REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 2127/2010

In the matter between:

KARABO TERRENCE KGOADI **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

COMMISSIONER JOSEPH TSABADI **Second Respondent**

PICK 'N PAY RETAILERS (PTY) LTD **Third Respondent**

Heard: **15 August 2013**

Delivered: **29 November 2013**

Summary: **CCMA arbitration proceedings – Review of proceedings, decisions and awards of commissioners – Test for review – Section 145 of LRA 1995 – practical application of review test set out – determinations of commissioner compared with evidence on record – commissioner's decision regular and**

sustainable – award upheld

CCMA arbitration proceedings – Review of proceedings, decisions and awards of commissioners – assessment of evidence by commissioner – commissioner determining evidence reasonably and rationally – no irregularity found to exist

Practice and procedure – review case must be made out in founding affidavit – impermissible to raise new review grounds in heads of argument – grounds of review so raised – cannot be so considered

Practice and procedure – selective discovery by the applicant of the record of review and pertinent parts of the review record in the form of documentary evidence and CCTV footage not placed before Court – applicant must stand or fall based on what is placed before the Court – incomplete record may even lead to dismissal of review on this ground alone

CCMA arbitration proceedings – conduct by commissioner – commissioner's powers in terms of Section 138 – commissioner conducting arbitration within the parameters that is acceptable – no misconduct committed

CCMA arbitration proceedings – Review of proceedings, decisions and awards of commissioners – assessment of evidence by commissioner – apply balance of probabilities – credibility findings by commissioner – principles stated

Misconduct – no remorse ever shown – destructive of employment relationship – dismissal justified – finding by commissioner sustainable

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JUDGMENT

SNYMAN AJ

Introduction

[1] This matter concerns an application by the applicant to review and set aside an

arbitration award of the second respondent in his capacity as a commissioner of the CCMA (the first respondent). This application has been brought in terms of Section 145 of the Labour Relations Act[1] ("the LRA").

[2] The third respondent dismissed the applicant for misconduct based on charges relating to dereliction of duties and breach of company procedures. The applicant pursued his dismissal as an unfair dismissal dispute to the CCMA and the matter came before the second respondent for arbitration on 1 July 2010. Pursuant to these arbitration proceedings, the second respondent then determined that the dismissal of the applicant by the third respondent was substantively and procedurally fair. The second respondent then dismissed the applicant's claim of unfair dismissal. It is this determination by the second respondent that forms the subject matter of the review application brought by the applicant, which application was timeously filed on 2 September 2010.

Preliminary issues

[3] From the outset, I have a difficulty with the review application of the applicant in that, the applicant has been selective in the providing of the record of the proceedings. The applicant has only discovered the transcript of the evidence presented in the arbitration proceedings before the first respondent and as presented to the second respondent, whilst in this case there clearly was pertinent, important and actually extensive documentary evidence also placed before the second respondent. This is apparent not only from the record itself, but also from the arbitration award where several references are made by the second respondent to pages of a bundle of documents, but no such bundle is part of the record. Added to this is the CCTV footage which was placed before the second respondent and which was an important foundation on which he based his conclusions, but which was never placed before this Court by the

[1] No 66 of 1995.

applicant.

[4] In my view, the review application is thus materially defective. Critical parts of the evidence have not been provided as part of the record, as it should have. Normally this situation arises in the context of the recordings of the *viva voce* evidence presented in the CCMA being lost or incomplete or inaudible, and the Court has on several occasions pronounced on this, as will be dealt with hereunder. However, and in the current matter, it is not about the transcript of the *viva voce* evidence in the CCMA which was indeed before me. It is about the absence of everything else, and in particular the documents and the CCTV footage. The simple point is that the record of the proceedings before the CCMA and the relevant commissioner, for the purposes of a review application, does not just consist of the transcript of the *viva voce* evidence. It must also include all the other evidence before the commissioner, and in particular the documentary evidence and other exhibits placed before the commissioner, especially if such documents were actually considered by the commissioner in coming to a determination. The absence of such parts of the record is just as important and material as the absence of the transcript of the *viva voce* evidence or part thereof, where it comes to the issue of the proper consideration and determination of a review application.

[5] If a review applicant does not provide the documentary evidence or other exhibits before the commissioner as part of the record of the proceedings, the review applicant should at the very least offer a proper and acceptable explanation why this is the case. If the documents are for example not relevant, the applicant must explain and motivate this. Equally, if the documents are lost, this must be explained, and it must be explained what steps were taken to recover such documents, such as for example asking the opponent for copies of their documents. In the current matter, the exact same considerations would also apply to the issue of the CCTV footage. The applicant has offered no such

explanation. The applicant has just simply elected not to provide a material part of the record.

[6] What is then the consequence of such a failure by the applicant? The Court has only dealt with this question in the context of a missing or incomplete transcript of the *viva voce* evidence, but in my view there is no reason why these exact same considerations cannot also equally apply to other parts of material evidence before a commissioner missing from the record, such as in this case the documents and CCTV footage. In *Lupo International Clothing and Sportswear (Pty) Ltd v Msenzi and Others,*[2] the Court dealt with the failure to discover documentary evidence in an appeal record and said: 'Furthermore, the copies of the record are manifestly incomplete in that the pre-trial conference minutes and the various documentary exhibits handed in during the hearing before the Industrial Court have not been included.'

[7] In *JDG Trading (Pty) Ltd t/a Russells v Whitcher NO and Others,*[3] which dealt with the absence of the *viva voce* evidence transcript, the Court said: 'In the absence of the transcribed record of the proceedings before the first respondent, the court *a quo* was in no position to adjudicate properly on the application before it and ought accordingly to have dismissed it.' The Court in *Solidarity on behalf of Botha v Commission for Conciliation, Mediation and Arbitration and Others*[4] said the following:

> 'The general rule applicable to review cases is that there is duty on an applicant to provide a review court with a full transcript of the proceedings he or she wishes to have reviewed and failing which the review must either be struck off the roll or be dismissed.'

[2] (1996) 17 ILJ 130 (LAC) at 134A.
[3] (2001) 22 ILJ 648 (LAC) at para 13 ; See also *Liwambano v Department of Land Affairs and Others* (2012) 33 ILJ 1862 (LC) at para 30.
[4] (2009) 30 ILJ 1363 (LC) at para 14.

The Court in *Solidarity on behalf of Botha* went further and said:[5]

> 'It seems to me from a reading of the authorities that where there is no record or the record is inadequate, the applicant has, in addition to explaining in the papers why the record is not complete or is inadequate, to indicate in full the steps he or she took to ensure that the record was before the court including attempts at reconstructing it.'

The Court concluded:[6]

> '….This portion of the record is materially important and without it this court is not placed in a position where it would be able fairly to determine whether the decision of the commissioner was reasonable or otherwise. …. This evidentiary material is essential in the determination of whether the decision of the commissioner that there was no dismissal is reasonable regard being had to the evidentiary material which was before him. There is no explanation from the applicant as to why the missing portion of the record which is so materially important to the determination of whether or not the court should interfere with the arbitration award is not transcribed and filed as part of the record.
>
> It is therefore my view that the applicant has failed to place before this court a complete record to enable the court to assess and evaluate the reasonableness of the conclusion reached by the commissioner. And for this reason I do not deem it necessary to determine the merits of the application. It therefore means that the applicant's application stands to be dismissed on this ground alone.'

[8] In confirmation of this reasoning, a number of authorities similarly concluded. In *Mabogoane v Commission for Conciliation, Mediation and Arbitration and Others,*[7] the Court said: 'It is trite that there is an obligation upon an applicant in a review application to place before a court the record of the proceedings which are subject to the review application. Where the applicant neglects to do so, the

[5] Id at para 22.
[6] Id at para 26 – 27.
[7] (2012) 33 ILJ 1874 (LC) at para 16.

applicant obviously runs the risk of the application either being struck off the roll or being dismissed …'. Also in *Boale v National Prosecuting Authority and Others,*[8] it was held: 'It is trite law that there is a duty on an applicant to provide a review court with a full transcript of the proceedings he wishes to have reviewed. The applicant has failed to provide this court with the full transcript of the proceedings that he wished to have reviewed. Where an applicant fails to provide a full transcript of the proceedings the review application must be dismissed…'

[9] In *Metalogik Engineering and Manufacturing CC v Fernandes and Others,*[9] the Court followed another approach and held, in the context of a missing portion of the record:

> 'I am in no position to form a reasoned assessment of what it amounts to and, hence, whether or not there are good grounds upon which the conclusion reached by the second respondent should be assailed. The applicant has also not sought to persuade me that these defects in the record cannot be cured, despite its best efforts to do so.'

This is also the approach followed by the majority of the Court in *Papane v Van Aarde NO and Others*[10] where the Court held:

> 'I do not understand the decided cases, cited earlier, to preclude this court from determining an appeal on less than a complete record in an appropriate and exceptional case, provided the court feels able to do so on the material before it. …'

[10] The Court has also said that another option would be that the Court simply considers the review on the basis of the record as it stands, and the applicant for

[8] (2003) 24 ILJ 1666 (LC) at para 5
[9] (2002) 23 ILJ 1592 (LC) at para 11
[10] (2007) 28 ILJ 2561 (LAC) at para 30 per Kruger AJA

review must stand or fall on such basis. I refer to *Public Servants Association of SA on behalf of Khan v Tsabadi NO and Others*[11] where it was held as follows:

> '…. A party who elects to proceed without the benefit of a complete record runs the risk that she will be unable to discharge the onus which is upon her. Moreover, disputes of fact will be decided according to the Plascon-Evans rule *which* could be obviated to some extent where there is a complete record of the proceedings (assuming, that is, that the ground of review is based upon an issue which appears from the record).'

The Court concluded:

> '…. as I have previously indicated, the rules to ensure the availability of the record are for the benefit of the applicant who is entitled to waive his or her right thereto. I should emphasize that the cases referred to above I regarding the application of this principle apply to an election by an applicant between the procedure contemplated by rule 7 and that contemplated by rule 7A. They have not been applied in the context of an election by an applicant to proceed in circumstances where, having requested the record, an insufficient or incomplete record is presented, thus compelling him or her to make an election on how to proceed.'

[11] Other instances where the Court elected to determine the review application on the defective and/or incomplete record as it stood was in *Doornpoort Kwik Spar CC v Odendaal and Others*[12], *Vodacom Service Provider Co (Pty) Ltd v Phala No and Others*[13]; *Nathaniel v Northern Cleaners Kya Sands (Pty) Ltd and Others*[14], and *Fidelity Cash Management Services (Pty) Ltd v Muvhango NO and Others*[15]. I have also had the opportunity to address this issue in *Brodie v Commission for*

[11] (2012) 33 ILJ 2117 (LC) at para 14
[12] (2008) 29 ILJ 1019 (LC) at para 7.
[13] (2007) 28 ILJ 1335 (LC).
[14] (2004) 25 ILJ 1286 (LC).
[15] (2005) 26 ILJ 876 (LC).

Conciliation, Mediation and Arbitration and Others[16] where it was said:

> 'The applicant has also been selective in the providing of the record of the proceedings. The applicant has only discovered the transcript of the evidence in the first respondent as presented to the second respondent, whilst in this case there clearly was pertinent and important documentary evidence also placed before the second respondent. This is apparent not only from the record itself, but also in the rule 7A(3) notice filed by the first and second respondents.
>
> As the applicant as dominus litis has brought the application in the form that it is before me, the review application will be determined on the basis as it stands, and the applicant must stand or fall on this basis ….'

[12] With specific reference to the review test and its application to the record in a review application, the Court in *Department of Transport, North West Province v Sebotha NO and Others*[17] held as follows:

> 'In order to apply the above test the court needs to have before it the record of the arbitration proceedings. As a general rule the complete record of everything that transpired during the arbitration proceedings needs to be placed before the court. There are however instances where the court may be able to determine whether or not the award is reviewable based on specific and relevant portions of the record only or for that matter on the arbitration award alone. This would be so in particular if the irregularity complained of is patent from a reading of the award.
> ….
>
> The responsibility to ensure that a proper and complete record is placed before the court rests with the applicant. Failure to place before the court a complete record by the applicant could result in the dismissal of the review application on that ground alone.'

[13] Accordingly, where the Court is confronted with an incomplete and defective

[16] (2013) 34 ILJ 608 (LC) at para 5 – 6.
[17] (2010) 31 ILJ 97 (LC) at para 17 – 18.

record of the arbitration, which relates to the issue of the transcript of the *viva voce* evidence in the arbitration, the documentary evidence and/or other material exhibits and evidentiary elements, the Court has one of three choices being: (1) to dismiss the application; (2) strike the application from the roll; or (3) determine the application on the basis of the record as it stands. I venture to suggest that which option the Court chooses is in turn dependent on the consideration of a number of factors, being: (1) the extent to which the record is incomplete/defective; (2) the actual explanation provided by the applicant for the incomplete/defective record; (3) who is to blame for the incomplete/defective record; (4) whether the record is capable of any form of reconstruction or proper constitution; (5) whether the applicant (parties) actually attempted reconstruction and proper constitution; (6) whether it is reasonably possible, on the record as it stands, to actually make a proper determination on the merits of the applicant's review application; and (7) being faced with the incomplete/defective record, how and on what basis the applicant actually wants to proceed with the review application. Possible examples are where the entire record is lost due to no fault of the applicant and reconstruction not being reasonably possible, the review could be granted and the matter remitted back to the CCMA or bargaining council for hearing *de novo*, or where reconstruction indeed being possible and would resolve the difficulties with the record but the applicant has not attempted this, the application could be struck from the roll, or where the record is incomplete and the applicant elects to proceed with the review on the merits, the review would then be determined 'warts and all', so to speak, with the applicant bearing the risk of such approach. These examples are not exhaustive, but simply some illustration on how the Court would approach this issue.

[14] In the current matter, the applicant has chosen to proceed with this matter on the record as it stands. There is no explanation offered as to why the documentary evidence and CCTV footage was not included in the record. There is no indication that this could not have been remedied but was not possible. I have

the review pleadings, the arbitration award (which is quite comprehensive) and the transcript of the *viva voce* evidence, which I consider to be sufficient for a proper determination of this matter. I therefore determine that the option I will follow in this matter is to determine the applicant's review application on the record as it stands. Where the applicant may be prejudiced or fail to make out a case because of the absence of the documentary evidence or CCTV footage as part of the record, then that is the risk the applicant takes and the applicant must stand or fall on such basis.

Background facts

[15] The applicant was employed by the third respondent as a floor manager at its Tramshed store. The applicant had some five years' service with the third respondent at the time of his dismissal. The applicant was part of the team of three senior managers who managed the store.

[16] This matter concerns irregularities pertaining to the cigarette stock in the store. These irregularities, in essence, were that stock was going missing from the cigarette locker. In order to curb these losses, the third respondent then implemented a number of specific and newly prescribed security measures.

[17] What the third respondent did first was to change the locks to the cigarette locker and restrict all access to the locker to only the three senior managers, being the store manager Samkelo Nyawula, the assistant manager David Masuku, and the applicant as the floor manager, and only they were given a key to the locker. In addition, and should any other person enter the cigarette locker, that person had to be accompanied at all times by one of the above three persons. It also followed that only one of these three persons could enter the cigarette locker unaccompanied. This new process was implemented on 15 July 2009.

[18] On 29 July 2009, a shipment of cigarettes was received in the store. On that day,

both Nyawula and Masuku were not in the store but were attending a SAP training course. The applicant thus, on 29 July 2009, was the duty manager in charge of the whole store. The applicant thus had to receive the cigarette delivery, ensure that it was properly packed in the security locker, the delivery was verified and the stock quantify confirmed. The applicant was also supposed to keep the cigarette locker locked at all times and any person entering the locker could only do so in his presence.

[19] Of relevance to this matter, the third respondent also had other security measures in place in the store pertaining to stock loss prevention. This related to staff searches. Firstly, the security personnel were not allowed to leave before the managers. The security must first search the managers and thereafter the managers search the security. Also, no staff was allowed to leave the store without first being fully searched. Being the only duty manager on 29 July 2009, the applicant was also responsible to ensure adherence to these procedures.

[20] When Nyawula returned to the store on 30 July 2009, he immediately noticed discrepancies in the cigarette stock in the locker. The fact is that despite the delivery the previous day, the stock was severely depleted, which should not have been the case. He also noticed that some of the cigarette cartons had been tampered with. Nyawula asked the applicant about the depleted stock, and the applicant explained that the cigarette kiosk was low on stock the previous day and that he (the applicant) had restocked it. Despite the applicant so reporting to Nyawula, the cigarette kiosk cashier however came to Nyawula on the very same day (30 July 2009) and asked for the cigarette kiosk to be restocked because the stocks were running low. What must also be mentioned specifically is that this report was made to Nyawula by the cashier, in the presence of the applicant himself, who reacted angrily to this report and disputed that this could be the case, and the cashier then left being extremely dissatisfied with the events. All of this was obviously of concern to Nyawula, who then decided to conduct an

investigation.

[21] The first point of call was the CCTV footage. It was found that inexplicably, the CCTV cameras in the cigarette locker were turned off on 29 and 30 July 2009, despite being fully functional. It was only the managers in the store that had access to the security area where the CCTV cameras are operated from and in where such cameras can be turned off. In addition, only the managers have the password needed to switch of the CCTV cameras. As Nyawula and Masuku were not there on 29 July 2009, only the applicant could have turned the CCTV cameras off in the cigarette locker.

[22] The next part of the investigation then concerned the CCTV footage in the cigarette kiosk on 29 July 2009. In respect of this area, the CCTV cameras functioned separately from those in the cigarette locker and were not turned off, and the footage showed that on 29 July 2009, the cigarette kiosk was never restocked as reported by the applicant to Nyawula on 30 July 2009.

[23] The final piece of the puzzle then is the CCTV footage of the store exit on the late afternoon on 29 July 2009. What is seen is that at approximately 18h42, being after the store closing time, a security officer by the name of Amanda handed two large full bags (the actual contents could not be seen) to two cleaners who left the store, but Amanda never searched the bags. Added to this, the other security personnel left the store early, on the instructions of the applicant, which was against security process and actually left the store vulnerable. What was also discovered is that the whole event with the two cleaners referred to above must have been visible to the applicant, as the applicant was in the management office at this time and thus he could clearly see the events through the large glass windows of the management office. It was concerning that the applicant did not act.

[24] Further exploration of the CCTV footage was conducted. It showed that on 19

July 2009, Amanda was seen opening the cigarette locker alone and leaving the locker with basket in hand, when the applicant was also the only manager on duty in the store. Similarly as before, Amanda left the store without her parcels being searched, which the applicant was supposed to do as the manager on duty in terms of the security procedure set out above. Also, it was discovered that the applicant had in fact given the cigarette locker keys to Amanda.

[25] In an attempt to further establish certainty, the applicant was asked to submit to a polygraph test. He refused. In the interim, Amanda had also disappeared and charges were laid against her and the police were searching for her. The two cleaners who were given the bags on 29 July 2009 agreed to submit to polygraph tests and failed. The cleaners then reported that after they carried the bags out, Amanda took the bags and placed them in a black Golf waiting outside, and they could feel there were cigarette cartons in the bag.

[26] The applicant was then notified to attend a disciplinary hearing on three charges, but only two of these charges are relevant to these proceedings. The first charge was one of dereliction of duties relating to the applicant failing to discharge his duties as locking manager in respect of the cigarette locker on 15, 19 and 29 July 2009. The second charge was that of breach of company procedures which related to the giving of the cigarette locker keys to Amanda.

[27] The disciplinary hearing was conducted before an independent chairperson, who found the applicant guilty of both these two charges, and recommended his dismissal, pursuant to which the applicant was then dismissed.

[28] In light of the above background facts, I will now turn to the merits of the applicant's review application, starting with the proper test for review.

The relevant test for review

[29] It has now authoritatively, and hopefully once and for all, been determined what

the relevant test for review entails. This review test is known in the general labour law colloquial tongue as the 'Sidumo test'. This test comes from the judgment in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[18] where Navsa, AJ held that in light of the constitutional requirement (in s 33 (1) of the Constitution) that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, and that 'the reasonableness standard should now suffuse s 145 of the LRA'. The majority of the Constitutional Court set the threshold test for the reasonableness of an award or ruling as the following: 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'[19] Following on, and in *CUSA v Tao Ying Metal Industries and Others,*[20] O'Regan J held:

> 'It is clear…. that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.'

[30] What the Constitutional Court meant in *Sidumo* and *Tao Ying Metal Industries* was a review test based on a comparison by a review court of the totality of the evidence that was before the arbitrator as well as the issues that the arbitrator was required to determine, to the outcome the arbitrator arrived at, in order to ascertain if the outcome the arbitrator came to was reasonable.

[31] The time the Labour Appeal Court authoritatively considered the *Sidumo* review test, and with respect initially correctly, was in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others,*[21] and the Court said the following:

> 'The Constitutional Court has decided in *Sidumo* that the grounds of review set

[18] (2007) 28 ILJ 2405 (CC).
[19] Ibid at para 110.
[20] (2008) 29 *ILJ* 2461 (CC) at para 134.
[21] (2008) 29 ILJ 964 (LAC) at para 96.

> out in s 145 of the Act are suffused by reasonableness because a CCMA arbitration award, as an administrative action, is required by the Constitution to be lawful, reasonable and procedurally fair. The court further held that such an award must be reasonable and if it is not reasonable, it can be reviewed and set aside.'

As to what would be considered to be unreasonable, the Court in *Fidelity Cash Management Service* held as follows:[22]

> 'The Constitutional Court further held that to determine whether a CCMA commissioner's arbitration award is reasonable or unreasonable, the question that must be asked is whether or not the decision or finding reached by the commissioner 'is one that a reasonable decision maker could not reach' (para 110 of the *Sidumo* case). If it is an award or decision that a reasonable decision maker could not reach, then the decision or award of the CCMA is unreasonable, and, therefore, reviewable and could be set aside. If it is a decision that a reasonable decision maker could reach, the decision or award is reasonable and must stand. It is important to bear in mind that the question is not whether the arbitration award or decision of the commissioner is one that a reasonable decision maker *would* not reach but one that a reasonable decision maker *could* not reach….'

The Court in *Fidelity Cash Management Service* then went further and formulated what can be described as an outcome based review test which the Court held the *Sidumo* review test envisaged, where the Court said:[23]

> 'It seems to me that, …. there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner's decision does not depend - at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such

[22] Id at para 97.
[23] Id at para 102.

> decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.'

The Court in *Fidelity Cash Management Service* concluded:[24]

> '…. Whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all H the evidence that was before the commissioner and what the issues were that were before him or her. There is no reason why an arbitration award or a finding or decision that, viewed objectively, is reasonable should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that existed which could demonstrate the reasonableness of the decision or finding or arbitration award.'

[32] Following a number of different interpretations and applications of the *Sidumo* test after the judgment in *Fidelity Cash Management*, matters came full circle, so to speak, in the judgment of the SCA in *Herholdt v Nedbank Ltd and Another*[25] where the Court again specifically considered the *Sidumo* test, and concluded as follows:[26]

> 'In summary the position regarding the review of CCMA award is this: A review of a CCMA award is permissible if the defect in the proceedings fall within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii),

[24] Id at para 103.
[25] 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA) Cachalia and Wallis JJA.
[26] Id at para 25.

> the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

What this judgment means is simply that if the arbitrator ignored material evidence and in considering this material evidence together with the case as a whole, the review court believes that the arbitration award outcome cannot now be reasonably sustained on any basis, then the award would be reviewable.

[33] Following the judgment of the SCA in *Herholdt*, the Labour Appeal Court has most recently in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[27] again authoritatively interpreted and applied the *Sidumo* test and held as follows:[28]

> '*Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator… In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material'

With respect, this clearly postulates that the *Sidumo* test is limited to an outcome

[27] (JA 2/2012) [2013] ZALAC 28 (4 November 2013) (4 November 2013) not yet reported, per Waglay JP.
[28] Id at para 14.

based review test. The Court further said:[29]

> '…. What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by *Sidumo*. The gross irregularity is not a self-standing ground insulated from or standing independent of the *Sidumo* test.…'

And concluded:[30]

> 'In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her, evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decision he or she arrived at.'

[34] In my view, what all the above means is that the first step in a review enquiry is to consider or determine if an irregularity indeed exists where it comes to the arbitration award or the arbitration proceedings. A review court determines whether such an irregularity exists by considering the evidence before the arbitrator as a whole, as gathered from the review record, and comparing this to the award and reasoning of the arbitrator as reflected in such award. The review court must also at this stage apply all the relevant principles of law in order to determine what indeed constituted the proper evidence that the arbitrator, as a whole, would have had to consider. Once an irregularity is identified, materiality of the irregularity then becomes relevant and must be considered. This means that the irregularity committed by the arbitrator must be a material departure from the acceptable norm or a material deviation from the actual evidence before him or a material departure from the proper principles of law or a material failure to considered and determine the evidence or case, in order to constitute an irregularity of sufficient magnitude to satisfy the first step in the review test enquiry. This approach of requiring materiality takes care of the requirement that

[29] Id at para 15.
[30] Id at para 16.

not every possible individual irregularity that may exist, is contemplated by the review test, as the review test requires the irregularity in the first place to be 'gross'.[31] If the review court in conducting this first step enquiry should find that no irregularity exists in the first instance, the matter is at an end, no further determinations needs to be made, and the review must fail.

[35] Should the review court however conclude that an irregularity indeed exists, then the second step in the review test follows, which is simply a determination as to whether this irregularity, if it did not exist, could reasonably lead to a different outcome in the arbitration proceedings. Put differently, could another reasonable decision-maker, in conducting the arbitration and arriving at a determination, in the absence of the irregularity and considering the evidence and issues as a whole, still arrive at the same outcome. In conducting this second step of the review enquiry, the review court needs not concern itself with the reasons why the arbitrator has given for the outcome he or she has arrived at, because the issue of the arbitrator's own reasoning was already considered in deciding whether an irregularity exists in the first place. The review court, in essence, takes the proper evidence as a whole, as ascertained from the review record, considers the relevant legal principles and decides whether the outcome that the arbitrator arrived at could nonetheless be arrived at by another reasonable decision-maker, even if it is for different reasons. If, and pursuant to this second step in the review enquiry, the review court is satisfied that the same outcome could not follow even for any other reasons, then the review must succeed, because, simply put, the irregularity would have affected the outcome. The end result always has to be an unreasonable outcome.

[36] I will now proceed to determine the applicant's review application on the basis of the principles and the two step enquiry in the application of the *Sidumo* test as I have set out above.

[31] See Section 145(2)(ii).

The review case of the applicant

[37] The applicant has to make out his case for review in his founding affidavit, as the applicant has elected not to supplement his notice of motion and founding affidavit in terms of Rule 7A(8)[32]. In *Betlane v Shelly Court CC,*[33] the Court said: 'It is trite that one ought to stand or fall by one's notice of motion and the averments made in one's founding affidavit. A case cannot be made out in the replying affidavit for the first time.' This approach applies equally in the Labour Court, and I refer to *De Beer v Minister of Safety and Security and Another*[34] where it was held that 'It is trite law that an applicant must stand or fall by his or her founding affidavit. The applicant is therefore not permitted to introduce new matter in the replying affidavit. The courts strike out such new matter.' The same sentiment was echoed in *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union*[35] where the Court specifically in a review application said: 'It is trite that an applicant must make out its case in its founding papers'.

[38] What are the grounds of review then raised by the applicant? The applicant raised in his founding affidavit that the second respondent committed a gross irregularity and erred in failing to listen to the evidence of both parties, and applying his mind to the facts and the law. The following specific grounds then formed the basis of these general contentions: (1) The second respondent failed to consider the evidence of the applicant pertaining to a policy called the Key

[32] Rule 7A(8) reads: '*The applicant must within 10 days after the registrar has made the record available either- (a) by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit; or (b) deliver a notice that the applicant stands by its notice of motion*.'

[33] 2011 (1) SA 388 (CC) para 29 ; See also *Van der Merwe and Another v Taylor NO and Others* 2008 (1) SA 1 (CC) para 122; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 150; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) paras 29 – 30; *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2008 (2) SA 448 (SCA) ; *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 636A – B ; *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC)

[34] (2011) 32 ILJ 2506 (LC)

[35] (2011) 32 ILJ 730 (LC) at para 9.

Carriers Code of Practice which justified his actions; (2) the second respondent failed to consider the applicant's evidence that when Amanda left the store with the bags he was on the telephone communicating with the help desk in Cape Town; (3) the second respondent failed to consider the minutes of the disciplinary enquiry that recorded that the cigarette consignment had actually been received on 27 July 2009 which was two days before the incident; (4) the second respondent erred when he concluded that it was the applicant who became upset when the cashier came to ask for further cigarettes when it was Masuku that became agitated; (5) The second respondent considered the evidence that the cleaners said they could feel cigarettes inside the bags when this was impossible; (6) the second respondent failed to consider that Amanda passed with the bags at 18h46 and not at 18h25 when the applicant was on the telephone; (7) the second respondent erred in stating that the video footage showed that Amanda was seen leaving and entering the store freely on 29 July 2009 when the footage only showed this on 19 July 2009; (8) the second respondent continued to refer to a charge that was not relevant; (9) the second respondent considered hearsay evidence of the cleaners who did not testify at the arbitration.

[39] In its review heads of argument, the applicant then sought to raise additional grounds of review. This related to the following: (1) the second respondent misconstrued the charges against the applicant considering that which he had actually been charged with and in fact found him guilty of something else; (2) The second respondent failed to consider the applicant's evidence with regard to the instruction he had been given about the locking up of the cigarette locker and that he had in fact complied with the process and received no contrary instruction; (3) the second respondent misconstrued the concessions of the applicant about not disputing most of the third respondent's evidence in that all that the applicant actually did not dispute was the CCTV footage; (4) the second respondent erred in considering the evidence about Amanda leaving the store

with the bags as this related to the charge the applicant was found not guilty of; (5) The second respondent committed misconduct in not allowing the applicant to cross examine a witness of the third respondent about the instruction relating to the locking procedure of the cigarette locker and by not allowing him to call his own rebuttal witness; (6) the second respondent erred in finding that Amanda had unfettered access to the cigarette locker only when the applicant was in charge in the store; (7) the second respondent misconstrued the CCTV footage evidence about the packing of cigarettes in the kiosk (or lack of such packing) and drew the wrong inferences from it; (8) the second respondent recorded that the applicant said his dismissal was procedurally unfair when this was not his contention; (9) the second respondent ignored that a fourth person save for the three managers also had unfettered access to the locked areas including the cigarette locker. It is not permissible for the applicant to raise these additional issues for the first time in his heads of argument on review. Reference is made to *Albany Bakeries Ltd v Van Wyk and Others,*[36] where it was held that it was prohibited for a review applicant to raise on review a case never placed before the arbitrator. Also, in *Northam Platinum Ltd v Fganyago NO and Others,*[37] it was held that:

> 'The applicant has in its heads of argument raised further grounds of review which were not raised in the founding affidavit. The only ground of review raised in the applicant's founding affidavit is the one quoted earlier in this judgment. I do not deem it necessary to repeat the grounds for review raised by the applicant in its heads of argument. In my view the law is very clear that a ground for review raised for the first time in argument cannot be sustained. The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit'.

[36] (2005) 26 ILJ 2142 (LAC).
[37] (2010) 31 ILJ 713 (LC) at para 27.

I fully agree with these sentiments, as I also did in the judgment of *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No and Others.*[38]

[40] The above being said, there is however one further ground of review that can considered even though it is only raised in the heads of argument of the applicant, which is the ground relating to alleged misconduct of the second respondent pertaining to the manner in which he conducted the arbitration. This is the ground relating to the second respondent's alleged interference with cross-examination and his failure to allow the applicant to call a witness. As I have said in the judgment of *Naartjie Clothing*, with specific reference to the issue that the review case must be made out in the founding affidavit:[39]

> 'Whilst the above principle must generally hold true, there is one important exception that would apply. What the court is seised with in this matter is a review application, and the power exercised by the court in such an application is to conduct a review of not only the arbitration award issued by the arbitrator, but also of the arbitration proceedings giving rise to such an award. This is evident from the wording of s 145(2)*(a)* of the LRA, as read with the prescription relating to the powers of the court in terms of s 158(1)*(g)* of the LRA. The exercise of the review jurisdiction and functions by the Labour Court in respect of arbitration awards of the CCMA entails the exercise of an overall supervisory duty over such functions of the CCMA. ….'

In *Naartjie Clothing* it was then concluded as follows:[40]

> 'The Labour Court fulfils this supervisory function irrespective of what the applicant party in the review application may raise as grounds of review. However, and to ensure that the policy consideration that the Labour Court should be mindful not to over-supervise the CCMA, as said in the judgment in *Pep Stores*, is not negated, the Labour Court should only intervene in terms of

[38] (2013) 34 ILJ 2347 (LC) at para 32 – 33.
[39] Id at para 34.
[40] Id at para 38.

> its general supervisory functions if it is apparent from the record before the court that one of the specific grounds as listed in s 145(2)*(a)* of the LRA actually exists, as the existence of any one of these three specific considerations must surely be entirely incompatible with any arbitration proceedings that would be considered to be lawful, reasonable and procedurally fair. ….'

[41] Therefore, I conclude that the only grounds of review competently raised by the applicant in these review proceedings are those grounds as set out in items (1) to (9) in paragraph 38 above. All these competently raised grounds of review will be dealt with hereunder. I will also consider the issue raised by the applicant about the alleged misconduct of the second respondent in the conduct of the arbitration in respect of the cross-examination and calling of a witness issue raised. I shall, for the reason given above, have no consideration at all of any of the other review grounds raised.

The reasoning of the arbitrator (second respondent)

[42] As stated above, the second respondent, as arbitrator, found that the dismissal of the applicant by the third respondent was both substantively and procedurally fair.

[43] The second respondent dealt with the merits of this matter in a manner which I consider to be sufficiently comprehensive and well reasoned. When presenting argument to me, Adv Jacobs, who represented the applicant, seemed to have difficulty in distinguishing between the part of his award where the second respondent summarized the respective cases of the two parties, and that part of the award where the second respondent actually set out his reasons for coming to the conclusions that he did. In argument, Adv Jacobs kept referring to what was recorded in the bullet points under the section of the award which recorded the third respondent's case as being actual reasons and conclusions the second respondent came to, when this was simply not the case at all. What the second

respondent did, under the heading of 'Analysis of evidence and argument' in his award, was to first summarize the third respondent's case in 29 bullet points in paragraph 39 of his award, and then summarize the case of the applicant in nine bullet points in paragraph 40 of his award. As stated, these are not the second respondent's reasons and conclusions.

[44] The second respondent's actual reasoning only takes place as from paragraph 41 of his award. The second respondent firstly considered probabilities, and concluded that the probabilities were overwhelming against the applicant. The second respondent then considered all of the defences and explanations raised by the applicant and rejected the same as improbable.

[45] Specifically, the second respondent dealt with the applicant's defence that he never saw Amanda leaving the store with the two bags because he was busy with a telephone call. The second respondent rejected this contention for a number of reasons, all of which, I must say, is entirely reasonable. The second respondent in fact concluded that there was no such telephone call at all.

[46] The second respondent then dealt with the applicant's case that he was entitled to allow Amanda unaccompanied access to the cigarette locker. The second respondent accepted the evidence of the third respondent that the clear instruction was given to the managers that only the three senior managers were allowed access into the cigarette locker, and that the locks were even changed for that purpose. The second respondent found that if Amanda was allowed such access, she would also have been authorized and given a key to the new lock. The second respondent also considered that Amanda only had unhindered access to the cigarette locker if the applicant was in charge of the store. Based on this, the second respondent concluded that the applicant did breach these security procedures.

[47] The second respondent considered the fact that only the CCTV cameras for the cigarette locker were turned off, and that the CCTV footage did not show that the cigarette kiosk was allegedly replenished by the applicant as he contended. The second respondent also considered the applicant's reaction when the cashier in the cigarette kiosk came to ask for more stock. The second respondent considered that none of this testimony was challenged under cross-examination. The second respondent concluded that all these facts and issues indicated that the stock was not taken out of the cigarette locker to replenish the kiosk, but found its way into the bags that Amanda had taken out of the store to the vehicle waiting outside.

[48] The second respondent also accepted the evidence of the third respondent that the applicant had failed to adhere to security procedures in the store and that under his tenure Amanda had basically been allowed to come and go as she pleased.

[49] The above being the crux of the reasoning of the second respondent, the first question now is whether the grounds of review properly raised by the second respondent, as set out above, have any merit and thus establish the existence of irregularities. The second question, if any such irregularities are indeed found to exist, is whether a consideration of all the evidence as established by the record before me, as it stands, and without the existence of the irregularities, could still justify the ultimate conclusion of the second respondent that the applicant's dismissal was fair, as a reasonable conclusion. I will now proceed to answer these questions.

Merits of the review: substantive fairness

[50] From the outset, and as I have said above, the task at hand requires a comparison of the entire record of the evidence in this application to the award of the arbitrator (second respondent). This immediately gives rise to a material

difficulty with regard to several of the grounds of review raised by the applicant. As set out above, the applicant has raised the grounds of review of the second respondent not properly considering the CCTV footage and ignoring evidence as contained in the disciplinary enquiry minutes. It is not possible to determine whether these contentions of the applicant have any substance without an actual consideration of the CCTV footage and disciplinary hearing documents and a comparison of the same to the second respondent's award. To put it simply, without this, there is nothing to compare the award of the second respondent with in this respect, and thus the conclusions as recorded in the award of the second respondent must be accepted as reasonable and properly made. The same considerations must equally dispose of the ground of review relating to the Key Carriers Code of Practice raised by the applicant, which document was also not included as part of the record. The applicant's review grounds in respect of all of these issues must fail for these reasons alone, as the existence of an irregularity simply cannot be established.

[51] I next consider the review grounds relating to the second respondent failing to consider the applicant's evidence relating to all the contentions he raised about when Amanda left the store with the bags, he was on the telephone communicating with the help desk in Cape Town and he could not have seen her, and that the second respondent erred when he concluded that it was the applicant who became upset when the cashier came to ask for further cigarettes when it was Masuku that became agitated. The insurmountable difficulty that the applicant has in respect of these grounds of review is simply that the second respondent made credibility findings against the applicant. The second respondent considered the evidence and concluded that the applicant should not be believed where he offered this evidence. These conclusions of the second respondent are simply unassailable in this review application. As was said in

Sasol Mining (Pty) Ltd v Ngqeleni No and Others:[41] 'One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him.' No case has been made out by the applicant why such credibility findings should be interfered with this instance, and such a case needed to be specifically made out by the applicant.[42] In this regard, I further refer to *Standerton Mills (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[43] where the Court said:

> 'The adverse credibility findings against Twala appear to have been justified and reasonable given that her evidence was contradictory on a number of material aspects. Credibility issues are indeed difficult to determine in motion proceedings such as these. The commissioner is undoubtedly in a better position to make a finding on this issue. In *Moodley v Illovo Gledhow and Others* (2004) 25 *ILJ* 1462 (LC) at 1468C-D Ntsebeza AJ observed in this regard as follows:
>
> 'Sitting as I do as a review judge, I fail to understand, in this case, how I could decide to set aside an award given by an arbitrator who sat at the hearing, observed the witnesses, their demeanour and the manner in which they came across. I cannot see that I can interfere merely on an assessment of whether she misdirected herself by reason of the fact that she considered whether the witnesses were credible before determining what the probabilities were in the light of their testimonies.... I should be extremely reluctant to upset the findings of the arbitrator unless I am persuaded that her approach to the evidence, and her assessment thereof, was so glaringly out of kilter with her functions as an arbitrator that her findings can only be considered to be so grossly irregular as to warrant interference from this court.'

[41] (2011) 32 ILJ 723 (LC) at para 9.
[42] See *Rex v Dhlumayo* 1948 (2) SA 677 (A); *Fidelity Cash Management Services (Pty) Ltd v Muvhango NO and Others* (2005) 26 ILJ 876 (LC); *Scopeful 21 (Pty) Ltd t/a Maluti Bus Services v SA Transport and Allied Workers Union on behalf of Mosia and Others* (2005) 26 ILJ 2033 (LC); *Custance v SA Local Government Bargaining Council and Others* (2003) 24 ILJ 1387 (LC).
[43] (2012) 33 ILJ 485 (LC) at para 18.

> [52] I also specifically dealt with credibility findings of commissioners in the judgment of *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others*[44] and said:'The issue of the importance of credibility findings made by the commissioner being accepted in this court on review was made by Mr *Snider*, who represented the third respondent. He submitted that it was the commissioner who sat in the arbitration proceedings, looked at the witnesses, listened to them, and assessed their credibility, and on review, this court should not readily interfere with this, as the commissioner was in the best position to make these findings. I agree with these submissions. This court should not readily interfere with credibility findings made by CCMA commissioners, and should do so only if the evidence on the record before the court shows that the credibility findings of the commissioner are entirely at odds with or completely out of kilter with the probabilities and all the evidence actually on the record and considered as a whole. Findings by a commissioner relating to demeanour and candour of witnesses, and how they came across when giving evidence, would normally be entirely unassailable, as this court is simply not in a position to contradict such findings. Even if I do look into the issue of the credibility findings of the second respondent in this case, I am of the view that the record of evidence in this case, if considered as a whole, simply provides no basis for interfering with the credibility findings of the second respondent. There is simply nothing out of kilter between the evidence by the witnesses on record and the credibility findings the second respondent came to. The evidence on record in my view actually supports the second respondent's credibility findings. The credibility findings of the second respondent therefore must be sustained.'

The above *ratio*, in my view, clearly and directly applies to the current matter as well, and the credibility findings of the second respondent must be sustained. Accordingly, I find that there simply exists no irregularity in the conduct of the second respondent in this regard, and in his accepting the evidence of the third

[44] (2013) 34 ILJ 945 (LC) at para 31.

respondent over that of the applicant in respect of the contentions of the applicant forking the subject matter of these grounds of review.

[53] The next ground of review raised by the applicant is that the second respondent accepted the hearsay evidence considering the reports made by the cleaners that they could feel cigarette cartons in the bags they had to carry out. There is no merit whatsoever in this ground of review. This is in fact one of the instances referred to above where the applicant was confusing the second respondent's recordal of the summary of the case presented by the third respondent as opposed the actual reasoning of the second respondent in coming to the conclusion that he did. The reference to the cleaners feeling cigarette cartons in the bags is found in one of the bullet points under the recording in the second respondent's award of the summary of the third respondent's case. In the second respondent's actual reasoning as found in paragraphs 41 – 46 of his award, there is no reference to this at all. This can only lead me to the conclusion that he simply did not consider this as a material issue and in fact had no regard to it in coming to the conclusion that he did. In *Maepe v Commission for Conciliation, Mediation and Arbitration and Another,*[45] it was said that:

> 'Although a commissioner is required to give brief reasons for his or her award in a dismissal dispute, he or she can be expected to include in his or her brief reasons those matters or factors which he or she took into account which are of great significance to or which are critical to one or other of the issues he or she is called upon to decide. While it is reasonable to expect a commissioner to leave out of his reasons for the award matters or factors that are of marginal significance or relevance to the issues at hand, his or her omission in his or her reasons of a matter of great significance or relevance to one or more of such issues can give rise to an inference that he or she did not take such matter or factor into account.'

[45] (2008) 29 ILJ 2189 (LAC) at para 8.

The above reasoning in *Maepe* simply means, if applied to the current matter, that the second respondent simply considered the "evidence' of the cleaners that forms the basis of the applicant's complaint as not materially significant, or even if considered to be significant, that he did not take it into account. Either way, there is simply no basis for concluding that any irregularity exists in this regard.

[54] This only leaves one ground of review to consider, being the complaint that the second respondent continued to refer to and rely on a charge that the applicant was not guilty of. This in essence related to the references by the second respondent that the applicant had misconducted himself so as to benefit himself at the expense of the third respondent. Whilst it is so that the second respondent's award does contain such references, it must be given proper context. These references all relate to the part of the award where the second respondent was considering whether the sanction of dismissal was appropriate. A proper reading of the award of the second respondent in my view clearly illustrates that the second respondent never found the applicant 'guilty', so to speak, of the third charge he had been acquitted of in the disciplinary hearing. In my view, and in raising this ground of review, the applicant actually misconstrues the award of the second respondent. However, and even if it is accepted that the second respondent had been relying on and considering this third charge, that it formed part of his reasoning in finding against the applicant, and may be considered to constitute an irregularity, the fact remains that if the second part of the review test is applied and this irregularity is eliminated, the outcome arrived at by the second respondent considering the other two charges still resorts well within the required bands of reasonableness, and in my view is actually correct. In fact, and in this regard, an important consideration specifically referred to by the second respondent is the applicant's complete lack of any remorse.[46] The fact is that the applicant never acknowledged or accepted any wrongdoing, and even in the arbitration proceedings, the applicant persisted with what was clearly

[46] See para 46 of the award.

false defence and which was rejected by the second respondent himself. In the absence of remorse and acknowledgement of wrongdoing, rehabilitation of the damaged employment relationship is not possible, and as such, dismissal was really the only viable option. As the Court said in *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others*:[47]

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

[55] Also and of particular relevance to the current matter, the Court said in *Greater Letaba Local Municipality v Mankgabe No and Others:*[48]

> 'In the instant case I am of the view that the employee's remorseless attitude did the employment relationship untold harm. Over and above the gravity of the misconduct, coupled with the magnitude of the employer's loss, the employee still falsely persisted on oath in his answering affidavit that he had done no wrong. He is basically a fieldworker. Driving is an essential component of his daily work routine. His repeated but false denial speaks volumes. The employer was understandably anxious and apprehensive that there was a great risk, that given another chance, the remorseless employee who did not acknowledge the wrong he had done, would do it again and that he would remain a great risk to retain as a member of the workforce allowed to drive its motor vehicles.'

[56] I find the analogy used in *Independent Newspapers (Pty) Ltd v Media Workers*

[47] (2000) 21 *ILJ* 1051 (LAC) at para 25.
[48] (2008) 29 ILJ 1167 (LC) at para 34.

Union of SA on behalf of McKay and Others,[49] particularly, appealing where the Court said:

> 'The analogy of a marriage, used by Mr *Van Zyl*, is perhaps a useful one. It is not unheard of for one partner in a marriage relationship who has been cuckolded to give the other partner a second chance, as it were, in the face of true remorse and a true effort to rebuild the trust relationship.'

Using this analogy, the applicant did none of this, made no attempt to rebuild the trust relationship, and instead persisted with a course of action of denying any wrongdoing.

[57] As to the issue of the false defence, the applicant persisted with, even in the arbitration, I refer to *National Commissioner of Police and Another v Harri NO and Others,*[50] where the Court held as follows, which in my view is of equal application to the current matter:

> 'Instead of coming clean, Lamastra advanced a manifestly dishonest defence at the disciplinary enquiry. It is true that he had long service and that the chairperson took this into account as a mitigating factor. However, as the Labour Appeal Court pointed out in *De Beers Consolidated Mines Ltd v CCMA and Others*, long service is not necessarily a guarantee against dismissal. As Conradie JA said, 'the risk factor is paramount. If, despite the prima facie impression of reliability arising from long service, it appears that in all the circumstances, particularly the required degree of trust and employee's lack of commitment to reform, continued employment of the offender will be operationally too risky, he will be dismissed'. He also noted that long service does not lessen the gravity of the misconduct or serve to avoid the appropriate sanction for it.'

The Court concluded:[51]

[49] (2013) 34 ILJ 143 (LC) at 146.
[50] (2011) 32 ILJ 1175 (LC) at para 50.
[51] Id at para 52.

> 'Lamastra showed no remorse, either when he was caught or during the disciplinary hearing. In these circumstances, it cannot be expected of the SA Police Service to keep him in its employ.'

[58] This kind of conduct of persistently pursuing a false defence in fact constitutes an act of dishonesty on the part of the applicant in itself, an issue which the second respondent actually appreciated and dealt with in his award. In *City of Cape Town v SA Local Government Bargaining Council and Others (2),*[52] the Court, in referring to the conduct of an employee in showing no remorse and persisting with a false defence, said that:

> 'Her actions should further be viewed against the fact that the respondent occupied a position in the workplace which requires her to be honest. The question which needs to be answered is whether or not her conduct impacted on her employment relationship in such a way that her actions resulted in the breakdown of the trust relationship between her and her employer. Trust is considered to be an important element of the employment relationship whether or not the employee is employed in private business or within the public sector…'

The Court in *City of Cape Town* then concluded that:[53]

> '….The fact that an employee shows remorse for his or her actions and takes responsibility for his or her actions may militate, depending on the circumstances, against imposing the sanction of dismissal. The converse also applies, dismissal may be an appropriate sanction where the employee commits an act of dishonesty, falsely denies having done so and then shows no remorse whatsoever for having done so… It is also important to point out that the respondent had persisted with her lying not only in the course of the investigations but also at her disciplinary hearing and in her sworn testimony before the arbitrator.'

[52] (2011) 32 ILJ 1333 (LC) at paras 21 – 22.
[53] Id at paras 29 – 30.

[59] In the end, and as a final consideration with regard to the review case of the applicant on the finding of the second respondent relating to substantive fairness, as a whole, I refer to the very recent judgment of *Gold Fields Mining,*[54] where the Court said:

> '…. The questions to ask are these:…(ii) Did the arbitrator identify the dispute he was required to arbitrate…? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) is the arbitrator's decision one that another decision-maker could reasonable have arrived at based on the evidence?'

I am entirely comfortable in giving a positive answer to all of the above articulated questions in the current matter, where it comes to the conduct and the award of the second respondent.

[60] I am equally satisfied that the second respondent properly considered and determined probabilities, as he was required to do,[55] which is clearly apparent from his award and specific references made to the issue of probabilities in his award. The applicant clearly has another view of the probabilities and suggests alternative conclusions, but this simply does not matter and cannot assist the applicant. Probabilities simply mean, as was said in *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport,*[56] that the inference drawn from the evidence has to be 'the most natural or acceptable inference'. In *Bates and Lloyd Aviation (Pty) Ltd v Aviation Insurance Co*,[57] it was held as follows:

> 'The process of reasoning by inference frequently includes consideration of

[54] *Gold Fields Mining* above n 27 at para 20 – 21.
55 In *SFW Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para 5 the Court said: '*The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.*'
[56] (2000) 21 ILJ 2585 (SCA) at para 9.
[57] 1985 (3) SA 916 (A) at 939I-J; See also *Govan v Skidmore* 1952 (1) SA 732 (N) at 734A-C.

> various hypotheses which are open on the evidence and in civil cases the selection from them, by balancing probabilities, of that hypothesis which seems to be the most natural and plausible (in the sense of acceptable, credible or suitable).' (emphasis added)

Considering the actual facts in the current matter, and for the reasons set out above, the most natural and logical inference could only be the inference that the second respondent arrived at, and thus the conclusion of the second respondent in this respect is entirely justified and sustainable. As I said in *National Union of Mineworkers,*[58] which in my view equally applies to the current matter:

> 'In my view, and in applying the above tests to the determination made by the second respondent, this can only lead to the determination that the conclusions arrived at by the second respondent on the probabilities were rational and reasonable, and thus sustainable. There is simply no basis to interfere with such conclusions. The fact is that all the bullet points of probabilities set out by the second respondent in his award are properly founded and grounded in fact, having regard to the evidence on record. These probabilities are probabilities that properly exist, and which can lead to the 'natural and plausible' conclusion that the second applicant was involved in the misconduct. It does not have to be the correct or only inference, it just has to be the most natural and commonsense one. The fact that other possible scenarios/inferences may or may not exist simply does not matter, as all the second respondent has to do is to come to a conclusion which appears to be the more natural or plausible conclusion from amongst several possible conclusions even though that conclusion is not the only reasonable one. That is clearly the approach the second respondent followed. I can simply find no cause or reason to interfere, and I uphold the approach and findings of the second respondent.'

[61] For all the reasons as set out above, I can find no substance in any of the grounds of review advanced by the applicant. There is simply no basis to

[58] (supra) footnote 44 at para 39.

interfere with the award of the second respondent, principally because no irregularities exist in the first but in any event, also because the outcome arrived at in the award clearly is a reasonable outcome.

The issue of the misconduct of the arbitrator

[62] As referred to above, the applicant also complained that the second respondent committed misconduct in his conducting of the arbitration. The applicant contended that when he wanted to dispute that it was true that only three persons had access to the cigarette locker and wanted to call a witness to establish this, the second respondent stopped him and did not allow him to call a witness. The applicant also contended that the second respondent unduly interfered with his cross-examination.

[63] In argument, I was referred to specific incidents in the transcript[59] in support of these contentions. To first put matters in context, and as has been set out above, the third respondent's case was that on 15 July 2009 specific measures were implemented about access to the cigarette locker forthwith, and the locks were changed and only three persons were given the key. The applicant, when starting his cross-examination, sought to cross-examine the third respondent's witness Nyawula about the security arrangements with regard to the cigarette locker prior to 15 July 2013. The second respondent intervened and stated that the past did not concern him, as the matter related to the current incident and after implementation of the changes referred to. The issue about the calling of the witness occurred when the applicant had completed giving evidence and the second respondent asked who his next witness would be. When the applicant said it would be "Sipho', the second respondent simply proceeded to make enquiries with the applicant about the relevance of the witness and what he would testify to. Having heard this, the third respondent then actually stated that

[59] See pages 59 – 60 and 97 – 100 of the record.

the third respondent would not dispute that which the applicant had explained "Sipho' would testify about, and the applicant then stated he would have nothing to add.

[64] In deciding this issue, I firstly refer to Section 138(1) of the LRA, which simply provides that a commissioner may conduct arbitration proceedings in any manner that a commissioner deems fit.[60] This right of the commissioner relating to the conduct of the proceedings cannot give a commissioner license to actually become engaged in the proceedings to such an extent that it becomes questionable as to whether the commissioner remains unbiased, and equally cannot be used to justify conduct that, in essence, deprives one of the parties of a fair hearing. As the Court said in *CUSA v Tao Ying Metal Industries and Others:*[61]

> 'Consistent with the objectives of the LRA, commissioners are required to 'deal with the substantial merits of the dispute with the minimum of legal formalities'…. Thus the LRA permits commissioners to 'conduct the arbitration in a manner that the commissioner considers appropriate'. But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.' (emphasis added)

[65] In *Naartjie Clothing,*[62] it was said:

> 'I also appreciate that in terms of the aforesaid three objectives as defined by the Constitutional Court in *Tao Ying Metal Industries* a commissioner would be permitted to conduct the proceedings in what may be described as an inquisitorial manner, and not just leave it up to the parties to place the relevant material,

[60] Section 138(1) reads 'The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.'
[61] *CUSA v Tao Ying Metal Industries and Others* (supra) at para 65.
[62] *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No and Others (supra)* at para 41.

evidence and issues before the CCMA. This being said, there is a fine line between conducting arbitration proceedings in an inquisitorial fashion and becoming involved in the proceedings to such an extent so as to constitute a descent into the arena by the commissioner. To descend into the arena means that the commissioner becomes an active participant in the conduct of the case by one of the parties, and that is simply not fair play and completely negates the imperative of the conduct of fair arbitration proceedings as contemplated by law. Such kind of conduct creates a perception of bias on the part of the commissioner and constitutes improper conduct.'

[66] I further refer as guidance in deciding this issue to *County Fair Foods (Pty) Ltd v Theron NO and Others,*[63] where the Court held:

'For there to be misconduct, it has been held that there must be some 'wrongful or improper conduct' on the part of the decision maker, in this instance the commissioner. (See *Dickinson and Brown v Fisher's Executors* 1915 AD 166 at 176.) Misconduct has also been described as requiring some 'personal turpitude' on the part of the decision maker. (See *Reunert Industries (Pty) Ltd t/a Reutech Defence Industries v Naicker and Others* (1997) 18 ILJ 1393 (LC) at 1395H-I.) The basic standards of proper conduct for an arbitrator are to be found in the principles of natural justice, and in particular the obligation to afford the parties a fair and unbiased hearing. (See Baxter *Administrative Law* at 536.) These principles have been reinforced by the constitutional imperatives regarding fair administrative action. (See *Carephone (Pty) Ltd v Marcus NO* (1998) 19 ILJ 1425 (LAC) at 1431I-1432A.) The core requirements of natural justice are the need to hear both sides (*audi alteram partem*) and the impartiality of the decision maker (*nemo iudex in sua causa*). (See Baxter at 536.)'

[67] The existence or not of the kind of misconduct referred to above is gathered from the typed transcript of the proceedings so as to determine whether the

[63] (2000) 21 ILJ 2649 (LC) at para 7.

commissioner was simply being inquisitorial to the extent permitted by law or had actually descended into the arena. As was said in *Naartjie Clothing*[64]:

> 'This record constitutes the picture that the Labour Court looks at in evaluating the conduct and discharging of the duties of the arbitrator. The arbitrator must, therefore, be careful of how he or she paints this picture because a painted picture of unfair arbitration proceedings emanating from the record would render the conduct of the arbitrator reviewable per se.'

[68] Similarly in *National Union of Security Officers and Guards and Another v Minister of Health and Social Services (Western Cape) and Others,*[65] the Court said:

> '…. the principle is apparent, ie when considering whether an award was fair, all the evidence (and that which is evident) before me should be considered in the light of all the evidence that was presented. The record is clear. The examination conducted by the commissioner is apparent from the transcript. No party is prejudiced if the transcript is examined to establish whether or not those proceedings were fair or the manner in which the arbitrator questioned.'

[69] In *Sondolo IT (Pty) Ltd v Howes and Others,*[66] it was held as follows:

> 'Section 138 (1) of the LRA thus places two distinct but related obligations on the commissioner. The first is to determine the manner in which the arbitration will be conducted. This discretion will be exercised bearing in mind the legislative instruction to determine the dispute fairly and quickly. Secondly, the commissioner must deal with the substantial merits of the dispute. In dealing with the matter the commissioner may rule on the evidence which may be presented to the arbitration and may also make rulings which may restrict the range of issues on which the parties are required to give evidence. The commissioner may therefore narrow down the issues and in doing so the commissioner may decide what evidence it wants to hear. In exercising this discretion, the commissioner will

[64] Id at para 42.
[65] (2005) 26 ILJ 519 (LC) at para 16.
[66] (2009) 30 ILJ 1954 (LC) at para 10.

> consider the facts and circumstances of the particular case and also the nature of the dispute that was referred to arbitration.'

In light of this *ratio*, it is clear that the idea behind an arbitrator exercising his or her powers in terms of section 138 would be to achieve the objectives of expedition and elimination of unnecessary legal formalities and to get to the substance of this matter. I agree with such an approach and such an objective.[67]

[70] The judgment in *Mollo v Metal and Engineering Industries Bargaining Council and Others*[68] specifically dealt with an arbitrator's decision to disallow a witness as being unnecessary without affording the applicant party in such proceedings an opportunity to explain the relevance of bringing the witness before making a ruling whether the witness was necessary. The Court concluded that this was a determination by the arbitrator as contemplated by Section 138(1) of the LRA but concluded that:

> 'I am satisfied that second respondent has committed a gross irregularity by making a decision on the objection raised without first affording the applicant an opportunity to show the relevance of the evidence he intended leading.'[69]

The point that needs to be made is that this judgment confirmed that where a commissioner acts in terms of Section 138(1) but this leads to unfairness in the conduct of the arbitration proceedings or the discharge of the duties of the arbitrator, this would either be misconduct or constitute a gross irregularity. In *Naartjie Clothing*[70] it was held:

> '… The golden thread, so to speak, from all of the above judgments referred to, is that the mere existence of what could be described as possible irregularities in the conduct of the arbitration proceedings by the commissioner is insufficient, and

[67] See also *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No and Others (supra)* at para 44.
[68] (2010) 31 ILJ 971 (LC).
[69] Id at para 32.
[70] Id at para 43.

> it needs to be clear from the record that such irregularities had the effect and consequence of depriving one or both of the parties of a fair hearing.'

[71] Applying the above principles to the current matter, I am not satisfied that the conduct of the second respondent referred to deprived the applicant of a fair hearing. Firstly, the fact is that the second respondent specifically asked the applicant to explain the relevance of the witness he wanted to call and what the witness would say, and the applicant explained this. The third respondent then indicated that it would not dispute this, and the applicant then stated that he had nothing to add. There surely can be nothing unfair in this. Insofar as the applicant may take issue with the second respondent so enquiring about the witness in the first place, this is clearly permissible conduct by the second respondent as contemplated by Section 138 and certainly does not give rise to any unfairness so as to render the arbitration proceedings unfair. Similarly, what the applicant described as the second respondent's interference in his cross-examination is nothing more than the second respondent simply directing the applicant, who was unrepresented, as to the pertinent issues he should rather address. Once again, this is in my view a proper exercise of the second respondent's powers in terms of Section 138 and certainly did not result in any unfairness in the proceedings. In the end, as the Court said in *Strydom v Commission for Conciliation, Mediation and Arbitration and Others,*[71] what the second respondent had to do was "steer and control" the arbitration proceedings, which is simply what he did.

[72] I therefore conclude that the second respondent committed no misconduct in the actual conduct of the arbitration proceedings as alleged by the applicant. The second respondent acted well within the boundaries of what would be contemplated to be lawful behaviour in exercising his powers under Section 138. The events referred to by the applicant, and a proper reading of the transcript in

[71] (2004) 25 ILJ 2239 (LC) at para 18.

this respect, leaves me with no doubt that it simply cannot be suggested that any unfairness resulted from what the second respondent actually did. This ground of review raised by the applicant thus equally has no merit and falls to be rejected.

Conclusion

[73] Therefore, in applying the review test as I have set out above to the circumstances of this matter as a whole, and for the reasons already given, I conclude that the second respondent considered all material evidence, properly determined what constituted the evidence properly before him on which he would base his determination, properly and rationally construed and applied the relevant legal principles, and provided proper reasons for his award/outcome. The second respondent dealt with the substantial merits of the dispute and came to what I consider to be a well reasoned and substantiated conclusion. Equally, and despite what the applicant contended, the second respondent committed no misconduct in the conduct of the arbitration proceedings. There simply exist no irregularities in this instance that would warrant interference with the award of the second respondent, and the applicant's review application must fail.

[74] Neither the applicant nor the third respondent really pressed the issue of costs before me. In terms of the provisions of section 162(1) and (2) of the LRA, I have a wide discretion when it comes to the issue of costs. I exercise this discretion in favour of making no order as to costs, as I am of the view that this would be fair and appropriate in this instance.

Order

[75] In the premises, I make the following order:

75.1 The applicant's review application is dismissed.

75.2 There is no order as to costs

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Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant: Advocate T L Jacobs

Instructed by: Pretoria Justice Centre

For the Third Respondent: Mr S Dodd of Bowman Gilfillan Inc