispute to the bargaining council.

21. The applicant's explanation for the delay, the precise length of which is uncertain, is set out in a needlessly bald and vague manner and cannot by any stretch of the word be said to be "compelling". The application for condonation should be refused on this ground alone.[4]

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[3] Quoted *verbatim.*
[4] See in general *National Union of Metalworkers of SA obo Nkuna and Others v Wilson Drills-Bore (Pty) Ltd t/a A and G Electrical* (2007) 28 *ILJ* 2030 (LC) at 2034A - B.

22. Insofar as the applicant seeks to blame the late filing of the review application on his attorney, that cannot assist him. This court has held numerous times that there is a degree beyond which a litigant cannot hide behind the remissness of his legal representative.[5]

23. The explanation for the delay is so weak that the application for condonation should be dismissed on this ground alone. I shall nevertheless deal with the prospects of success, ie the merits of the application for review.

Prospects of success

24. The applicant has altogether failed to deal with the prospects of success on the merits in the application for condoning his failure to institute review proceedings within six weeks and the application is thus in any event fatally flawed.

25. Only at end of the application condoning the late filing of the supplementary affidavit, and even then, only as an afterthought, does the applicant state:

'My Application [for review] has prospects of success when the matter is heard before the Honourable Court.'

26. Even if this allegation could be said to apply to the application for the failure to institute these proceedings within six weeks, which it does not as it was not made in the initial founding affidavit, it in no way indicates how the applicant's prospects of success are 'strong'.

27. In any event, the applicant's prospects of success are in fact weak. The grounds for review relied on by the applicant at best constitute grounds for an appeal. At the outset of his oral argument, I asked Mr Mbeleni what the applicable test on review was, as he had not set it out in his heads of argument. His response was that the test was "whether the arbitrator was

[5] *Saloojee v Minister of Community Development* 1965 (2) SA 135 (A) 141 B-H; *Khan v Cadbury SA (Pty) Ltd* [2011] JOL 27124 (LC); *Silplat v CCMA and Others* [2011] 8 BLLR 798 (LC) at para 54.

incorrect". This is clearly wrong in the light of *Sidumo and another v Rustenburg Platinum Mines Ltd and others*[6] and tainted the whole application.

28. Two days before this matter was heard, the Supreme Court of Appeal reiterated the distinction between appeal and review in *FAWU v Pioneer Foods.*[7] Navsa JA remarked:

'This case, as many others before it, demonstrates, once again, how difficult it is to keep the dividing line between appeal and review. This is so because, almost inevitably, in reviewing a commissioner's award the Labour Court deals with the merits of a case. Yet that dividing line has to be kept. See *Sidumo* paras 109 and 244 and the decision of this court in *Shoprite Checkers (Pty) Ltd v CCMA* 2009 (3) SA 493 para 28. In *Shoprite* para 30, this court stated the following in relation to the review powers of the Labour Court:

"Its warrant for interference with the award of the arbitrator was narrowly confined."'

Navsa JA further referred with approval to an article of Prof Paul Benjamin:

'Paul Benjamin in "Friend or Foe? The impact of Judicial Decisions on the operation of the CCMA" (2007) 28 *ILJ* 1, correctly states that the dispute resolution procedure introduced by the LRA sought to incorporate review proceedings of arbitration awards by the labour courts in a manner that would not undermine the purposes of a system of expeditious dispute resolution. He points out that the exclusion of a right to appeal against a decision of an arbitrator was designed to speed up the process and free it from the legalism that accompanies appeals as well as to avoid inordinate delays and high costs that flow from appeal hearings. The learned author refers to s 145 of the LRA and correctly states that it was intended to create a narrow ground of review, subject to shorter time periods. He rightly concludes that the institution of a review does effectively constitute a major delay to the resolution of the disputes. At the time of the article the average time taken for the Labour Court to hear a review application was 23 months from the date of the arbitration award. Statistics provided by the author shows how extensively, before the Constitutional Court judgment in *Sidumo*, employers used review applications. Dealing with this Court's judgment in *Sidumo* before its ultimate hearing in the Constitutional Court, the author

[6] (2007) 28 *ILJ* 2405 (CC).
[7] [2011] ZASCA 210 (29 November 2011) para [22]. See also *SAMWU v Ethekwini Municipality* (LAC case number DA 6/09, 29 November 2011) para [18]; and *Bestel v Astral Operations* [2011] 2 BLLR 129 (LAC) para [18].

contemplates whether the flood of review applications would be reduced by this court's decision. He concluded that it is more likely that it would increase the number of reviews. In the event of the submissions by the applicants being upheld the system would, in my view, be flooded, with the likelihood of a greater number of reviews being brought by employers.'

29. This is one of those cases where the dispute resolution process envisaged by the LRA has been undermined by the applicant lodging an appeal in the guise of a review application.

30. The applicant has not alleged that the arbitrator committed a gross irregularity in the conduct of the arbitration. Nor has he alleged that the decision reached by the arbitrator was so unreasonable that no reasonable decision-maker could have reached it.

31. He has in essence simply alleged that the arbitrator erred in the manner in which she weighed up the evidence, as Mr *Mbeleni* reiterated in his oral argument. As such he is seeking a rehearing on the merits which he is not entitled to.

32. In his replying affidavit, the applicant has attempted to adduce further grounds for review. They are the following:

'(a) it is difficult to find work;

(b) I am the bread winner;

(c) my wife was pregnant;

(d) I have a child who is […] years of age; and

(e) I have a nephew and a niece that I have to support.'

33. Notwithstanding that the applicant is not entitled to make out a new case in reply, these appear to be mitigating factors to be taken into account when considering whether or not an employee should be dismissed. They do not constitute grounds upon which the arbitrator's award can be reviewed.

Condonation for the late filing of the supplementary affidavit

34. The record was made available by the bargaining council on 15 February 2011. Accordingly the supplementary affidavit should have been filed by no later than 1 March 2011. In the event, it was filed on 29 March 2011, exactly four weeks late.

35. Similarly in this further application for condonation the applicant's attempts at demonstrating good cause are once again set out in a needlessly vague and bald manner.

35.1. The applicant again provides no details as to why he was required to raise additional funds to pay R9 356, 00 for the transcription of the recording of the arbitration proceedings. Given that the salary he earned at the City was R840 000, 00 per annum, this allegation is without further explanation, highly improbable.

35.2. Again the applicant does not take this Court into his confidence by explaining what avenues he explored for funding, how long this took him and how he ultimately raised the money.

36. In reply, the applicant attached a "notice of payment" dated 20 April 2011 (after the City had filed its opposing affidavit) which reflects an amount of R 9 356, 00 paid by "Career Mobile Services CC" on 4 March 2011. The account number and reference number correspond to those on the quotation of Legal Transcriptions CC.

36.1. No explanation is offered for why the funds have been channelled through the bank account of the very close corporation at the centre of this dispute (a close corporation which the applicant repeatedly claimed he was not actively involved in). Mr Mbeleni stated from the bar that the applicant and the close corporation operated one and the same bank account.

36.2. The applicant claims in reply that that he "had to borrow money from friends" and that he "had to sell two cows". However he is precluded from making out a case for condonation in his replying papers.

37. The applicant also fails to explain why, despite making payment to Legal Transcriptions on 4 March 2011 for “urgent transcription”, and notwithstanding their quoted turnaround time of seven days as well as their oral assurance to the applicant’s attorney that they would be able to do the work within three days, the transcript was only available on 22 March 2011.

37.1. Finally, contrary to Mr Mbeleni’s assertion on behalf of his client, it is not the responsibility of the decision-making body to type up the transcript of the recorded proceedings. It is clear from Rule 7A(7) that ‘the costs of transcription of the record, copying and delivery of the record and reasons, if any, must be paid by the applicant and then becomes costs in the cause’.

38. Accordingly the applicant has not provided a reasonably acceptable explanation for his failure to file the supplementary affidavit on time.

39. He has, for the same reasons referred to above, not made out a case as to why he claims to have strong prospects of success, stating simply that he ‘has prospects of success’.

40. In the circumstances the applicant has not demonstrated good cause upon which this Court should exercise its discretion to condone either the late institution of the review application or the late filing of the supplementary affidavit. The application for review should accordingly be dismissed with costs on these grounds alone. As I have indicated, though, I shall nevertheless deal more fully with the merits of the review application as well.

Failure to file heads of argument

41. Against this background of non-compliance one might have expected that the applicant – or his attorney -- would have perceived the need to at least file heads of argument timeously. This was however not the case and the attorney has offered no explanation for the late filing of the heads of argument. This demonstrates a pattern of disregard for the rules of this Court.

42. Finally, Mr Mbeleni claims in his heads of argument that the City's attorneys advised him that they would not oppose 'the application for condonation'. He persisted with this statement in oral argument. The letter referred to however clearly deals with the extension agreed to by the City's attorneys for the applicant to file his replying affidavit after the due date. This is in fact the explanation offered by the applicant for failing to file his replying affidavit on time.

43. It is inexplicable how Mr Mbeleni could have construed this indulgence by the City's attorneys in any other way.

The merits: summary of relevant facts

44. The following relevant facts appear from the record of the proceedings and were before the arbitrator when she made her award.

44.1. The applicant was employed by the City from 1 May 2005 to 4 January 2010. The applicant claims his employment was terminated on 12 December 2009. Nothing turns on this dispute.

44.2. At the time of his dismissal, the applicant was employed in a senior position as the Manager of the Integrated Development Programme and earned approximately R 840 000, 00 per annum.

44.3. The terms of the applicant's employment agreement with the City included *inter alia* the following:

44.3.1. A general duty to 'devote the whole of his time and attention to the performance of his duties under this agreement during usual business hours and after usual business hours when reasonably required to do so; to display a high duty of care and good faith in the performance of his duties; [and] well and faithfully to serve the City and use his…best endeavours to promote its interests'.

44.3.2. A specific duty to comply with the Code of Conduct for municipal staff members set out in Schedule 2 of the Local Government Municipal Systems Act 32 of 2000. Section 4(2) of the Systems Act prohibits staff from

being involved in any business other than the work of the municipality without the employer's prior consent.

44.3.3. The applicant was required to 'disclose in writing to the City by 31 July each year for the duration of [his] contract all his…current directorships (regardless of how much time they take up) and all his…outside interests and activities which take up more than an average of 6 (six) hours per week, and shall obtain the approval of the City Manager for continuing to hold such directorships and remain involved in such outside interests and activities'.

44.3.4. In terms of Annexure A to the City's Disciplinary Code ("the Disciplinary Code") setting out the "Conduct and Standards", the applicant was 'expected to comply in every respect with the conditions of employment and collective agreements and any related regulations, order, policy and practice'. The applicant was also obliged to 'refrain from accepting any other employment outside of normal working hours without the prior permission of the Department Head or Municipal Manager, which permission shall not be unreasonably withheld'. [underlining added].

44.3.5. The applicant was bound by the City's Policy on "Private Work and the Declaration of Interest in Companies or Close Corporations" ("the Private Work Policy").

44.4. On 20 October 2009 the applicant was given notice to attend a disciplinary hearing in respect of two charges, namely:

44.4.1. That he had committed an act of serious misconduct by submitting a sick leave application form, requesting sick leave and being paid for sick leave, including for 19 December 2008, when in fact he was performing private work; and

44.4.2. That he had committed an act of serious misconduct in that he had engaged in a business called Career Mobile Services CC trading as Research and Performance Solutions ("*RAPS*"), from at least August 2008 to

at least February 2009 in violation of the City's policy on private work and declaration of interests in companies and close corporations.

44.5. The charges arose out of an annual report prepared for the Oudtshoorn Municipality by RAPS, the trading name of the close corporation of which the applicant is the sole member.

44.6. An internal audit by Oudtshoorn Municipality, triggered by the fact that one quotation only had been obtained for the compiling of the annual report, led to a forensic investigation which linked the applicant to RAPS. This information was then passed on to the City.

44.7. The applicant was found guilty of both charges at the internal disciplinary hearing and was dismissed.

44.8. The applicant referred a dispute for arbitration to the bargaining council, claiming that his dismissal was substantively unfair. The main defence raised by the applicant at arbitration was that he had not performed the work of producing the Annual Report for Oudtshoorn Municipality but that this had been done by his alleged partner, Dr Balintulo.

44.9. The applicant testified that he had won the CC in a business competition prior to commencing work with the first respondent. He disclosed his ownership of the CC to Dr Wallace Mgoqi ('Dr Mgoqi'), the former City Manager, at the time of his interview but said that it was dormant. Dr Mgoqi allegedly told the applicant that this would not be a problem as long as it did not interfere with the applicant's work.

44.10. At that time, so the applicant testified, he had no intention of using the CC. However he was subsequently approached by Dr Balintulo (in 2007) who asked if he could conduct business through RAPS.

44.11. Although the applicant is the only member of RAPS registered on the founding statement, he claims that Dr Balintulo and Ms Nyameka Fani ("Ms Fani") were also members. This is based on an alleged oral partnership agreement the applicant had with Dr Balintulo and Ms Fani.

44.12. In terms of this alleged agreement, the applicant would sell 40% of his members' interest to Dr Balintulo and 20% to Ms Fani. This would however only be paid for at a later stage. He would retain the remaining 40%. The applicant admitted that no amended founding statement was ever lodged with the Registrar of Companies and Close Corporations, offering simply the excuse that he 'was very busy'.

44.13. In reply the applicant claims that his 'intentions were to give Dr Balintulo and Nyameka Fani shares in the CC'. This is in direct conflict with his earlier insistence in the replying affidavit that Dr Balintulo and Ms Fani were also members of the CC.

44.14. The applicant also clearly indicated in a belated declaration of interest and application for private work that he was the owner of 100% of RAPS.

44.15. Notwithstanding these claims, the proposal sent to Oudtshoorn Municipality was on a RAPS letterhead containing all the applicant's details and was signed by the applicant. Significantly, the letter purported to be signed by "Themba Jack, Managing Director" and not by Dr Balintulo; it was purportedly sent from Jack's residential address; and it provided his personal email address and cellphone numbers, and not those of Balintulo, as contact details. Similarly the invoice for an amount of R 82 627, 00 sent by RAPS to Oudtshoorn Municipality was also signed by the applicant and not by Balintulo.

44.16. The applicant's explanation for this was that he had given his electronic signature and the letterhead of RAPS with all of his contact details on it to Dr Balintulo. He also testified that he had prepared a *pro forma* proposal for Dr Balintulo to use.

44.17. The applicant's signature was on the attendance register for a meeting at Oudtshoorn Municipality held on 19 December 2008. At the arbitration, he confirmed that this was his signature. At the internal disciplinary hearing, the applicant denied ever having gone Oudtshoorn.

44.18. However at the arbitration proceedings he changed his version to say that he had in fact gone to Oudtshoorn but not on 19 December 2008 as alleged by the first respondent. Instead he claimed he had gone there on 5 September 2008, as "the owner of the company" to secure the contract for Dr Balintulo. He claimed that he had simply forgotten about the previous trip to Oudtshoorn as he was on anti-depressant medication.

44.19. Yet once he had been charged and advised to attend the disciplinary hearing, he admitted that he had told Dr Van der Merwe, his immediate superior, that he had gone to Oudtshoorn.

44.20. The applicant in his replying affidavit, makes much of the fact that he nevertheless denied mentioning to Dr Van der Merwe any specific amount that he earned. This does not detract from the fact that between the time that he was charged and the disciplinary hearing he admitted to Dr Van der Merwe that he had gone to Oudtshoorn. Yet at the disciplinary hearing itself he neglected to put up the version that he had indeed gone to Oudtshoorn on 5 September 2008. Notwithstanding the comments of the arbitrator in her award that the applicant's excuse for this was 'reasonable', I agree with Mr *Kahanovitz* that this version is highly improbable; but that is not part of the review application before me.

44.21. Dr Balintulo allegedly went to the meeting at Oudtshoorn Municipality on 19 December 2008 after the applicant declined his request to attend. Dr Balintulo had also allegedly written the annual report and sent out the invoices himself.

44.22. The next time the applicant heard about the issue, he says, was when he contacted Dr Balintulo to ask him how much RAPS had earned so that he could fill out the form for the declaration of interest and application to do private work in March 2009.

44.23. The applicant testified that when he returned to work in February 2009 from approximately two months of sick leave he was prompted to make the declaration of interest and apply for permission to do private work after a colleague informed him that the Private Work Policy had been amended.

44.24. On 26 March 2009, the applicant both declared his interest in RAPS and applied for permission to conduct private business by providing ‘corporate governance advice’. The applicant indicated at three separate places in his declaration of interest that RAPS was involved in ‘corporate governance, head-hunting and performance management’. Dr Van der Merwe testified that the compiling of annual reports is a component of performance management and one the applicant is instrumentally involved in for the City.

44.25. Dr Van der Merwe also testified that he had approved the applicant’s application on the basis that the applicant had told him he was not actively involved in managing the business, but that he would never have done so had the applicant mentioned that he was providing services to the Oudtshoorn Municipality. He also pointed out that the applicant had, in discussion, indicated that he would be providing services to private businesses.

44.26. Dr Van der Merwe testified that larger municipalities have a duty to assist smaller municipalities. Therefore there was a clear conflict of interest in the applicant providing services for a fee to another municipality which he would ordinarily have been required to provide in the course of his employment with the first respondent.

44.27. Although the applicant filled in the amount of R 82 500, 00 under remuneration received from RAPS, he testified that he never received any of that money and he only declared it because it was his company. He claimed that in terms of the alleged agreement with Dr Balintulo the person who did the work would earn the money for the work done.

44.28. Despite confirming that he was familiar with the term of his employment contract that he was required to disclose, by 31 July each year, all his current directorships, regardless of the amount of time they take up, the applicant insisted, both at the arbitration proceedings and in his replying affidavit, that because RAPS was a dormant company and did not take up more than six hours a week of his time, he did not need to. This is a disingenuous argument.

44.29. The applicant conceded that after his initial disclosure to Dr Mgoqi at his job interview he did not make any formal or informal disclosures until March 2009.

44.30. The only application ever submitted by the applicant to do private work was on 26 March 2009. There was no permission to do private work on either 28 August 2008 when the proposal from RAPS was sent to Oudtshoorn Municipality or on 28 January 2009 when the invoice for work done was submitted by RAPS to Oudtshoorn Municipality.

44.31. The applicant agreed that the Disciplinary Code applied to him and that it required the applicant to obtain “prior” permission for outside work. Similarly the applicant confirmed that the Private Work Policy was in place prior to his employment with the City and the Disciplinary Code required him to familiarise himself and comply with all polices.

44.32. The applicant conceded that there was a conflict of interest as RAPS was now active and the work Dr Balintulo was doing was for local government.

45. Therefore on his own version the applicant knew by 5 September 2008 at the latest, that RAPS was tendering to provide work to other municipalities. The applicant therefore conceded that a conflict of interest was present (even where the work was done by Dr Balintulo).

46. Although the applicant produced an affidavit from Dr Mgoqi, neither Dr Balintulo nor Ms Fani was called by the applicant to testify on his behalf. His reasons for not calling these people to testify ranged from a sense he had that they did not wish cross the DA, to the fact that he regarded Dr Balintulo as his senior and that there was some dispute between them about the tax payable by RAPS for income earned.

Summary of the arbitrator's findings

47. The arbitrator made the following findings:

47.1. In respect of the first charge against the applicant, she (the arbitrator) found that the City had not discharged the onus of proving that the applicant had been in Oudtshoorn on 19 December 2008. Taking into account the employer's onus, she was prepared to accept the version now raised by the applicant that he had been there on 5 September and not 19 December 2008. Thus, although he was found to have breached his obligation not to take on private work, he was not found to have also abused his sick leave for this purpose. The first charge has therefore fallen away and does not form part of this review application.

47.2. In respect of the second charge the arbitrator found that the applicant was under an obligation in terms of the City's Private Work Policy to seek permission prior to engaging in private work. The applicant was the sole member of RAPS and it was common cause that RAPS had performed work for a municipality without the prior consent of the City and that this work created a conflict of interest.

47.3. The arbitrator noted that '[t]he applicant had gone to great lengths to remove himself from the business dealings of Dr Balintulo' in order to disclaim responsibility for RAPS's transactions with the Municipality but the applicant had failed to call additional witnesses who could have supported his version that it was Dr Balintulo only who had done the work for the Oudtshoorn Municipality.

47.4. He had failed to call his most important witness and cited various reasons for not calling him. The arbitrator however found that '[t]here was no need to protect Dr Balintulo if the applicant, and Dr Balintulo for that matter, were doing honest dealings'.

47.5. She found however that there was no basis in law for the contention that there was no relationship between the applicant and Dr Balintulo. The applicant was the sole member of the CC. Dr Balintulo was (at best) an

employee or an agent of RAPS. Dr Balintulo also could not have been a director, as the misleading letterhead claimed, as close corporations do not have directors. It was thus clear that the applicant had engaged in private work without the requisite prior permission to do so.

47.6. The arbitrator therefore found the applicant guilty on charge two and upheld the decision to dismiss him, finding his misconduct to be of a serious nature as it involved dishonesty.

Grounds for review

Founding affidavit

48. The applicant sets out his grounds for review at paragraphs 11.1 and 11.2 of his founding affidavit. He claims that:

48.1. The arbitrator failed to consider the fact that he had disclosed the activity of RAPS after he came back from sick leave; and

48.2. Although the first respondent's principal forensic officer, Mr Rod Strange ("Mr Strange"), had testified that he had recommended that Ms Fani be charged she was never charged.

Supplementary founding affidavit

49. The applicant then expanded on these grounds for review in his 'amended founding affidavit' and raised these additional grounds:

49.1. The arbitrator failed to take into account the fact that he was only charged approximately seven months after disclosing his interests;

49.2. The arbitrator failed to consider that he was on sick leave during December 2008 and could not disclose prior to Dr Balintulo attending the meeting at Oudtshoorn Municipality on 19 December 2008;

49.3. His failure to disclose timeously did not prejudice the City;

49.4. His conduct did not involve an intentional disregard of the City's policy but an error of interpretation;

49.5. The arbitrator failed to take into account the provisions of the employment contract and the fact that the City did not prove that his directorship of RAPS took up more than six hours per week of his time;

49.6. The arbitrator did not capture all the evidence before her;

49.7. The arbitrator did not apply her mind to the evidence before her;

49.8. She ignored the level of honesty demonstrated by him through his voluntary disclosure of the activities of RAPS; and

49.9. She failed to take into account that dismissal was not a proper sanction.

50. As I remarked above, these 'grounds for review' do not constitute anything of the sort. They are, at best, grounds for an appeal. This court only has jurisdiction to entertain a review from the bargaining council, not an appeal; and, as the SCA recently reminded us, the distinction should be kept clear.

51. Each of these grounds is nevertheless dealt with below.

<u>The arbitrator did not deal with the fact that the applicant disclosed the activity of RAPS after he returned from sick leave and he was unable to make the disclosure before Dr Balintulo attended the meeting on 19 December 2008</u>

52. The arbitrator clearly stated twice in her award that it was 'not intended to form a comprehensive record of the evidence led' and that '[a]ll the evidence has been considered'.

53. The applicant's disclosure of the activity of RAPS on 26 March 2009 was extensively dealt with by the applicant in both his evidence in chief and under cross-examination. It appears that the arbitrator considered this evidence in reaching the decisions set out in her award.

54. However it is not clear what relevance the applicant is seeking to place on the timing of his disclosure in relation to his period of sick leave.

55. The applicant was on sick leave for approximately two months from 17 November 2008 to February 2009.

56. In terms of his employment contract the applicant was required to:

56.1. ‘disclose in writing to the City by 31 July each year for the duration of [his] contract all his…current directorships (regardless of how much time they take up) and all his outside interests and activities which take up more than an average of six hours per week, and shall obtain the approval of the City Manager for continuing to hold such directorships and remain involved in such outside interests and activities’; and

56.2. ‘refrain from accepting any other employment outside of normal working hours without the prior permission of the Department Head or Municipal Manager, which permission shall not be unreasonably withheld’.

57. The applicant, on his own version, knew by no later than 5 September 2008 that his close corporation, RAPS, was tendering to provide services to Oudtshoorn Municipality. Most tellingly he was the person who was instrumental in securing this work for RAPS.

58. It is common cause that the first time the applicant either applied for permission to engage in private work or declared his directorship in RAPS (after his initial disclosure at his interview with Dr Mgoqi) was on 26 March 2009.

59. Therefore the fact that he was on sick leave from November 2008 to February 2009 is in no way relevant to the question of whether he had prior permission to conduct work, through RAPS, for the Oudtshoorn Municipality or his failure to disclose his directorship in RAPS by 31 July each year and accordingly whether he was in breach of his contract of employment.

60. Accordingly the award is not reviewable on these grounds.

The arbitrator failed to consider that Ms Fani was not charged

61. The applicant claims that the arbitrator failed to take into account the fact that, despite Mr Strange testifying that Ms Fani was a director of RAPS and that he recommended that she also be charged, she was not charged.

62. In this regard, Mr Mbeleni put much store in the unreported judgment of *Tokwe v Masote NO and Others.*[8] But in that case the employee was a member of a dormant close corporation; and the arbitrator had not considered whether dismissal was an appropriate sanction. In the case before me, despite the applicant's denials, it is clear that the close corporation of which he was the sole member was active in the relevant period from August 2008 to February 2009; and the arbitrator specifically dealt with the fairness of the sanction in these terms:

'The applicant's misconduct was serious and dishonest. He held a senior position and one of responsibility. He knew his actions were wrong but nevertheless embarked and continued with it. The applicant flagrantly disregarded the rules of the respondent and his actions can be described as gross. The applicant was depressed and I had considered his personal circumstances as well. I had regard to the guidelines of the disciplinary code of the respondent as well as all the circumstances of this case. I find that dismissal was a fair sanction for this matter.'

63. Item 7 of the Code of Good Practice: Dismissal set out in Schedule 8 to the LRA, states that in considering whether a dismissal for misconduct was fair regard should be had to whether a rule or standard was contravened; and if so whether this rule or standard was (i) was valid or reasonable, (ii) was known to the employee, (iii) was consistently applied and (iv) dismissal was the appropriate sanction for contravention of the rule.

64. On the basis of Mr Strange's testimony, the applicant appears to take issue with (iii) above, namely that the rule was not consistently applied.

65. It is however clear from the evidence placed before the arbitrator that the rule was in fact not inconsistently applied.

[8] [2009] ZALC 26 (Case no JR 113/08, 27 February 2009).

65.1. First, the testimony of Mr Strange that Ms Fani was a 'director' of the applicant was based solely on the fact that she was listed as such at the bottom of the RAPS letterhead. Mr Strange testified further that she was not registered as a member of RAPS on the database of the Registrar of Companies and Close Corporations.

65.2. The applicant's testimony that Ms Fani and Dr Balintulo were directors of RAPS was disregarded as improbable (and in fact impossible in terms of company law) by the arbitrator in her award.

65.3. The only evidence connecting Ms Fani to RAPS was the version of the applicant that he had sold 20% of his members' interest in RAPS to her.

65.4. It was common cause that Ms Fani had never done any work through RAPS.

65.5. Ms Fani was not employed in the same position as the applicant. Her particular terms and conditions of employment were never placed before the arbitrator at the arbitration proceedings nor was it alleged by the applicant, or any evidence produced to support such an argument, that Ms Fani had not applied for permission to engage in private work or declared her interest in RAPS.

65.6. At the time of Mr Strange's report to the first respondent, Ms Fani's fixed term contract was about to expire. The applicant in fact testified that Ms Fani's contract with the City had come to an end on 30 July 2009 – several months before the applicant was charged in October 2009. In oral argument, Mr Mbeleni argued that this was an error and that she in fact left the City's employ shortly before the applicant's disciplinary hearing. It is in any event common cause that she was no longer employed by the City at that time.

65.7. Ms Fani, the person best placed to testify on this point, was never called as a witness by the applicant. The reason offered by the applicant for not calling her was that 'she does not want to be called and she has nothing - she wants nothing to do with anyone'.

66. It is clear from the evidence before the arbitrator that the cases of the applicant and Ms Fani were quite distinct. The fact that Mr Strange recommended that she be charged is irrelevant and her involvement with RAPS was covered in evidence.

The arbitrator failed to take into account the fact that the applicant was only charged seven months after disclosing

67. The applicant claims that the reason for the delay in charging him was linked to the fact that he had lodged a complaint against Councillor Belinda Walker.

68. That this was the rationale for charging the applicant is denied by the City in its opposing papers. The course of events leading to the applicant being charged was canvassed at length in the evidence of Mr Nel and Mr Strange and was not challenged by the applicant at the proceedings, namely that:

68.1. An internal audit was conducted by Oudtshoorn Municipality into the compiling of the annual report for which only one quote had been obtained which lead to a forensic investigation being commissioned.

68.2. It was found that there was a link between the company that produced the annual report and an employee of the City, namely the applicant and the acting municipal manager of Oudtshoorn, Mr Gutas.

68.3. This information was passed on to the City which in turn passed it on to its own Forensic Services Department who conducted an investigation.

68.4. The forensic officer tasked with investigating the matter recommended that the applicant be charged.

69. In the absence of any evidence to gainsay this, and in particular evidence that the motive for charging the applicant was the complaint lodged

by him against Ms Walker, the version of the City on this dispute of fact must be preferred.[9]

70. Even in his replying affidavit the applicant's claim of a conspiracy against him falls down where he states that '[t]his mean (sic) that the first respondent was planning to dismiss me before I submit my letter of Complain (sic) on 23 July 2009'. (my underlining).

71. It follows that the arbitrator did not fail to consider that the applicant was only charged seven months after he disclosed and that the reason for this was, on the evidence placed before the arbitrator, unrelated to the complaint lodged by the applicant.

Failure to disclose timeously did not prejudice the City

72. A conflict of interest arises when a party who owes a duty to another party instead promotes the interests of a third party over those of the party to whom he owes a duty.

73. By its very nature, a conflict of interest prejudices the party whose interests are subjugated to the interests of another party.

74. The applicant was required, in terms of his employment contract, 'to display a high duty of care and good faith in the performance of his duties; [and] well and faithfully to serve the City and use his best endeavours to promote its interests'.

75. By being the sole member of a close corporation that received remuneration for providing services to another municipality when these services would ordinarily have been provided by the applicant within the course of his employment with the City, the applicant was placing the interests of RAPS (and hence his own interests) above those of the City. A conflict of interest therefore clearly existed.

[9] In this regard see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635B; *Masombuka v Mashiane N.O. and Others* (JR 2619/05) [2009] ZALC 16 (3 February 2009) at para 13.

76. The applicant admitted this much under cross examination when he stated that the reason he disclosed his interest in RAPS in March 2009 was because the close corporation was now active and services were being provided to other municipalities.

77. The applicant claims in his replying affidavit that he simply 'testified that there was a potential conflict of interest because the close corporation could do work with the City at any time'.

78. However Dr Van der Merwe's testimony was clear and unchallenged: had he known that RAPS, the close corporation which the applicant declared having the sole interest in, was providing services to other municipalities, he would not have approved the applicant's application to engage in private work through RAPS. Dr Van der Merwe made it clear both that a duty rested on larger municipalities to assist smaller municipalities and that the work performed by RAPS for Oudtshoorn Municipality was the type of work which the applicant was performing for the City.

79. It is therefore clear that the conflict of interest was not 'potential'. It had arisen. It follows that the applicant's failure timeously to disclose did prejudice the City.

Applicant's conduct did not involve an intentional disregard of the City's policy but an error of interpretation and the fact that the City did not prove that his directorship of RAPS took up more than six hours a week.

80. The applicant repeatedly claimed at the arbitration proceedings that he was not required to disclose his directorship in RAPS by 31 July each year as required by clause 13.4 of his employment contract as he claimed that it did not take up more than an average of 6 hours per week of his time.

81. The applicant persisted with this claim in his replying affidavit and in oral argument.

82. Clause 13.4 is conjunctive and clearly places a duty on the applicant to do two things, namely to 'disclose in writing to the City by 31 July each year for the duration of [his] contract:

82.1. "all his…current directorships (regardless of how much time they take up) and

82.2. all his…outside interests and activities which take up more than an average of 6 hours per week"'.

83. If either or both of the above disclosures apply then clause 13.4 requires the applicant to 'obtain the approval of the City Manager for continuing to hold such directorships and remain involved in such outside interests and activities'.

84. It therefore beggars belief that the applicant can persist with his claim that he was not required to disclose his directorship of RAPS as it did not take up more than six hours a week of his time, and claim that the arbitrator should have considered that his only fault was an error of interpretation of what was required by the City's policy and his employment contract.

85. It was never the applicant's testimony at the arbitration proceedings that he had misinterpreted his employment contract nor was this argued in the written submissions filed on his behalf.

86. The award is not reviewable on this ground.

The arbitrator did not capture all the evidence and did not apply her mind to the evidence before her.

87. The testimony at the arbitration proceedings was captured on a recording device.

88. In the absence of an indication in his founding papers as to which evidence the arbitrator allegedly failed to capture, the applicant has failed to establish that her award is reviewable on this ground.

89. Similarly the applicant does not specify which evidence the arbitrator allegedly failed to apply her mind to.

90. In his replying affidavit the applicant appears to alter his complaint to say that the arbitrator 'failed to analyse all the evidence before her'.

91. Again, no indication of which evidence the arbitrator allegedly failed to analyse is provided by the applicant. This is therefore a clear indication that the applicant has no grounds for review but is simply seeking a rehearing on the merits.

The arbitrator ignored the level of honesty demonstrated by the applicant through his voluntary disclosure and failed to take into account that dismissal was not a proper sanction

92. It is common cause that at the time of RAPS producing the annual report for Oudtshoorn Municipality the applicant had neither made an application to engage in private work or a declaration of his ownership of RAPS other than at his initial interview.

93. When the applicant did finally make the disclosure and apply for permission in March 2009, he was far less candid than he would have this Court believe.

94. Dr Van der Merwe's clear and uncontested testimony was that the applicant had informed him that he was not actively involved in the management of RAPS. He also testified that the applicant told him that RAPS would be providing services to private businesses. It was on this basis that the Dr Van der Merwe approved the applicant's application.

95. As the evidence showed this was in fact not the case.

96. Clause 2.7.5 of the Annexure to the Disciplinary Code provides that an employee may be dismissed on the first occasion for *inter alia* 'any act of gross dishonesty'.

97. As the arbitrator found that the applicant had been grossly dishonest, taking into account the nature of his position and the misconduct, it follows that dismissal was an appropriate sanction.

98. In fact the applicant admitted at the arbitration proceedings that if a person were found guilty of the charges he was charged with, it would be appropriate that he be dismissed.

99. The arbitrator therefore clearly considered the appropriateness of the sanction of dismissal taking into account the various circumstances. The award is not reviewable on this ground.

Reasonableness of the award

100. Although not specifically raised by the applicant, save for several unsupported assertions in reply that the second respondent's award was unreasonable, I am entitled to consider the reasonableness of the award.[10]

101. The standard against which the arbitrator's award must be measured is whether, taking into account all the evidence placed before her, the decision of the arbitrator was so unreasonable that no decision-maker could have reached this decision.[11]

102. This does not require that the decision of the arbitrator be impeccable. In many instances decision-makers acting reasonably would reach different decisions. The test simply requires that the actual decision reached is one that a reasonable decision-maker could not reach in that it falls outside of the range of reasonable outcomes. [12]

103. The arbitrator's award has not been shown to be so unreasonable that no decision-maker could have reached it, taking into account the evidence set out above, in particular the fact that:

103.1. The applicant admitted being bound by the City's policies as well as the terms of his employment contract;

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[10] See: *Commercial Workers Union of SA v Tao Ying Metal Industries and Others* (2008) 20 *ILJ* 2461 (CC) at para 131, per O'Regan J.
[11] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 *ILJ* 2405 (CC) at para 110; and *Fidelity Cash Management Service v CCMA and Others* (2008) 29 *ILJ* 964 (LAC) at para 103.
[12] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (supra)* at para 118-119.

103.2. He was the sole member of a close corporation that provided services for remuneration to another municipality;

103.3. He admitted going to Oudtshoorn on 5 September 2008 as the owner of the close corporation to present his company to the Oudtshoorn Municipality;

103.4. It is common cause that no prior permission to engage in private work was obtained at the time of RAPS providing services to the Oudtshoorn Municipality nor did the applicant make any declaration concerning his directorship after his initial disclosure at his interview.

104. The Supreme Court of Appeal has held that the test enunciated by the Constitutional Court in *Sidumo supra* is conceptually no different to the 'justifiability' test set out in *Carephone (Pty) Ltd v Marcus N.O. and Others*.[13]

105. Even on this standard, the arbitrator's award was rationally connected to both the reasons for her decision and the evidence placed before her.

106. The award is therefore not reviewable on this ground.

Conclusion

107. The applicant has failed to make out a proper case in either of the condonation applications brought by him. Accordingly, the application for review should be dismissed with costs on this basis alone.

108. Similarly, the applicant has failed to make out a case for review on any of the various grounds set out in his founding affidavits. He has simply sought to claim that the arbitrator incorrectly weighed up the evidence. As such he is seeking to appeal her decision which he is not entitled to do.

109. With regard to costs, I take into account the applicant's and his attorney's pattern of disregard for the rules of this court, and the fact that the application was entirely without merit from the outset.

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[13] (1998) 19 *ILJ* 1425 (LAC) and see also *Edcon v Pillemer N.O. and Others* [2010] 1 BLLR 1 (SCA) at 9E-G.

Ruling

110. The application for condonation is dismissed.

111. The application for review is dismissed.

112. The applicant is ordered to pay the first respondent's costs, such costs to include the costs of two counsel where so employed.

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STEENKAMP J

JUDGE OF THE LABOUR COURT

Heard: 1 December 2011

Delivered: 9 December 2011

APPEARANCES:

Applicant:	B. Mbeleni of Tsengiwe Mbeleni Attorneys.
First Respondent**:**	C.S. Kahanovitz SC
	(Assisted by S. Fergus in drafting of heads of argument)
	Instructed by Webber Wentzel.