IN THE EDUCATION LABOUR RELATIONS COUNCIL HELD IN CAPE TOWN

Case No PSES 256-06/07WC

In the matter between

E JODWANA Applicant

and

DEPARTMENT OF EDUCATION WESTERN CAPE Respondent

ARBITRATOR: Adv D P Van Tonder

HEARD: 9 NOVEMBER 2006

DELIVERED: 23 NOVEMBER 2006

SUMMARY: Labour Relations Act 66 of 1995 – Dismissal of educator on account of alleged misconduct relating to alleged social grant fraud – Whether such fraud proved; Social grant fraud committed by educator – whether dismissal is an appropriate sanction;

ARBITRATION AWARD

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

[1] This is a dispute concerning an alleged unfair dismissal referred to the ELRC in terms of section 191 of the Labour Relations Act No 66 of 1995[1] read together with the Constitution of the ELRC. The arbitration hearing took place in Cape Town on 9 November 2006 and

was finalised when the final written heads of argument, were received on 20 November 2006. The applicant was present at the arbitration and represented by Mr. L Padayachi, a practising attorney. Respondent was represented by Ms. N Ntsadu, assisted by Mr R Jansen, who are both employed in respondent's Labour Relations Department.

[2] Since the issue in dispute relates to the fairness of a dismissal based on alleged misconduct, applicant was not entitled to be represented by a legal practitioner unless the requirements of Rule 25.4.2 of Annexure B to the ELRC Constitution, were complied with. Accordingly, Mr Padayachi, at the commencement of the arbitration hearing, made an application on behalf of applicant, to permit applicant to be represented by an attorney. Although respondent did not oppose this application, I ruled that this in itself was not sufficient reason to allow legal representation and accordingly asked Mr Padayachi to motivate his request. After having heard arguments and having considered all the criteria in Rule 25.4.2, namely the (a) the nature of the questions of law raised by the dispute, (b) the complexity of the dispute, (c) the public interest and (d) the comparative ability of the opposing parties or their representatives to deal with the dispute, I was of the view that it would be unreasonable to expect applicant to deal with the dispute without legal representation and I accordingly ruled that Mr Padayachi may represent applicant during the proceedings.

[3] I am indeed indebted to Mr. Padayachi for the professional, competent and thorough manner in which he has represented applicant during the arbitration. By focusing on the relevant issues in dispute, he certainly made my task in finding the facts in a quick and fair manner as required by the LRA, much easier.

THE ISSUE IN DISPUTE

[4] It is not in dispute that applicant was indeed dismissed by respondent. I only have to decide whether the dismissal was substantively and procedurally fair or not and, if not, the appropriate relief.

THE BACKGROUND TO THE DISPUTE

[1] hereinafter also referred to as the LRA

[5] Not too long ago, our government initiated a campaign to clamp down on civil servants who are receiving social grants to which they are not entitled. After investigations, culprits were identified. During these investigations, it was discovered that applicant, an educator, employed by respondent, had been receiving a child support grant since 2000, to which she was not entitled. As a result, applicant was disciplinary charged and convicted of fraud, which resulted in her dismissal on 27 March 2006. The internal appeal which applicant noted against her conviction and dismissal was unsuccessful and on 13 June 2006, the MEC for Education in the Western Cape, the Honourable Mr. Cameron Dugmore, confirmed applicant's dismissal. Not being satisfied with this outcome, applicant referred a dispute to this tribunal, attacking both the substantive as well as procedural fairness of the dismissal, asking for retrospective reinstatement with full back pay.

SUMMARY OF EVIDENCE AND ARGUMENT

[6] As from 1 January 2000 until her dismissal on 13 June 2006, applicant was employed by respondent as an educator on post level 1, teaching to grade 3 pupils at Vukani Primary School in Lower Cross Roads. At the time of her dismissal she had a clean disciplinary record and her monthly salary was R8543,75. She received this salary until the 13th of June 2006, when her salary was stopped.

[7] During the disciplinary hearing, held on 15 February 2006, applicant was charged with misconduct in that it was alleged that on 6 April 2000, she committed an act of fraud by unlawfully and intentionally misrepresenting to the Department of Social Services that she was entitled to a social grant in terms of Section 4 of the Social Assistance Act No 58 of 1992. There was also an alternative charge, alleging that applicant committed an act of dishonesty by unlawfully and intentionally misrepresenting to the Department of Social Services that she was entitled to a social grant in terms of Section 4 of the Social Assistance Act No 58 of 1992.

[8] At the commencement of the disciplinary hearing when applicant was asked to plead to these charges, her representative, being Ms K Spiers of SADTU stated that applicant pleads not guilty to the main charge, but guilty to the alternative charge. The representative of the Western Cape Education Department[2] was however not prepared to accept a plea on the alternative charge and accordingly the disciplinary hearing proceeded on the basis that the WCED would attempt to prove fraud.

[2] hereinafter also referred to as the WCED

[9] Applicant did not testify during the disciplinary hearing or during the arbitration hearing before me.

[10] During the arbitration hearing before me, Mr Padayachi, on behalf of applicant admitted that:

10.1 Applicant did apply for a child support grant from the Department of Social Services;

10.2 Applicant received from the Department of Social Services a child support grant of R100 per month, between June 2000 and November 2003, which she personally collected each and every month during this period on all pay days;

10.3 At all relevant times, when applicant applied for and received the child support grant, she never qualified for a child support grant, given the fact that she was employed by respondent as an educator and that her NET monthly salary at all relevant times exceeded the maximum prescribed amount of earnings which would entitle a person to qualify for such a grant;

10.4 During the year 2000 applicant's NET monthly salary was R4378,49 whereas the maximum amount which a person was allowed to earn in order to qualify for a social grant, was R800 per month.

[11] In addition to the above admissions made by Mr Padayachi on behalf of applicant, Mr Padayachi also placed on record that applicant's version is that:

11.1 Although she now knows that she never qualified for a child support grant, she did not know this when she applied for the grant or during the period when the grant was paid to her;

11.2 Applicant is a widow and has one child to support and when she applied for the grant, she thought that she did qualify for a child support grant, seeing that she is a widow;

11.3 Applicant denies that she at any stage made any misrepresentation either to respondent or to the Department of Social Services as was alleged in the charge sheet and that she further denies that she had any intention to make a misrepresentation.

[12] Pages 15 to 17 of the bundle of documents, handed in by respondent during the arbitration hearing, contains a photocopy of an official document bearing the title:

"Application for a child support grant"

[13] At face value, this document appears to be a photocopy of an application for a child support grant, with the applicant for the grant being one Euphemia Kuoleka Jodwana, with identity number 7004270459089. It states that the applicant is a widow and has one child to support. The part of the form dealing with financial information where an applicant must declare his or her income is not completed and under the subheading "remarks", still under the heading of "Financial information", it is stated:

"Supported by her mother in law. No Bank account. Never worked"

[14] The application form ends with a declaration in the form of an affidavit, where the oath is taken by the person applying for the grant and confirming under oath on 6 April 2000, before a certain Mr Somka, that she understands the contents of the affidavit and that the contents is correct. The signature of the person who took the oath and who appears to be the person who had applied for the grant, contains the initials "EK" and the surname starts with a "J" and one can also identify the letters "o", "d" and "w" in the surname portion of the signature. There is also a thumb print next to the signature. The next part of the document is a certificate, which at face value, appears to verify the particulars contained in the affidavit, completed by a different official than the one who attested the affidavit. For the sake of brevity, I will hereinafter refer to this document as "the application".

[15] As regards the document contained in pages 15 to 17 of the bundle of documents, namely the application, Mr Padayachi stated that:

15.1 applicant **denies** that she completed the application in her handwriting and denies that she supplied the information contained in the application;

15.2 applicant **does not either admit or deny** that it is her signature on the application and expects respondent, who bears the onus, to prove that this is indeed applicant's signature.

[16] Respondent called two witnesses, being Mohammed Shafir Daniels and Wernich Wandrag, whereas applicant called only one witness being Kay Spiers.

[17] **Daniels** is employed by the State and has been working for the Department of Social Services for 18 years. Referring to the copy of the application, contained in pages 15 to 17 of the bundle, he testified that he had never seen this specific application before, is not familiar with this specific application and does not know applicant. He is however very familiar with the official form itself as well as with the procedure followed to apply for a child support grant. This is indeed the form which is used to apply for a child support grant.

[18] When it was put to him that applicant will say that she did not personally complete the form, he replied that she would be correct because the form is never completed by an applicant. An official of the Department of Social Services, called an attesting officer, takes instructions from an applicant, and then completes the form in his handwriting based on the information supplied by an applicant. In this case, it would appear that a certain Mr Sonka, who no longer works for the Department, was the attesting officer. Once the attesting officer has obtained all the required information from an applicant, the applicant must take an oath before the attesting officer, swearing under oath that the information contained in the application, is correct. This cannot be done unless the attesting officer has verified the personal details of an applicant by comparing it to his or her bar-coded identity document.

[19] It is impossible for the application to be finalised without the person who applies for the grant, personally appearing before the attesting officer, personally signing the affidavit and personally taking the oath, verifying the correctness of the information contained in the application, under oath. If necessary, officials will pay a home visit to an applicant in order

to finalise his or her application, but under no circumstances will the Department allow another person to appear before the attesting officer on behalf of the actual applicant or sign the application on behalf of the actual applicant.

[20] After the attesting officer has completed the form and after an applicant has taken the oath before him, the form is then taken to a second official, known as the verifying officer, who once again goes with the applicant through the application form, to ensure that the information contained in it, is indeed correct. Only once the verifying officer is also satisfied that an applicant agrees with the information contained in the application, will he sign the form and only then can the application be processed. In this particular case, a Mr T Koli appears to have verified the information.

[21] Since he does not know applicant and has no personal knowledge of applicant's application for a child support grant, he cannot state under oath that it was applicant who signed the application. He can however say that the procedure which officials must follow is to ensure that the application is signed by an applicant personally.

[22] **Wandrag**, who is employed by respondent in its labour relations department has extensive experience as presiding officer in disciplinary hearings. He has presided since 1994 and although he is not legally qualified, he does have a certificate in labour law and has attended courses aimed at training presiding officers to preside over disciplinary hearings. He presided over applicant's disciplinary hearing on 15 February 2006. At the commencement of the hearing, Ms Spiers, who represented applicant, stated that applicant pleads not guilty on the main charge of fraud but guilty on the alternative charge. He did not enquire from applicant whether this was correct, and since the WCED did no want to accept this plea on the alternative charge, the hearing proceeded.

[23] Initially, during the disciplinary hearing, Ms Spiers stated that applicant never signed the application for a child support grant, but later Ms Spiers changed this version and said that applicant admits that she did indeed sign the application. He only had a copy of the application before him, but did not find it necessary to enquire as to the whereabouts of the original since this was never in dispute.

[24] Neither did he see the need to ask why Mr Sonka, the official who appears to have been the attesting official, was not called as a witness, because he thought that after 6 years, Sonka, who must process many applications every day, would not be able to recall the incident any more in any event and not be able to give any relevant evidence.

[25] Having heard all the evidence, he convicted applicant of fraud. In convicting applicant, he certainly did take into account the fact that she elected not to testify during the disciplinary hearing. When it was put to him that he was biased, he denied this. He was satisfied that the relationship of trust was broken and given the additional fact that applicant showed no visible signs of remorse, he believed that dismissal was the only appropriate sanction.

[26] Concerning the aspect of consistency, it was put to him by Mr Padayachi that there is widespread fraud in the civil service, particularly with regard to civil servants obtaining social grants to which they are not entitled. It was also put to him that most of these civil servants have not been dismissed. To this the witness replied that although he has heard that civil servants in other departments have made themselves guilty of similar misconduct, he does not have personal knowledge of what has occurred in other departments.

[27] The WCED has taken a tough stance on this and decided to disciplinary charge offenders. He has presided over numerous disciplinary hearings where educators and non-educators employed by respondent, were charged with fraudulently receiving social grants whilst they were not entitled to it. The first of these cases which he presided over, was applicant's case. Of all those cases, applicant is the only person he has dismissed. The reason why he had dismissed applicant and not the others who have appeared before him, is because whereas the others had all pleaded guilty and expressed remorse, applicant did not show any visible signs of remorse at all.

[28] Apart from knowing how this issue is being approached by the WCED, the only other civil service department whose approach is known to him is that of the Kwa Zulu Provincial Department of Education. It has come to his attention that that department has not yet dismissed any offenders who had committed this same offence, but he is not certain what exactly that department plans to do in future.

[29] **Spiers** who represented applicant during the disciplinary hearing, testified that she never at any stage during the disciplinary hearing, said that applicant denies that she had signed the application. Neither did she at any stage say that applicant admits that she had signed the application. What had happened was, that the representative of the WCED during the disciplinary hearing, placed on record that before the proceedings had commenced, during the settlement negotiations, applicant had first denied that she had signed the application and later admitted that she had signed the application. Spiers testified that when this happened, she immediately objected to this being placed on record by the representative of the department, because it was not true and had never been said.

[30] I do not intend to summarise the closing arguments here but will refer to them where relevant during my analysis of the evidence. I am however indebted to both representatives for the closing arguments which have greatly facilitated the writing of this award.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

SUBSTANTIVE FAIRNESS OF THE DISMISSAL

[31] In terms of section 188 of the LRA, the onus is on respondent to prove on a balance of probabilities that there was a fair reason for the dismissal. In determining whether there was a fair reason for the dismissal, I am guided by item 7 of the Code of Good Conduct on Dismissals contained in Schedule 8 to the LRA (hereinafter referred to as "the Code") which requires me to consider:

(a) whether or not the applicant contravened a rule regulating conduct in or of relevance to the workplace;
(b) if a rule was indeed contravened, whether or not:
  (i) the rule was a valid or reasonable rule
  (ii) the applicant was aware or could reasonably be expected to be aware of the rule
  (iii) the rule had been consistently applied by the respondent
  (iv) dismissal was an appropriate sanction for the contravention of the rule.

[32] It is in dispute whether applicant is guilty of misconduct, whether dismissal was applied consistently for this form of misconduct and whether the sanction of dismissal was appropriate. I will deal with each of these issues under separate subheadings.

GUILT

[33] The charge of which applicant was convicted, is fraud. It is trite law that fraud consists in unlawfully making, with the intent to defraud, a misrepresentation which causes actual or potential prejudice to another.[3] Although applicant also disputes the element of prejudice, it is particularly the elements of intent and misrepresentation, which lie at the heart of this dispute.

[3] Burchell & Milton *Principles of Criminal Law* (3rd ed) 835

[34] When one deals with proof, there is indeed a wide variety of possible degrees of certainty of proof. On assessing the evidence in a particular case, one will find that the happening of an event which is in dispute, could be completely impossible, remotely possible, reasonably possible, more probable than not, very probable, almost certain, or certain. In civil trials, the standard of proof which is required, is not certainty or proof beyond a reasonable doubt, but merely proof on a balance of probabilities which means that the factual finding must be more probable than not.[4] In proceedings before employment tribunals such as the CCMA and ELRC, the same standard of proof required in civil cases, applies.[5]

[35] In accordance with these principles it has been held that an employer need not prove with absolute certainty that an employee is guilty of alleged misconduct since proof on a balance of probabilities is sufficient.[6]

[36] There is no direct evidence that applicant has committed fraud. The case against her is based on circumstantial evidence. In *Onderlinge Assuransie-Assosiasie Bpk v De Beer*,[7] is was held that when dealing with circumstantial evidence, and if more than one inference can be drawn from the evidence, then the court must select the most plausible inference. It is not necessary in a civil trial that the inference which is drawn, must be the only reasonable inference which can be drawn with exclusion of all other reasonable inferences. In fact, the correct approach has been summarised as follows:

> "…..in finding facts or making inferences in a civil case, it seems to me that one may…by balancing probabilities select a conclusion which seems to be the more natural, or plausible conclusion from amongst several conceivable ones, **even though that conclusion be not the only reasonable one"**(emphasis added) [8]

[37] In making factual findings, I am guided by the approach of the Supreme Court of Appeal in *Stellenbosch Farmers' Winery Group Ltd v Martell & Cie*[9], bearing in mind that a trier of fact must adopt a holistic view. A conspectus of all the evidence is required and a compartmentalized and fragmented approach is not allowed. Although I intend to evaluate the evidence holistically, it is indeed necessary to deal with different issues separately.

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[4] *Wildebeest v Geldenhuis* 1911 TPD 1050; *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1925 AD 245 262–263; *Rich v Lagerwey* 1974 (4) SA 748 (A) 760G
[5] *Fourie's Poulty Farm (Pty) Ltd t/a Chubby Chick v CCMA* [2001] 10 BLLR 1125 (LC)
[6] *Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 (LAC)
[7] 1982 (2) SA 603 (A) at 614E-H
[8] *Govan v Skidmore* 1952 (1) SA 732 (N) at 734C-D
[9] 2003 (1) SA 11 (SCA) at 14 para 5

The allegation that Ms Spiers made certain admissions

[38] As regards the allegation that Ms Spiers, during the disciplinary hearing made two admissions namely that applicant denies that she has signed the application but later retracted this statement and said that applicant admits that she has signed the application, I am faced with two mutually destructive versions.

[39] Spiers denies that she had ever said this, whereas Wandrag is positive that Spiers did make these statements. Either Wandrag or Spiers is lying or mistaken. Although the disciplinary hearing was recorded on tape, none of the parties chose to place that transcription before me in order to assist me in establishing whose version is correct. Neither Spiers nor Wandrag had been broken down during cross-examination and neither of them made an unfavourable impression on me. In fact, I was impressed with the demeanour and contents of the evidence of both Wandrag and Spiers. On this aspect, namely whether Spiers actually uttered the words that Wandrag alleges she did, there are simply no probabilities which can assist me in making a factual finding. The probabilities in this regard, are simply evenly balanced. Our law is very clear in this regard. Where there are two mutually destructive versions, as we have here, and where the probabilities are evenly balanced, a court or tribunal may only find for the party upon whom the onus rests, if it is satisfied on a balance of probabilities that the version of the party upon whom the onus rests is true and the other is false.[10] On the available evidence I cannot find that Spiers' version is false. I can also not find that Wandrag's version is false, but that does not assist respondent because it bears the onus. Accordingly I have no choice but to find that respondent has not succeeded in proving that Spiers first said that applicant did not sign the application and later said that applicant did sign the application.

Pleading guilty to the alternative charge

[40] At no stage did either Ms Spiers during her evidence before me, or Mr Padayachi during the arbitration hearing, ever deny that Ms Spiers did indeed at the commencement of the disciplinary hearing, indicate that applicant pleaded not guilty to the main charge of fraud, but guilty to the alternative charge of dishonesty. From the questions put by Mr Padayachi to Wandrag, it rather appeared that Mr Padayachi's approach in this regard was to criticize Mr Wandrag for not having established from applicant personally whether she agrees with statements made by her representative.

[10] *National Employers Mutual General Insurance Association v Gany 1931 AD 187 at 189*

[41] I therefore find that when applicant was asked to plead, Ms Spiers did indeed state that applicant pleads not guilty to the main charge but guilty to the alternative charge. I also find that this plea was not accepted by respondent and that the hearing then proceeded.

The admissibility of the copy of the application form for a child support grant

[42] During the arbitration hearing, Mr Padayachi made it very clear that he was objecting to the admission into evidence of the copy of the application for child support, which applicant, according to respondent had allegedly completed, and which document was contained in pages 15 to 17 of the bundle of documents. The basis upon which Mr Padayachi objected to the admission of this document into evidence was based on the fact that only a copy was produced and the fact that the document was not authenticated.

[43] In Courts of Law, in order to prove the contents of a document, as a general rule, the original needs to be produced. Secondly the general rule is that a party wishing to prove a document must prove that it is authentic.[11] The mere fact that the original is produced and that it is properly authenticated, is however not proof of the truth and reliability of the contents of the document, because, the contents, would still remain hearsay evidence.[12]

[44] Respondent argued that I should admit the photocopy of the application, contained in pages 15 to 17 of the affidavit. In support of this argument, I was informed that the original document is currently in possession of either the Department of Justice or South African Police Services since it was an exhibit during a criminal investigation and court proceedings. To substantiate these allegations, respondent handed in an original letter from the Department of Social Development dated 9 November 2006, addressed to me, and signed by the Assistant Manager: Enterprise Risk Management, in which it is stated that under the circumstances it would take approximately two to three weeks to obtain the original document.

[45] On behalf of respondent, a request was then made that I should postpone the case for approximately three weeks in order to obtain the original document. This request was opposed by Mr Padayachi and I refused the postponement.

[46] Although the general rule is that it is necessary to produce the original document in Courts of Law, this is not an inflexible rule. Even in Courts of Law, the non-production of the

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[11] Schwikkard et al *Principles of Evidence* (March 2006 Reprint) 372-375
[12] *Knouwds v Administrateur, Kaap* 1981 (1) SA 544 (C)

original may, if the non-production of the original is satisfactorily explained, be excused and a copy may be admitted into evidence:

> "A failure to produce the original may be excused if, for example, it is lost or destroyed, if production is inconvenient, or impossible, or if the original is in possession of the opposing party"[13]

[47] This tribunal is not a Court of Law but merely a statutory tribunal. Presiding officers sitting in statutory tribunals, are not bound by the same strict rules of evidence applicable in Courts of Law.[14] Furthermore, the LRA specifically provides that disputes should be arbitrated quickly and fairly with the minimum of legal formalities[15] and that the appropriate form of the proceedings is subject to the discretion of the arbitrator.[16] As such, an arbitrator needs to determine the rationale behind a rule of evidence, before blindly following that rule. Merely blindly applying the law of evidence, which is associated with a strict adversarial system, will make proceedings legalistic, and will prevent arbitrators from arbitrating quickly, and fairly with the minimum of legal formalities. The main focus should be to be fair to both parties. Many parts of our law of evidence, have unfortunately outlived its usefulness and are based on archaic, outdated principles. One rule which specifically needs to be revised is the rule that only the original document may be produced unless a satisfactory explanation for its absence can be given. Conradie J(as he then was), expressed his views in this regard as follows:

> "As far as the best evidence rule is concerned, it is a rule which applies nowadays only in the context of documents and then only when the content of a document is directly in issue. It does not apply where the document serves to record a fact capable of being proved outside the document. It provides that the original of a document is the best evidence of its contents. The rule is a very ancient one. **It goes back to the Dark Ages, well perhaps the twilight days, before faxes and photocopying machines, when making copies was difficult and such copies as were made often inaccurate. Under those circumstances Courts, naturally, insisted upon production of the original document as being the most reliable evidence of its contents. Nowadays, a Court can be asked to permit the use of a copy if the original of a document is not available." [17]** (emphasis added)

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[13] *S v Twala* 1979 (3) SA 864 (T) 875
[14] *Birkett v Ongevallefonds en 'n ander* 1965 (2) SA 630 (A) 639; *Naraindath v CCMA & others* [2000] 6 BLLR 716 (LC) – both cases concerned the admissibility of documentary and hearsay evidence
[15] section 138(1)
[16] section 138(2)

[17] *Welz and another v Hall and others* 1996 (4) SA 1073 (C) 1079

[48] Hence, even Courts of Law have become sceptical as regards the necessity for insisting that the original document, must as a rule be produced. As Conradie J (as he then was) correctly points out, the rationale behind this rule, stems from days before photocopy machines, when copies had to be reproduced by hand and often reflected inaccuracies. There can really only be two rational reasons why a Court or tribunal needs to peruse an original document. The first one is that the copy may have been reproduced inaccurately and contains bona fide mistakes and the second one is that the copy has deliberately been tampered with and that certain parts of it have been intentionally forged and reproduced inaccurately.

[50] The copy of the application which was handed in during the arbitration proceedings, is a photocopy. It is hardly possible that photocopiers can erroneously copy information from an original document and therefore the first rational objection to the production of copies, can be excluded in this case. The second objection cannot be excluded merely because the copy is a photocopy, because it is not difficult to change information on photocopies in such a manner that the alterations are not visible without comparing the copy with the original. I must however ask myself, how probable it is, based on the evidence before me, that the copy which was handed in, would contain fraudulent inaccuracies, which one would be able to detect by comparing it to the original document. This I believe, is not very probable at all.

[51] Had applicant's case been that the original application and the photocopy of the application differed or had her case perhaps been that respondent or another person was attempting to discredit her by working her out of the Department of Education and that they therefore had altered information on the form, which forgery is not visible on the copy but which one would be able to notice on the original, I would have been more willing to exclude a copy of the application. The approach which was adopted by Mr Padayachi, as I understood it, was however simply that applicant is objecting to the admission of the copy simply because she is entitled to object since the law of evidence requires the original to be produced.

[52] Given the rationale behind the rule, and given the lack of any rational basis for Mr Padayachi's objection, apart from the fact that the objection is indeed based on the law of evidence, I was not satisfied that there was any merit in the objection. In being fair to both parties, I was satisfied that the absence of the original document, was not sufficient reason for the exclusion of the copy.

[53] Moreover, I took into account that even in Courts of Law, the rule is not rigid and that failure to produce the original may be excused if its non-production is satisfactorily explained. If I was given any impression that the document was for example intentionally not produced in order to conceal facts which would favour applicant's case of prejudice respondent's case,[18] I would indeed have refused to admit the document. Given the fact that it was explained to me that the original document is currently in possession of either the Police or Criminal Courts since it was used as an exhibit in a criminal case, it was however clear that there was nothing sinister about the non-production of the original document. Given these circumstances, it appears to me that even a Court of Law, applying strict rules of evidence, would not have refused to admit the photocopy of the document into evidence, merely because the original was not produced. That disposes of the objection against admission of the copy.

[54] This however is not the end of the enquiry into the admissibility of the document, because the general rule is that documents must also be properly authenticated when handed in as exhibits in Courts of Law by for example calling a witness such as the author of the document or somebody who was an attesting witness or who can identify the handwriting or signature of the author of the document.[19] Respondent did not call the attesting officer namely Mr Sonka in order to verify applicant's signature.

[55] The explanation which was advanced as to why Mr Sonka was not called, was that he no longer works for the Department of Social Services and that it would be difficult to trace him in order to call him as a witness. I am satisfied that this is an acceptable explanation for not calling the witness. The probability that he would after six years be able to recall the incident, is in any event remote.

[56] Furthermore, it was conceded by respondent's witness Daniels, that applicant would not personally have completed the application form since it is practice for the attesting official to do this in his own handwriting based on information which he must obtain from an applicant. There are many ways in which a document can be authenticated in Courts of law. In *S v Boesak*, the authenticity of an incriminating letter, which was allegedly written by Dr Boesak, which he did not admit, was also in dispute. The Supreme Court of Appeal dealt with this issue as follows:

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[18] see for example *Barclays Western Bank Ltd v Creser* 1982 (2) SA 104 (T) 106-107
[19] *Knouwds v Administrateur, Kaap* 1981 (1) SA 544 (C)

> "He limited his attack to the authenticity of the letter submitting that it had not been proved, beyond reasonable doubt, that the appellant had authorised, written or signed the letter…Let it be said immediately : there is no direct evidence that the signature on the letter is that of the appellant. No witness saw him signing the letter. **But lack of proof that the appellant personally signed the letter is, of course, not the only relevant enquiry.** The enquiry includes whether the appellant authorised the letter, or had given instructions for its typing and dispatch, or had knowledge of its contents, or had affirmed its contents by signing it. If any one of these factors could be established beyond reasonable doubt, the State would have discharged"[20]

[57] Given the fact that I am not bound by the same strict rules of evidence as Courts of Law and given the factors which I have already referred to when discussing my reasons for excusing the non-production of the original document, and given the fact that on the face of it, the document appears to have been completed on the instructions of applicant and signed by applicant, I was satisfied that it would be fair to accept that the document was satisfactorily authenticated for purposes of the arbitration hearing. The application form off course also constituted hearsay evidence and although I was not specifically addressed in this regard and no objection was made on the basis that it constitutes hearsay evidence, I also applied my mind as to whether I should not perhaps exclude the document, it being hearsay evidence. Bearing in mind the criteria contained in section 3(1)(c) of Act 45 of 1988, I was satisfied that it would be in the interests of justice to admit the document, despite it being hearsay evidence.

[58] Having regard to all these rules of evidence I have discussed, I was satisfied that fairness could best be achieved by admitting the copy of the document and applying my mind at a later stage, at the end of the case, to the weight to be attached to the contents of the document. Accordingly, before respondent closed its case, I ruled that I admit the copy of the application form into evidence, and I am still of the view that this was the correct decision.

Evaluation of the evidence in order to make crucial factual findings

[59] Having made some basic factual findings and having explained why I have admitted the copy into evidence, I now intend to focus on the crucial factual findings which I need to make, in order to determine whether applicant's guilt has been proved.

[60] The central focus in deciding whether applicant made any misrepresentation and had any intention to defraud, revolves around the question whether the information contained in

[20] *S v Boesak* 2000 (3) SA 381 (SCA) par 31 - 32

the part of the application concerning “Financial Information”, was indeed supplied by applicant or not.

[61] According to that part of the form, the distinct impression is created that applicant has no income. Indeed it is stated in this part of the application: *“Supported by her mother in law. No bank Account. Never worked”*. It is common cause that the information contained in this statement is false in that applicant was employed at the time when this form was completed and indeed at all other relevant times.

[62] I must decide whether applicant supplied this false information contained in this statement or not. Had applicant not admitted that she did indeed apply for and received a child support grant and had the only information before me been the application form and its contents it would have been difficult to find that applicant was necessarily the one who had supplied this information concerning her financial status. However, based on certain admissions made by applicant, together with certain probabilities, respondent’s version seems to me to be the more probable version before me.

[63] It is common cause that applicant did indeed apply for a social grant for her child, that her application was successful and that between 2000 and 2003, she indeed received this grant and personally collected the grant each and every month. In order to have obtained this grant which she herself admits she had applied for, she must have completed an official application form. Daniels’ evidence in this regard is very clear that it is impossible to receive such a grant without having completed the prescribed form. The information contained in the application form for a social grant handed in during the arbitration, namely applicant’s first names, surname and identity number, correspond in all respects with those details as reflected in her referral form when she referred her dispute to arbitration. This form therefore clearly relates to an application for a social grant made by applicant. It is inherently improbable that there will be more than one application form in respect of applicant’s application for a social grant, and I am accordingly satisfied that the copy of the application form handed in during the arbitration proceedings, is indeed a copy of the application form which was used as the basis for approving applicant’s application for a grant.

[64] According to Daniels, the Department is very strict about the procedure to be followed when applications for social grants are processed and it is insisted that the official who interview applicants must verify their personal details by perusing their bar-coded identity documents. Not only is the information supplied by an applicant verified by an attesting officer before whom an applicant is required to take an oath in this regard, but a second

official also verifies this information. It is conspicuous that most of the information contained in the form, coincides with information which I can verify objectively. As already stated, I could verify the correctness of applicant's name, surname and identity number as contained in the application form for the grant, by comparing it to the information supplied by her in her referral form of this dispute to the ELRC. The correctness of other information contained in the application form such as the fact that it is stated that applicant is a widow and that she has one child to support, I could verify through statements which Mr Padayachi made during the arbitration hearing.

[65] Objectively speaking, the information pertaining to applicant's personal details as contained in the application form, is therefore correct and the truth. It is impossible that the attesting officer could have correctly guessed this information namely applicant's names, identity number, marital status and dependants. He must have obtained it from applicant, not only because the information is correct but also because according to Daniels, attesting officers do not allow any person other than the holder of a bar-coded identity document whose details correspond with the personal details on the application form, to take the oath, verify the information and sign the application form.

[66] Having so meticulously obtained all the correct details from applicant concerning her personal details, it is inherently improbable, that the attesting officer would have made a mistake and misunderstood applicant with regard to the most important information on the application form, namely applicant's financial details. It is even more improbable that the second official, namely the verifying officer would, when he verified the information supplied by applicant, also have made exactly the same mistake with regard to applicant's financial information.

[67] The probabilities that anybody could have misunderstood applicant with regard to her financial information as supplied in the form, are in any event remote, since too much detail is given. Had the statement simply been "No job", it could possibly still have been argued that this could have been due to miscommunication. The statement however consists of three parts namely (1) that applicant is supported by her mother in law (2) that she has no bank account and (3) that she has never worked. Why on earth would any attesting officer have sucked such detailed information out of his thumb, unless of course applicant had perhaps bribed him to assist her into illegally getting a social grant? It was however never applicant's case that she had bribed the official to forge false information in order to qualify for a grant and accordingly the possibility of corruption on the part of the official can be safely excluded.

[68] Having excluded both corruption and bona fide error on the part of the attesting official, as reason for the incorrect information concerning applicant's financial statement, the only possible explanation which remains, which indeed seems to be the most plausible inference to be drawn from the evidence, is that applicant is the one who had supplied to the attesting official false information in respect of her financial details.

[69] As to whether applicant had signed the application form, it is highly improbable that anybody would have wanted to or have had any reason to forge her signature on the application form. Furthermore it was conspicuous that whereas Mr Padayachi was prepared to state to respondent's witnesses that applicant was not the one who supplied the information contained in the application form or completed the application form, he was not prepared to make a similar statement regarding the signature on the application form, which on the face of it appears to be the signature of one EK Jodwana. Instead Mr Padayachi's statement in this regard was that applicant was not prepared to either admit or deny that this was her signature but that respondent must prove that it is her signature. The difference in the statements are obvious and I indeed cleared this up with Mr Padayachi so that there can be no misunderstanding.

[70] When comparing the semantic differences in these two statements, the only inference I can draw is that Mr Padayachi's instructions were that applicant did indeed sign the form and that being an attorney who is bound by rules of professional ethics, Mr Padayachi was not prepared to make a statement which he knew was false and state that applicant's version is that she had never signed the application. This certainly supports my finding that applicant is the one who had signed the application form, a copy of which was handed in as an exhibit. Further support for the finding that applicant had signed the form, is to be found in the fact that on the face of it, the form indicates that applicant is the signatory: Not only because of the fact that her initials and surname are reflected in the signature, but also because the signature according to the form, is that of the applicant for the grant, who according to the personal information on the first part of the form, is applicant. Lastly, I have compared the first two letters "E" and "K" in the signature contained in the application for the grant and it looks almost identical to the letters "E" and "K" in applicant's signature contained in the attendance register which she signed at the arbitration hearing.[21] The application form is in the form of an affidavit in which

[21] A Court or tribunal itself is indeed allowed, without the aid of a handwriting expert, to compare the handwriting of a person contained on a disputed document, with other genuine specimens of her

applicant by her signature verified the correctness of the information contained in the form under oath. Hence, once the finding is made that applicant had signed the form, which finding I indeed make, this is further support for the inference that applicant is the one who had supplied the false information regarding her financial status to the officer who then wrote it down on the form.

[71] Further support for this inference is to be found in the fact that Ms Spiers during the disciplinary hearing indicated that applicant pleads not guilty to the main charge of fraud but guilty to the alternative charge. The alternative charge specifically alleges that applicant committed an act of dishonesty by unlawfully and intentionally **misrepresenting to the Department of Social Services that she was entitled to a social grant** in terms the Social Assistance.

[72] Before me neither Mr Padayachi nor Ms Spiers contended that Ms Spiers did not tender a plea of guilty on the alternative charge at the disciplinary hearing. Instead Mr Padayachi focussed in his cross-examination of Wandrag on Wandrag's failure to establish from applicant whether she agreed with her representative's statements.

[73] I agree that it would have been desirable that Wandrag should have asked applicant whether she agrees with the plea of guilty on the alternative charge, but this does not mean that applicant did not actually instruct her representative to say that she is prepared to plead guilty on the alternative charge. Mr Padayachi suggested that applicant could have felt intimidated. He also suggested that perhaps applicant did not pay attention when her representative made statements. Therefore, he submitted that the only inference which one could draw from applicant's failure to intervene and failure to say that Ms Spiers was wrong and that she was not guilty on the alternative charge, is not necessarily that applicant was in actual fact guilty on the alternative charge.

[74] Anything is possible, but that is not the test in a civil case. Apart from the fact that these arguments of Mr Padayachi's amount to speculation and are not based on facts placed before me under oath, the suggestions offered by Mr Padayachi are certainly not the most plausible inferences which I can draw from the facts. Mrs Spiers is a very experienced representative. I do not believe for one moment that she would have said that applicant pleads guilty to the alternative charge without having taken proper instructions in this

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signature or handwriting in order to establish whether it is similar or the same. See *S v Boesak* 2000 (3) SA 381 (SCA) paragraphs 57 and 58

regard from applicant. Had there been even the slightest possibility that Mr Spiers had incorrectly understood applicant's instructions when she offered a plea of guilty on the alternative charge, then I would have expected Mr Padayachi to have asked Ms Spiers to testify to this effect before me. This was not done. The most plausible inference I can draw from these facts, is that applicant indeed instructed her representative at the disciplinary hearing that she was prepared to plead guilty on the alternative charge.

[75] The alternative charge to which applicant was prepared to plead guilty, specifically contains the allegation that applicant had misrepresented to the Department of Social Services that she was entitled to a social grant and has so committed an act of dishonesty. The fact that applicant was prepared to admit this, is further support for my earlier finding that she was the one who supplied the false information concerning her financial affairs and employment status to the attesting official who then wrote it down in the application form.

[76] At the end of respondent's case, there certainly was prima facie evidence before me, which at face value incriminated applicant and pointed towards her guilt. The copy of the application form, which I admitted into evidence before the closing of respondent's case, on the face of it appeared to be a copy of an affidavit signed by applicant in which she under oath stated to the Department of Social Services that she has never had a job, and on that basis applied for a child support grant, to which she was not entitled. If this circumstantial evidence, which pointed towards applicant's guilt, created a factually incorrect impression, applicant should have told me so under oath. However, applicant elected, after consultation with her attorney, not to give evidence. I therefore have no version from applicant before me. Whereas the admissions made by her attorney can be used against her, the exculpatory statements made by her attorney which applicant never repeated under oath namely that she all along thought that she was entitled to a child support grant since she is a widow, cannot have much weight. Although applicant was entitled to remain silent by not testifying, that does not mean that there are no consequences attached to her decision not to testify. In *Pezzutto v Dreyer*, the Supreme Court of Appeal remarked as follows:

> "It is true that it does not follow merely from the fact that if a witness' evidence is uncontradicted that it must be accepted. It may be so lacking in probability as to

> justify its rejection. But where a witness' evidence is uncontradicted, plausible and unchallenged in any major respect, there is no justification for submitting it to an unduly critical analysis.."[22].

[77] Subsequent to the enactment of our Constitution and with regard to an accused person's right in criminal cases to remain silent, our Courts have confirmed this principle in the well known case of *S v Boesak*. Dr Boesak's counsel also attacked the admissibility of an incriminating letter which the State wanted to prove, based on the fact that it was allegedly not properly authenticated, which argument the trial court as well as the Supreme Court of Appeal rejected. As in this case, an important part of the incriminating evidence against Dr Boesak consisted of a document, namely the letter, the authenticity of which was disputed. As in this case, the evidence against Dr Boesak was circumstantial, and as in this case, he elected not to testify. He was convicted and this conviction was confirmed by both the Supreme Court of Appeal[23] as well as the Constitutional Court,[24] which held that held that:

> "if there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation, to prove the guilt of the accused".[25]

[78] Whether such a conclusion is justified will depend on the weight of the evidence. In this regard the following was said in *Osman and Another v Attorney-General Transvaal*[26]:

> "Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice."

[79] Since the onus is only on a balance of probabilities in civil trials and arbitration hearings and not beyond reasonable doubt as required in criminal trials, this approach should be equally, if not more applicable, in civil trials and arbitrations.

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[22] *Pezzutto v Dreyer* 1992 3 SA 379 (A) at 391E-F per Smalberger JA

[23] *S v Boesak* 2000 (3) SA 381 (SCA)
[24] *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC)
[25] *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 24

[80] The admissions made by Mr Padayachi, together with the facts which were common cause and the remainder of the evidence, which I have already discussed shouted for an answer from applicant. In particular, an explanation was required from applicant to explain, how, if she was not the one who had given the false information to the attesting officer regarding her financial statement, the false information found its way into the application form. If it was really not applicant who had supplied the false information to the attesting officer, it would have been the easiest thing in the world for her to come and explain so under oath. This is what one would have expected an innocent person to do when faced with such incriminating evidence.

[81] The application form, which falsely states that applicant is unemployed, on the face of it appears to have been completed on the instructions of applicant and signed by her after she took the oath to confirm the contents of its correctness. If this impression was factually incorrect, the evidence called for applicant to explain to me under oath that the document was never completed on her instructions and that she never verified the correctness of its contents, neither under oath, nor otherwise. Given the fact that applicant admits that she indeed applied for a social grant, indeed received such a grant for 3 years and indeed did not qualify for this grant, and given the contents of the application which on the face of it appears to have been signed by applicant, the evidence called for an answer from applicant to explain why she would in the light of that not be guilty of fraud. No weight can be placed on the statement by Mr Padayachi that applicant thought that she would qualify for a grant since she is a widow. If this was really the truth, applicant should have stated so under oath which she did not do.

[82] Having regard to all the evidence in an holistic manner, I am satisfied that the most probable and plausible inference to be drawn from the evidence is that applicant had supplied false information to the Department of Social Services on 6 April 2000 when she applied for a child support grant by stating to the attesting officer under oath that she does not have a bank account and had never worked.

[83] The information about her employment status was clearly false and applicant clearly knew that it was false because on 6 April 2006, applicant was employed by respondent on a full time basis at a Net salary of R4378,49. Based on the factual findings I have made, I will

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[26] 1998 (11) BCLR 1362 (CC); 1998 (4) SA 1224 (CC) at para 22

now proceed to establish whether all the elements of fraud had been proved and whether applicant is guilty of fraud.

Misrepresentation

[84] Misrepresentation for purposes of fraud simply consists of making an incorrect statement of fact or law made by one person to another.[27] Clearly applicant's conduct which consisted of supplying false information regarding her financial position, constituted a misrepresentation for purposes of fraud.

Intent

[85] Intent to defraud consists of an intention to deceive and an intention to defraud, which means that the alleged suspect must have made the misrepresentation knowing or foreseeing that it might be false. In addition the suspect must intend her lie to be acted upon, failing which the necessary intention to defraud will not be established.[28] It is hardly ever possible to lead any direct evidence in order to prove intent. Intent is generally inferred from the conduct of a person and the surrounding circumstances.[29] In *R v Taylor*[30] JA Schreiner commented in this regard as follows:

> The ultimate enquiry is whether the Crown has in all the circumstances proved…that the accused had the intent in question at the time when he did the act; but the presumption, or reasonable assumption, that a man intend the natural consequences of his acts must lead, ordinarily if not invariably, to the conclusion that an accused person was capable of forming the relevant special intent and did in fact form it.

[86] The inference seems inescapable that when applicant made the misrepresentation regarding her financial status and falsely stated that she has never worked, she knew that this information was false. Having regard to the fact that she was employed as an educator at the time, it is inherently improbable that she did not know that she was lying. The inference that her intention was to cause the Department of social services to act to the State's prejudice on applicant's misrepresentation by granting to applicant a child support grant to which she was not entitled, seems equally inescapable.

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[27] Burchell & Milton *Principles of Criminal Law*(3rd ed) 836
[28] Burchell & Milton *Principles of Criminal Law*(3rd ed) 844
[29] Schmidt *Bewysreg* (2nd ed) 176
[30] *R v Taylor* 1949 (4) SA 702 (A) 713

[87] If applicant had honest intentions and if she really, honestly thought that despite her income of R4000 per month, she was entitled to a child support grant because she was a widow, she would not have had any reason to lie under oath and state that she is not employed and had never had a job. Had she stated that she was an educator, the Department of Social Services would undoubtedly have known that applicant earned more than R800 per month. Applicant clearly realised this. She also clearly realised that she would not be entitled to the grant based on her income. It is for these reasons that she lied about being unemployed. For these reasons also, she did not want to state that she was employed as an educator, because she did not want the Department of Social Services to enquire about her salary from her employer, knowing very well that she was earning too much to qualify for a child support grant. These are the most plausible inferences to be drawn from the evidence.

[88] Clearly applicant must have realised that the natural consequences of these lies, would more probably than not, lead to the granting of a child support grant to her to which she was not entitled and which she would not have received, had the Department of Social services known that she was employed as an educator, earning R4000 per month. Being an educator to grade 3 pupils, I also do not believe for one moment that applicant did not know that she was doing wrong and committing fraud. The intention to defraud was therefore proved because applicant made the representation knowing that it was false, intending her lie to be acted on and knowing that she was committing fraud which was wrong.

Causation and Prejudice

[89] In order to constitute the crime of fraud, the misrepresentation with the intent to defraud must cause actual or potential prejudice.[31] The prejudice required for purposes of fraud is a very wide concept because either actual prejudice in a proprietary or non-proprietary form or potential prejudice, is sufficient.[32] Potential prejudice which would suffice has been interpreted so widely that even where a person's fraudulent intentions had been defeated or unsuccessful[33] and even where her intention to defraud would never have succeeded

[31] *S v Ostilly* 1977 (2) SA 104 (D) at 115H
[32] Burchell & Milton *Principles of Criminal Law*(3rd ed) 840
[33] *R v Jolosa* 1903 TS 694 at 698

because of the forgery being so gross and so obvious,[34] this would still be sufficient to constitute potential prejudice for purposes of fraud. That there was prejudice to the Department of Social Services cannot be disputed because for 3 years it paid a monthly grant to applicant, to which she was not entitled and would not have received had it not been for her intentional misrepresentation.

[90] That prejudice was caused to the respondent through applicant's intentional misrepresentation seems also obvious, for various reasons. Although she defrauded the Department of Social Services, her employer namely respondent like the Department of Social Services, is indeed part of the State. Defrauding another state department, certainly affects the trust relationship between a civil servant and her employer causing prejudice. In addition potential prejudice was caused in that applicant through her fraud created the risk that her employer's good reputation in the public eye could be jeopardized for employing individuals who defrauds the taxpayers whilst being remunerated with tax payers money. There was also potential prejudice to respondent in that applicant through her bad example, could corrupt learners in that they may get the impression that rules are made to be broken and that there is nothing wrong to defraud the State.

Unlawfulness

[91] Since there is no justification for applicant's conduct, I have not doubt that her conduct was indeed also unlawful.

Conclusion regarding misconduct

[92] I am satisfied that respondent has succeeded to prove on a balance of probabilities that the most plausible inference to be drawn from the evidence, is that applicant is indeed guilty of fraud as charged. Accordingly the conviction on the count of fraud is confirmed.

[93] The mere fact that applicant committed fraud towards the Department of Social Services whereas she was employed by the Western Cape Department of Education is of no relevance, since both these Departments are part of the State. According to Grogan, misconduct committed outside working hours and outside the workplace is nevertheless misconduct for which an employer can discipline his employee, provided that the

[34] *R v Seabe* 1927 AD 28 at 32

misconduct is work related.[35] The test for whether the conduct is work related is whether the conduct affects the employment relationship and not whether the conduct was covered by the employment contract.[36] In my view it would be untenable to argue that where a civil servant commits fraud towards another State Department of the State, this does not constitute misconduct which is work related. Through her dishonest conduct towards the State, applicant not only defrauded the State, of which her employer forms part, but also created the potential risk that learners would follow her bad example and think that fraud is acceptable in our Country. I am therefore satisfied that applicant was guilty of work related misconduct in the form of fraud and that her employer was entitled to discipline her for that.

CONSISTENCY

[94] It was argued on behalf of applicant, that even if she was guilty of fraud, which was still denied, dismissal was unfair because the State has not been consistent with regard to the manner in which it has acted against other civil servants in either the WCED or other State departments in respect of social grant fraud or other fraud.

[95] As regards consistency the only evidence before me is that of Wandrag who testified that in the WCED, respondent has been consistent in that a decision was taken that all offenders would be disciplinary charged. His explanation for dismissing applicant and not the other offenders whose disciplinary hearings he had presided over was that the other offenders displayed visible signs of remorse whereas applicant did not. He is not aware of the position in other State departments, apart from the fact that he it has come to his attention that the Kwa Zulu Natal Department of Education has not disciplined their employees for social grant fraud related misconduct. Mr Padayachi made mention of failure of other state departments and parliament to discipline offenders for similar fraud but since Wandrag has no personal knowledge of this, since no other evidence was placed before me regarding consistency, and since I am not prepared to take judicial notice of this, I am not prepared to place any reliance on these statements made from the bar. Even if such evidence was placed before me, it would in any event not have made a difference to my finding.

[96] The Labour Appeal Court has held that consistency is simply a general principle of fairness and cannot be applied rigidly:

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[35] Grogan *Dismissal, Discrimination and Unfair Labour Practices* (1st ed, Juta August 2005) page 314

> "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' … There is really no separate 'principle' involved. Consistency is simply an element of disciplinary fairness… Every employee must be measured by the same standards…. 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…. The point is that consistency is not a rule unto itself".[37]

[97] As regards contemporaneous consistency, Wandrag's evidence, which I accept, is that respondent approached the misconduct related to social grant fraud consistently. His explanation that applicant was dismissed whereas other educators were not because they showed remorse whereas applicant did not, is rational, compelling and sufficient to persuade me to find that he did not apply the rule inconsistently. Even Dr Grogan states that to treat employees differently on the basis of remorse or lack of remorse, is fair.[38]

[98] The argument that since civil servants in other departments had not been dismissed for similar conduct, it would be unfair to dismiss applicant, is not convincing. In fact, this in my view, is a dangerous argument, which could if applied, seriously jeopardize our young democracy. It will be a sad day in the history of our young democracy when a Head of Department is precluded from dismissing a civil servant in his department for fraud, merely because other civil servants in other state departments who committed similar misconduct or members of parliament who had committed fraud, had not been dismissed. If this argument were to hold any water, I can foresee serious problems in the fight to combat corruption and fraud in the civil service. Eventually no civil servant will be dismissible on

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[36] Grogan *Dismissal, Discrimination and Unfair Labour Practices* (1st ed, Juta August 2005) page 315
[37] *SACCAWU & others v Irvin & Johnson Ltd* (1999) 20 ILJ 2302 (LAC) at 2313C-J
[38] Grogan *Dismissal, Discrimination and Unfair Labour Practices* (1st ed, Juta August 2005) page 156

account of fraud, theft or corruption, simply because others before him or her, had not been dismissed. This cannot be.

[99] Heads of Department who decide to dismiss civil servants who commit fraud or corruption should be commended by arbitrators for taking such a tough stance. They should be encouraged to clamp down on corruption and fraud in order to get rid of the bad apples in the civil service. Those Heads of Department who do not take action, are the ones who should be criticized for undermining the values of our Constitution and making a mockery of our democracy. Their actions should not be seen as the benchmark to which other Departments must conform.

[100] It is off course true that historical inconsistency can be particularly unfair since inconsistent application of rules in the workplace creates confusion and possible doubt about whether a rule in fact exists.[39] In this case however, historical consistency cannot have much relevance. I can still understand that where in a particular workplace, the practice is that employees are not dismissed for petty theft or pilfering, it would be unfair to suddenly out of the blue, without any prior warning start disciplining employees for such misconduct. Naturally there would be confusion amongst the employees as to whether the employer approves of this conduct or not. In this case we are not talking of petty theft or pilfering. This case concerns the fraudulent abuse of tax payers money by civil servants.

[101] Even if there had been cases in the past where civil servants had not been disciplined for such misconduct, no civil servant can argue that based on that, therefore she cannot be dismissed for defrauding the state and abusing taxpayers money. The misconduct involved is simply too serious for such an assumption. Even if others before her had not been dismissed for similar conduct, no civil servant could honestly argue that she never expected to be dismissed for such misconduct in the event of being caught.

[102] On the available evidence I am satisfied that the dismissal did not contravene the principle of consistency either from an historical point of view or from a contemporaneous point of view.

THE APPROPRIATENESS OF DISMISSAL AS A SANCTION

[39] Grogan *Dismissal, Discrimination and Unfair Labour Practices* (1st ed, Juta August 2005) page 223

[103] Discipline falls within the province of the employer. It is for the employer to determine an appropriate sanction and interference with the sanction will only be justified in the case of unreasonableness and unfairness.[40] The fact that an arbitrator may feel that he would have imposed a different sanction had he been the employer, is not the correct test in determining whether a fair sanction had been imposed. The Labour Appeal Court has held that when considering whether the sanction of dismissal is fair, arbitrators have the limited function of ensuring that the dismissal does not fall outside the wide band of reasonableness.[41] This approach was recently, on 26 September 2006 confirmed by the Supreme Court of Appeal when Cameron JA issued a stern warning to arbitrators:

> "Commissioners must exercise caution when determining whether a workplace sanction imposed by an employer is fair. There must be a measure of deference to the employer's sanction, because under the LRA it is primarily the function of the employer to decide on the proper sanction...
> In determining whether a dismissal is fair, a commissioner need not be persuaded that dismissal is ***the only*** fair sanction. The statute requires only that the employer establish that it is ***a*** fair sanction. The fact that the commissioner may think that a different sanction would also be fair does not justify setting aside the employer's sanction"[42]

[104] In elaborating on the manner in which arbitrators should exercise their discretion to interfere with sanctions imposed by employers, Cameron JA held: (a) the discretion to dismiss lies primarily with the employer; (b) the discretion must be exercised *fairly*; (c) interference should not lightly be contemplated (d) commissioners should use their powers to intervene with 'caution', and (e) they must afford the sanction imposed by the employer 'a measure of deference'.[43]

[105] In guiding arbitrators to determine whether a sanction is fair, the Court made the following remarks:

> "The use of 'fairness' in everyday language reflects this. We may describe a decision as 'very fair' (when we mean that it was generous to the offender); or 'more than fair' (when we mean that it was lenient); or we may say that it was 'tough, but fair', or even 'severe, but fair' (meaning that while one's own decisional response might have been different, it is not possible to brand the actual response unfair). It is in this latter category, particularly, that CCMA commissioners must exercise great

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[40] *Country Fair Foods (Pty) Ltd v CCMA &* Others [1999] 11 BLLR 1117 (LAC) at 1121E-F).
[41] *Nampak Corrugated Wadeville v Khoza* (1999) 20 ILJ 578 (LAC)
[42] per Cameron JA in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA*, unreported case No 598/05, delivered on 26 September 2006, para 48
[43] ibid para 42

> caution in evaluating decisions to dismiss. The mere fact that a CCMA commissioner may have imposed a different sanction does not justify concluding that the sanction was unfair. Commissioners must bear in mind that fairness is a relative concept, and that employers should be permitted leeway in determining a fair sanction. As Myburgh and van Niekerk suggest:
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> > 'The first step in the reasoning process of the commissioner should be to recognise that, within limits, the employer is entitled to set its own standards of conduct in the workplace having regard to the exigencies of the business. That much is trite. The employer is entitled to set the standard and to determine the sanction with which non-compliance with the standard will be visited….
>
> As the approach of Ngcobo AJP implies, the solution to the flood of cases the LAC understandably fears does not lie in unduly constricting the grounds of review to permit. It lies in pointing commissioners firmly to the limits the statute places upon their power to intervene:
>
> > 'If commissioners could substitute their judgment and discretion for the judgment and discretion fairly exercised by the employers, then the function of management would have been abdicated – employees would take every case to the CCMA. This result would not be fair to employers.' "[44]

[106] Accordingly an arbitrator cannot interfere with the sanction imposed by an employer merely because he does not like it.[45] An arbitrator may not interfere with the sanction of dismissal unless the sanction is so excessive as to shock one's sense of fairness[46] or unless the sanction makes you whistle.[47] This however does not mean that arbitrators must merely rubber stamp sanctions imposed by employers. It is still the duty of arbitrators to decide for themselves whether penalties imposed by employers are fair[48] and in judging the fairness of a dismissal, an arbitrator must ultimately apply a moral or value judgment to the established facts and circumstances of the case.[49]

[107] In circumstances where the employer could not reasonably be expected to continue employing the offending employee, dismissal is justified and fair.[50] With regard to what exactly constitutes circumstances where the employer cannot reasonably be expected to continue employing the offending employee, guidance is given in the Code of Good Practice on Dismissals. The Code suggests that dismissal must be reserved for the most

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[44] ibid para 46 - 47
[45] per Ngcobo AJP in *Country Fair Foods v CCMA* (1999) 20 ILJ 1701 (LAC)
[46] per Ngcobo AJP in *Country Fair Foods v CCMA* supra; *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA supra para 42*
[47] per Conradie JA in *Country Fair Foods v CCMA* (1999) 20 ILJ 1701 (LAC)
[48] *Toyota South Africa Motors (Pty) Ltd v Radebe & Others* (2000) 21 ILJ 340 (LAC)
[49] *Boardman Brothers v Chemical Workers' Industrial Union* 1998 (3) SA 53 (SCA) 58B-C
[50] *South African Commercial Catering and Allied Workers Union and others v Irvin & Johnson Limited (1999) 20 ILJ 2302 (LAC) para 33 per Conradie J*)

serious forms of misconduct and repeated offences, the test being whether the misconduct renders the continuation of the employment relationship intolerable.[51]

[108] If there is one area where arbitrators must tread lightly and think twice before interfering with an employer's decision, it is those cases where an employee is guilty of dishonesty and where the employer has dismissed her on account of that dishonesty. Once an arbitrator has made a finding that a dismissed employee was correctly convicted of misconduct involving dishonesty, his discretion to interfere with the sanction of dismissal, is very limited. Invariably, if an arbitrator interferes with the sanction of dismissal in such a case, the award will be set aside on review by the Labour Court.

[109] There is a plethora of case law where the Labour Courts and Labour Appeal Court have set aside awards of arbitrators who have found that although employees were guilty of dishonesty, dismissal was too harsh a sanction.[52] This does not mean that an arbitrator may never or only in exceptional circumstances interfere with dismissal in cases involving dishonesty, for that would be irrational and amount to an abdication of an arbitrator's discretion which would not be permissible. It simply means that an arbitrator must intervene with caution.

[110] The employment relationship is regarded as "one of the highest good faith".[53] Dishonesty, irrespective of the value involved, has always constituted good grounds for dismissal as it usually constitutes a fundamental breach of the employment contract, the argument being that a breach of the relationship of trust occurs where an employee is guilty of dishonesty at the workplace.[54] In *Standard Bank of South Africa Limited v CCMA and others*[55] Tip AJ observed as follows:

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[51] See *Code of Good Practice on Dismissal, Item 3(2), (3);* Grogan *Workplace Law page 154*

[52] see for example *Expo Liquor Wholesalers v Mokheseng & others* (2006) 27 ILJ 1133 (LC); *Consani Engineering v CCM & others* (2004) 25 ILJ 1707 (LC); *Standard Bank of South Africa Ltd v CCMA & others* [1998] 6 BLLR 622 (LC); *Vaal Toyota (Nigel) v Motor Industry Bargaining Council & others* [2002] 10 BLLR 936 (LAC); *Consol Ltd t/a Consol Glass v Ker NO & Others* [2002] 4 BLLR 367 (LC); *Ellerines Holdings v CCMA & others* [1999] 9 BLLR 917 (LC); *Nasionale Parkeraad v Terblanche* [1999] 6 BLLR 545 (LAC); *Toyota South Africa Motors (Pty) Ltd v Radebe & others* [2000] 3 BLLR 243 (LAC); *Truworths Ltd v Ramabulana NO & others* [1999] 12 BLLR 1369 (LC); *Metcash Trading Ltd t/a Metro Cash & Carry v Fobb & others* [1998] 11 BLLR 1136 (LC)

[53] *Carter v Value Truck Rental (Pty) Ltd* [2005] 1 BLLR 88 (SE) para 44 per Grogan AJ

[54] *Metcash Trading Ltd t/a Metro Cash & Carry v Fobb & another* (1998) 19 ILJ 1516 (LC); *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 ILJ 573 (LAC)

[55] (1998) 19 ILJ 903 (LC)

> " It is one of the fundamentals of the employment relationship that an employer should be able to place trust in the employee. A breach of trust in the form of conduct involving dishonesty is one that goes to the heart of the relationship and is destructive of it. The existence of the duty of an employee to act with good faith towards his or her employer and to serve honestly and faithfully is one of long-standing in the common law."

[111] Similar remarks were made by the Labour Appeal Court in the landmark case of *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 ILJ 573 (LAC) at 590 – 591 where the Labour Appeal Court held:

> "It seems to me that the relationship between such an employer and such an employee is of such a nature that, for it to be healthy, the employer, must, of necessity, be confident that he can trust the employee not to steal his stock-in-trade. If that confidence is destroyed or substantially diminished by the realization that the employee is a thief, the continuation of their relationship can be expected to become intolerable, at least for the employer. Thenceforth he will, as it were, have to be continually looking over his shoulder to see whether his employee is being honest".

[112] However, it is not an invariable rule that each and every offence involving dishonesty must necessarily always incur the penalty of dismissal. The facts of every case must be assessed, the mitigating features taken into account, and the effect of the dishonesty on the employment relationship evaluated.[56]

[113] There are indeed several mitigating factors in this case. At the time of dismissal applicant had a clean disciplinary record and had been employed by respondent for 6 years since 2000. She is a widow, a sole breadwinner and has one child. Although the grant was paid to her over a period of three years, on a monthly basis, it amounted to only R100 per month and her fraud did therefore not result in substantial financial loss to her employer or the State. In addition unemployment is rife in our Country and dismissal should not be resorted to as a first option.

[114] I have indeed given it a great deal of thought whether I should not in the light of these mitigating factors, interfere with the sanction which was imposed. However, mitigation, as that term is understood in the criminal law, has no place in employment law. An employer

[56] *Toyota SA Motors (PTY) LTD v Radebe & others* (2000) 21 ILJ 340 (LAC) para 44; *Consol Ltd t/a Consol Glass v Ker NO & Others* [2002] 4 BLLR 367 (LC) at 367

who dismisses a dishonest employee does not do so because he primarily wants to punish her. The reasons why an employer needs to get rid of a dishonest employee are basically twofold. Firstly the employee can no longer be trusted which would affect the operational requirements of the business and secondly a signal needs to be send out to other employees that dishonesty will not be tolerated.[57] This does not mean that mitigation does not have a place in employment law at all; it certainly does have a place but not in the same context as in criminal law. Conradie JA explains this as follows:

> "Mitigation, as that term is understood in the criminal law, has no place in employment law. 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."[58]

[115] Together with the mitigating factors, there are also aggravating factors, which completely outweigh the mitigating factors. Firstly, this offence cannot be said to have been committed on the spur of the moment. Applicant must have planned it because she had to go to the office of Social Services with her identity document and proof of her child's birth and age. She must therefore have planned the offence.

[116] Moreover, the fraud was committed over a period of 3 years on a monthly basis when applicant went to collect her grant once a month on all pay day. Each and every month, for a period of three years when she went to collect the grant, she perpetuated the fraud by receiving it under the false pretence that she was unemployed and or having an income of less that R800 per month. That money which she collected so diligently, could have been used to feed a child in need or to help building a house for a homeless family. It was not intended to enrich dishonest civil servants such as applicant, who earn substantial salaries. Social grant fraud costs the taxpayer millions of Rands every year. In a country such as ours where many of our people are unemployed and living in poverty, social grants are meant for the poorest of the poor and play a fundamental roll in order to

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[57] see also *Consani Engineering (PTY) LTD v Commission for Conciliation, Mediation & Arbitration & Others (2004) 25 ILJ 1707 (LC) at 1715 para 21*

[58] De Beers Consolidated Mines Ltd v CCMA & others (2000) 21 ILJ 1051 (LAC) at 1058 para 22 per Conradie JA

promote social justice. It is a disgrace that an educator can be so unethical and dishonest to receive social grants to which she is not entitled, thereby, in essence, stealing from the poorest of the poor.

[117] After being caught, applicant had the ideal opportunity to come clean and admit her misconduct. Yet, that opportunity was not taken. Although an attempt was made to plead guilty to the alternative charge at the disciplinary hearing, this can hardly be seen as true remorse because a full disclosure of the facts underlying the plea of guilty was not made by applicant at that stage nor at any other stage.[59]

[118] It has been held that where an employee's dishonesty is calculated and where she fails to take an opportunity to rectify her dishonesty, dismissal will invariably be seen as the only appropriate sanction.[60] Applicant shows no signs of remorse whatsoever. Had she admitted to her employer right from the start that she had defrauded the State, the outcome of the disciplinary hearing and/or this arbitration, might have been very different. Instead of playing open cards, her instructions to her representatives were to dispute that she had made any misrepresentation, which version I have rejected as false. Both during the disciplinary hearing as well as during the arbitration proceedings she was fully entitled to plead not guilty, but having done so, and having lied to her representatives by advising them to dispute that she had misrepresented her financial position, she deprived herself of the opportunity to persuade her employer that she can ever be trusted again. An employee who is guilty of dishonesty and who does not even want to admit that she did wrong, cannot be trusted since she shows no intention to rehabilitate because she does not want to admit the wrongfulness of her conduct. In this regard the Labour Appeal Court has remarked:

> "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

[59] In order for a plea of guilty to be accepted as true remorse the penitence must be sincere and the accused must take the tribunal into her confidence by making a full disclosure. Cf *S v Seegers* 1970 (2) SA 506 (A)

[60] *Consol Ltd t/a Consol Glass v Ker NO & Others* [2002] 4 BLLR 367 (LC) 367 per Waglay J

> say to itself that the risk of continuing to employ the offender is unacceptably great"[61]

[119] It is true that priority should be given to corrective discipline in the workplace rather than just dismissing employees with a clean service record. However this does not mean that dismissal may never be appropriate for a first offender irrespective of the circumstances and nature of the offence.

[120] Where an employee is guilty of dishonesty and is not prepared to take responsibility and admit that she has acted dishonestly and was wrong, it cannot be expected of the employer to impose a sanction which emphasizes rehabilitation rather than operational requirements and deterrence. A workplace is not equipped to deal with the rehabilitation of unrepentant dishonest employees. It would seriously undermine the proper functioning of a workplace if a dishonest employee, who refuses to give the first step towards rehabilitation by accepting liability and who shows no remorse, needs to be kept on board to be rehabilitated within the workplace. Even if she does not handle money, it would require that she be constantly monitored and closely watched to ensure that she is indeed on the right track. For as long as a dishonest employee is not prepared to accept guilt and admit that she has done wrong, it is only logical that her employer will have reason to distrust her in every thing she does and says in the workplace. A work relationship cannot survive under such circumstances.

[121] It is not surprising then that respondent has argued that the trust relationship has been destroyed and that dismissal was therefore appropriate. Wandrag expressed the same views during his evidence. Whether there was a breakdown in the employment relationship, must however be determined objectively. An arbitrator cannot have regard merely to an employer's subjective feelings to determine whether the trust relationship was indeed destroyed.[62] In this regard, the Supreme Court of Appeal remarked:

> "The Code states that generally it is not appropriate to dismiss for a first offence unless the misconduct is serious and of such gravity that it makes a continued employment relationship 'intolerable'. 'Intolerable' means 'unable to be endured' (Concise Oxford Dictionary). This necessarily imports a measure of subjective perception and assessment, since the capacity to endure a continued employment relationship must exist on the part of the employer. It follows that

[61] *De Beers Consolidated Mines Ltd v CCMA & others (2000) 21 ILJ 1051 (LAC) at 1058 para 25 per Conradie JA*

[62] *Concorde Plastics (Pty) Ltd v NUMSA & others* [1998] 2 BLLR 107 (LAC)

> the primary assessment of intolerability unavoidably belongs to the employer. This is not to confer a subjective say-so. Allowing some leeway to the employer's primacy of response does not permit caprice or arbitrariness. A mere assertion on implausible grounds that a continued relationship is intolerable will not be sufficient. The criterion remains whether the dismissal was fair."[63]

[122] I am satisfied that applicant's dishonest conduct does impact on the employment relationship for various reasons, despite the fact that she does not handle money at work. Where there is dishonesty on the part of the employee, the trust relationship is invariably destroyed. Trust is the core of the employment relationship. Dishonest conduct by an employee breaches this trust which the employer places in the employee. Given the serious nature of applicant's misconduct and her unwillingness to openly accept guilt and take the first step towards rehabilitation and openly express remorse, I have no doubt that respondent is correct in saying that the trust relationship was destroyed.[64]

[123] More importantly, section 28(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. Against the background of section 28(2) the High Court has held that as important as the rights of educators may be, the paramountcy of children's rights and interests must not be overlooked.[65] The profession of educator is indeed a noble one. Educators fulfill a crucial roll in society. Children, especially those in the lower grades, to which applicant taught, are very impressionable. It is easy to influence them, either in a good way or in a bad way. It is for this reason that the community is entitled to have high expectations of educators, especially as regards their integrity, honesty and ethical and moral values. Where an educator commits fraud and receives social grants to which she is not entitled and is not prepared to accept liability and despite that remains in service, this sends out the wrong message to learners as well as members of the community. It sends out the message that rules are there to be broken, that it is not all that bad to commit fraud, that even educators do it and that the authorities do not see it in a serious light. If such behaviour is tolerated, we should not be surprised that many of our learners these days display anti social behaviour in schools.

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[63] per Cameron JA in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA*, para 45
[64] also see my remarks in paragraph 120
[65] per Bertelsmann J in *Settlers Agricultural High School v Head of Department of Education, Limpopo Province* [2002] JOL 10167 (T), case No 16395, delivered on 3 September 2002

[124] Learners at a primary school level where applicant taught are very impressionable. Many of them may already come from unstable families and may be in desperate need of educators to act as roll models in setting a good example. Applicant was teaching to potential future cabinet ministers, bankers, and parliamentarians. Setting a bad example to these young learners, could affect the way in which they think about fraud and corruption. It could influence their moral values when they are appointed one day in responsible positions. It may be, as Mr. Padayachi said, that the learners would never even have known about the fraud, but on the other hand learners do gossip about teachers and the potential is at least there that at some stage some learners may come to know of applicant's fraud.

[125] The conduct of every educator who displays a lack of moral or ethical values by making herself guilty of serious misconduct such as fraud, has the potential of corrupting the minds of our learners and future leaders through the bad example he or she sets. There is no reason why we should tolerate such educators in public schools. Learners, parents and the taxpayers deserve better. Education departments should get rid of such educators and arbitrators should not discourage education departments from dismissing such culprits by interfering with their dismissals.

[126] Applicant was guilty of serious misconduct which led to a complete breakdown of the trust relationship between herself and her employer. I cannot see my way open to interfere with the sanction which was imposed by the respondent. I am of the view that respondent has succeeded in proving on a balance of probabilities that as a result of the dishonesty, the lack of remorse, the unwillingness to admit guilt, applicant had irreparably destroyed the relationship of trust and had made the continuation of the employment relationship intolerable. Therefore, respondent cannot reasonably be expected to have continued employing the applicant. I certainly cannot find that the sanction which was imposed either induces a sense of shock or makes one whistle. In fact, had I been the presiding officer I would have imposed exactly the same sanction. Dismissal was clearly the only appropriate sanction.

[127] Accordingly I find that the respondent has discharged its onus by proving on a balance of probabilities that the dismissal was substantively fair. I may just add that it certainly evokes sympathy to see how an educator looses her job in a country where unemployment is rife. There is certainly nothing gratifying in seeing how a person looses

her job. However, misplaced sympathy is not a relevant factor when evaluating the fairness of a dismissal.[66]

PROCEDURAL FAIRNESS OF THE DISMISSAL

[128] The procedural fairness of the dismissal was attacked only on the basis that the presiding officer of the disciplinary hearing was allegedly biased against applicant. Mr Padayachi attempted to demonstrate that Wandrag was biased by pointing out that due to Wandrag's experience and qualifications in labour law, one would have expected of him to have displayed a higher degree of competence and skill in dealing with evidence and in respect of the procedure which he followed. So for example, Wandrag was criticised for not having considered the admissibility of the copy of the application instead of the original, for not having confirmed with applicant that statements made by her representative were correct and for not having questioned the reason for the failure of the WCED to call the attesting officer Mr Sonka as a witness. Therefore, the argument as I understand it, is that Wandrag must necessarily have been biased because had he been fair and impartial, he would have been stricter regarding the procedure and admissibility of evidence. The issues in respect of which Wandrag was criticized, are all issues in respect of which one would have expected a Magistrate in criminal proceedings, not to have erred. Magistrates presiding in criminal cases are expected to apply their minds to the admissibility of each and every piece of evidence, to enquire why certain witnesses are not called and to ask an accused person whether he or she confirms admissions made by the representative. The same skills and competence cannot be expected of presiding officers presiding over disciplinary hearings.

[129] This was recently confirmed by the Labour Court in a judgement which left no doubt as to what is not expected of employers presiding over disciplinary hearings:

> "…It follows that the conception of procedural fairness incorporated into the LRA is one that requires an investigation into any alleged misconduct by the employer, an opportunity by any employee against whom any allegation of misconduct is made, to respond after a reasonable period with the assistance of a representative, a decision by the employer, and notice of that decision. This approach represents a significant and fundamental departure from what might be termed the 'criminal justice' model that was developed by the industrial court and applied under the unfair labour practice jurisdiction that evolved under the 1956 Labour Relations Act. That model likened a workplace disciplinary

[66] *Consani Engineering (Pty) Ltd v CCMA & others* (2004) 25 ILJ 1707 (LC) per Murphy AJ; *Carter v Value Truck Rental (Pty) Ltd* (2005) 26 ILJ 711 (SE) 725 per Grogan AJ

enquiry to a criminal trial, and developed rules and procedures, including rules relating to bias and any apprehension of bias, that were appropriate in that context.

The rules relating to procedural fairness introduced in 1995 do not replicate the criminal justice model of procedural fairness. They recognise that for workers, true justice lies in a right to an expeditious and independent review of the employer's decision to dismiss, with reinstatement as the primary remedy when the substance of employer decisions are found wanting. For employers, this right of resort to expeditious and independent arbitration was intended not only to promote rational decision making about workplace discipline, it was also an acknowledgement that the elaborate procedural requirements that had been developed prior to the new Act were inefficient and inappropriate, and that if a dismissal for misconduct was disputed, arbitration was the primary forum for determination of the dispute by the application of a more formal process.

The balance struck by the LRA thus recognises not only that managers are not experienced judicial officers, but also that workplace efficiencies should not be unduly impeded by onerous procedural requirements. It also recognises that to require onerous workplace disciplinary procedures is inconsistent with a right to expeditious arbitration on merits. Where a commissioner is obliged (as commissioners are) to arbitrate dismissal disputes on the basis of the evidence presented at the arbitration proceedings, procedural requirements in the form that they developed under the criminal justice model are applied ultimately only for the sake of procedure, since the record of a workplace disciplinary hearing presented to the commissioners at any subsequent arbitration is presented only for the purpose of establishing that the dismissal was procedurally fair.

The continued application of the criminal justice model of workplace procedure therefore results in a duplication of process, with no tangible benefit to either employer or employee.

The signal of a move to an informal approach to procedural fairness is clearly presaged by the explanatory memorandum that accompanied the draft Labour Relations Bill. The memorandum stated the following:

> "*The draft Bill requires a fair, but brief, pre-dismissal procedure …(It) opts for this more flexible, less onerous, approach to procedural fairness for various reasons: small employers, of whom there are a very large number, are often not able to follow elaborate pre-dismissal procedures; and not all procedural defects result in substantial prejudice to the employee."*

On this approach, there is clearly no place for formal disciplinary procedures that incorporate all of the accoutrements of a criminal trial, including the leading of witnesses, technical and complex 'charge sheets', requests for particulars, the application of the rules of evidence, legal arguments, and the like." [67]

[130] Under these circumstances the argument that Wandrag by not having followed a stricter approach to procedure and evidence, displayed bias because one would have expected a man with his skills and competence to have followed a more stricter approach, is not compelling. My experience is that presiding officers in disciplinary hearings, no matter who

[67] *Avril Elizabeth Home for the Mentally Handicapped v CCMA* (2006) 27 ILJ 1644 (LC) at 1651 and further per Van Niekerk AJ

they are or how senior they are, do not pay much attention the rules of evidence and procedures followed in criminal trials. In fact, I have arbitrated labour disputes, where chairpersons of disciplinary hearings had been senior attorneys with many years experience in labour law, who had specifically been selected to ensure that a fair correct procedure is followed. Even in those cases, a very informal approach to procedure and the admissibility of evidence was followed by the chairperson. The manner in which Wandrag conducted the disciplinary hearing, is therefore simply in accordance with the manner in which presiding officers conduct, and in fact are encouraged during training sessions, to conduct disciplinary hearings.

[131] The fact that Wandrag never even considered the admissibility of the copy of the application, can in any event not be construed as bias. My experience has certainly been that presiding officers hardly if ever consider the admissibility of documentary evidence but simply admit is, especially where the document is not in dispute. Wandrag's evidence is that he specifically did not consider the admissibility of the document, because it was not in dispute. In doing so, he was in good company, because there are reported cases, where even Supreme Court Judges have reasoned in the same manner and followed the same approach, admitting copies of documents into evidence, on the basis that it was not disputed.[68]

[132] Neither could the fact that Wandrag did not confirm with the applicant that her representative's statements are correct, or the fact that he did not question the absence of Mr Sonka as a witness, constitute evidence of bias. Apart from the fact that he gave satisfactory reasons for his conduct in this regard, his approach was simply in accordance with the very relaxed, informal manner in which disciplinary hearings are conducted, even by very experienced presiding officers.

[133] It was also suggested that Wandrag was biased because he dismissed applicant since she failed to plead guilty whereas others who had pleaded guilty were not dismissed. This argument is also without merit. Wandrag explained that the real reason why applicant was dismissed and the others not, was because applicant displayed no visible signs of remorse whereas others he had convicted for similar offences did show remorse. I have already pointed out earlier herein, with reference to jurisprudence, that a dishonest employee who denies guilt, cannot complain if she is dismissed, precisely because she

shows no remorse and is not prepared to take the first step to rehabilitation. Wandrag was absolutely correct in his approach in distinguishing between applicant and others who had pleaded guilty. His differentiation does not support a finding of bias. It is merely in accordance with an approach sanctioned by the Labour Appeal Court.

[134] Having carefully considered Wandrag's written judgement, which was handed in as an exhibit together with his evidence before me as well as the arguments raised on behalf of the parties, I am satisfied that there is no merit in the argument that Wandrag was biased. I am also satisfied that there are no reasonable grounds to have caused any reasonable person in applicant's position, to have harboured a reasonable suspicion that Wandrag was biased.[69] Accordingly I find that the dismissal was also procedurally fair.

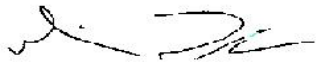
AWARD

In the premises I make the following order:

1. The dismissal was both procedurally as well as substantively fair.

2. Applicant is not entitled to any relief in terms of the LRA and her application is dismissed.

3. No order as to costs is made.



adv D P Van Tonder

Arbitrator/Panellist: ELRC

[68] *Kaputuaza and another v Executive Committee of the Administration for the Hereros and others* 1984 (4) SA 295 (SWA); *S v Makoba* 1980 (1) SA 99 (N)

[69] see *S v Harksen; Harksen v President of the Republic of South Africa and others; Harksen v Wagner No and another* 2000 (1) SA 1185 (C) AT para 71 for the test to establish whether a reasonable perception of bias has been proved