REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 2642/2010

In the matter between:

JOHANNES POTELO **First Applicant**

JOHANNES SENNYA **Second Applicant**

ELLIOT PHAKOE **Third Applicant**

and

COMMISSIONER FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

DUMISANI JOHANNES NGWENYA N.O. **Second Respondent**

KLOOF GOLD MINING LTD **Third Respondent**

Heard: **23 August 2013**

Delivered: **12 December 2013**

Summary: **CCMA arbitration proceedings – Review of proceedings, decisions and awards of commissioners – Test for review – consideration of current**

developments of the review test – practical application of review test set out – determinations of commissioner compared with evidence on record – arbitrator's award regular and sustainable – award upheld

CCMA arbitration proceedings – Review of proceedings, decisions and awards of commissioners – assessment of evidence and legal principles by commissioner – assessment and determination reasonable – award upheld

CCMA arbitration proceedings – Review of proceedings, decisions and awards of commissioners – assessment of evidence by commissioner – finding of no proper evidence as to establish inconsistency sustained

Practice and procedure – failure of employees to testify – consequences of such failure to their case

Inconsistency – principles applicable – employee parties have evidentiary burden to show inconsistency – no inconsistency shown in this instance

Procedural fairness – refusal to participate in disciplinary hearing – consequence to contentions of procedural unfairness – principles stated – commissioner's findings that no procedural unfairness existed sustained

Condonation – late filing of review application – proper case made out for condonation – condonation granted

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerns an application by the applicants to review and set aside an arbitration award of the second respondent in his capacity as 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 applicants on 21 January 2010 for misconduct based on charges relating to dishonesty for fraudulently claiming for overtime not worked. The applicants then pursued their dismissal as an unfair dismissal dispute to the CCMA and the matter came before the second respondent for arbitration on 23 August 2010. Pursuant to these arbitration proceedings, the second respondent then determined that the dismissal of the applicants by the third respondent was substantively and procedurally fair. The second respondent then dismissed the applicants' claim of unfair dismissal. It is this determination by the second respondent that forms the subject matter of the review application brought by the applicants, which application was filed on 15 December 2010.

[3] The arbitration award of the second respondent was received by the applicants on 9 September 2010. In terms of Section 145 of the LRA, the review application had to be brought within six weeks of such date, being on or before 24 October 2010. The review application was thus brought some seven weeks out of time.

[4] Contrary to what is suggested by the applicants in their condonation application in the founding affidavit, a delay of some seven weeks in the context of a review application must be considered to be significant. In *Academic and Professional Staff Association v Pretorius No and Others,*[2] even a three weeks' delay was found to be excessive when it comes to review applications. Because a delay of seven weeks is material, a comprehensive and proper explanation is required for the delay.

[5] The Labour Appeal Court in *A Hardrodt (SA) (Pty) Ltd v Behardien and Others*[3] dealt with a condonation application for the late filing of a review application. The

[1] Act No 66 of 1995.
[2] (2008) 29 ILJ 318 (LC).
[3] (2002) 23 ILJ 1229 (LAC).

Court referred with approval to the judgment in *Queenstown Fuel Distributors CC v Labuschagne NO and Others*[4] and said:

> 'The principles laid down in that case included, firstly that there must be good cause for condonation in the sense that the reasons tendered for the delay had to be convincing. In other words the excuse for non-compliance with the six-week time period had to be compelling. Secondly, the court held that the prospects of success of the appellant in the proceedings would need to be strong. The court qualified this by stipulating that the exclusion of the appellant's case had to be very serious, ie of the kind that resulted in a miscarriage of justice.'

[6] What is clear from the judgment in *A Hardrodt* is that in seeking condonation for the late filing of a review application the explanation that needs to be submitted must be compelling and the prospects of success need to be strong. Where it comes to the issue of prejudice, the applicant in fact has to show that a miscarriage of justice will occur if the applicant's case is not heard. The reason for this is that review applications occur after the parties have already been heard, presented their respective cases and a finding has been made. Under such circumstances, considerations of justice, fairness and expedition require that challenges of such findings must not be delayed and must be completed as soon as possible.

[7] The Court in *Academic and Professional Staff Association,*[5] developed the principles applicable to the consideration of condonation applications in the context of review applications even further, and held as follows:

> 'The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with time frame; (c) prospects of success or bona fide defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the

[4] (2000) 21 ILJ 166 (LAC).
[5] *Academic and Professional Staff Association* (*supra*) at paras 17–18.

judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. See *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC). It is trite law that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay.'

[8] The applicants explained the delay in this matter as follows: (1) the applicants actually applied for a case number for review in time on 8 October 2010; (2) the applicants had already consulted an attorney on 27 September 2010 who needed to obtain instructions to proceed with the litigation from three different insurance institutions each of the applicants were individually members of; (3) the applicants had difficulty in getting their file content from their previous attorneys; (4) the applicants had difficulty in getting a case number; and (5) the applicants' attorney had difficulty in getting confirmation of cover from all the institutions and finally decided to proceed without cover. The applicants only addressed the issue of prejudice with a bald statement that the third respondent would not be prejudiced.

[9] I consider the above explanations to be rather thin and lacking in detail. What however in my view saved the applicants is that the third respondent did not oppose this condonation application and the issue of condonation was not raised by the third respondent when the matter was argued before me. Therefore, and despite the explanation being far from acceptable, it is nonetheless at least some explanation, which in the absence of opposition, convinces me to consider the issue of the prospects of success of the review application and this in turn entails a full consideration of the merits of the applicants' review application, which I will now proceed doing. I will thus record that condonation is granted for this purpose.

Background facts

[10] The three applicants were employed by the third respondent as production supervisors. As such, they occupied a position of trust and responsibility.

[11] The events giving rise to this matter took place on 9 August 2009. On that day, two of the applicants, being Potelo and Phakoe, were scheduled to work a 12 hour overtime shift underground. The duties these two applicants had to fulfil were the supervision of cleaning to be conducted underground. There was in fact no surface work scheduled on that day. In the case of the applicant Sennya, he was not scheduled to work underground, but he added his name to the overtime list after it has already been signed off by the mine overseer Henery, without the knowledge and approval of Henery. Sennya then also proceeded to work underground on 9 August 2009.

[12] The difficulty was that none of the three applicants completed their working shift, but claimed payment, and were paid, for the full shift. This is actually dishonest conduct. In the case of Sennya, he clocked above ground, meaning he came up from working underground, at 09h04, which was only about two hours into his shift, but claimed and was paid for the full 12 hour shift. In the case of Potelo and Phakoe, they also clocked above ground at 09h04 and actually left the mine premises at just after 13h00, never to return. Both these applicants also claimed, and were paid for, the full 12 hour shift.

[13] What is significant is that Potelo and Phakoe both left separately in their own vehicles, which was recorded on the video surveillance. On the same surveillance, these applicants were never recorded as having returned. The final piece of the puzzle was that Potelo and Phakoe were both clocked out for duty at 18h04, at the end of their shift, when they were not even there. Some unidentified person must have done this for them.

[14] The applicants were then charged with dishonesty as a result of the above

conduct, and following disciplinary proceedings presided over by an independent third party chairperson, the applicants were dismissed. It must be stated that the applicants refused to participate in the disciplinary proceedings and left such proceedings from the outset.

[15] The matter then came before the second respondent for arbitration who determined that the applicants' dismissal was fair. Hence the current review application.

The relevant test for review

[16] The proper review test to be applied 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,*[6] 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?'[7] Following on, and in *CUSA v Tao Ying Metal Industries and Others,*[8] 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.'

[17] 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

[6] (2007) 28 ILJ 2405 (CC).
[7] Ibid at para 110.
[8] (2008) 29 *ILJ* 2461 (CC) at para 134.

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.

[18] The first occasion 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,*[9] where the Court said the following:

> 'The Constitutional Court has decided in *Sidumo* that the grounds of review set 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:[10]

> '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….'

[9] (2008) 29 ILJ 964 (LAC) at para 96.
[10] Id at para 97.

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:[11]

> '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 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:[12]

> '…. 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.'

[19] Following a number of different interpretations and applications of the *Sidumo* test after the judgment in *Fidelity Cash Management*, matters came full circle, so

[11] Id at para 102.
[12] Id at para 103.

to speak, in the judgment of the SCA in *Herholdt v Nedbank Ltd and Another*[13] where the Court again specifically considered the *Sidumo* test, and concluded as follows:[14]

> '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), 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 commissioner ignored material evidence, and the review court in considering this material evidence so ignored together with the case as a whole, believes that the arbitration award outcome cannot still be reasonably sustained on any basis, then the award would be reviewable.

[20] 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*[15] again authoritatively interpreted and applied the *Sidumo* test and held as follows:[16]

> '*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…

[13] 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA) Cachalia and Wallis JJA.
[14] Id at para 25.
[15] (JA 2/2012) [2013] ZALAC 28 (4 November 2013) (4 November 2013) not yet reported, per Waglay JP.
[16] Id at para 14.

> 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 based review test. The Court further said:[17]

> '…. 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:[18]

> '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.'

[21] In my view, and with the view to encapsulate a practical application of the review test in line with the principles set out above, 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

[17] Id at para 15.
[18] Id at para 16.

whole, would have had to consider. Once an irregularity is identified, the 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 consider and determine the evidence or case, in order to constitute an irregularity of sufficient magnitude to satisfy this first step in the enquiry. This approach of also requiring materiality of the irregularity takes care of the imperative that not every possible individual irregularity that may exist, would be contemplated by the review test, as the review test requires the irregularity in the first place to be 'gross'.[19] 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.

[22] 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 if this irregularity did not exist, this 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 reasonable arrive at the same outcome. In conducting this second step of the review enquiry, the review court needs not concern itself with the reasons 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

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

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 reasonably 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 for a review to succeed.

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

The reasoning of the commissioner

[24] The second respondent accepted that the applicants had been paid for a full overtime shift, and the issue he was required to determine was whether the applicants indeed worked the whole shift.

[25] The second respondent then considered the evidence and found that the evidence of the investigator of the third respondent, Minnaar, to the effect that Patelo and Phakoe actually left the mine premises each in their own vehicle before the end of the shift was never disputed. The second respondent further found that there was no record of the said two applicants ever returning was equally undisputed.

[26] Based on the above undisputed evidence, the second respondent then concluded that the only conclusion that can be drawn was that the applicants had left before the end of their shift and never came back to work, yet claimed payment for the entire shift. The second respondent found that this was fraud which destroyed the trust relationship, and entitled the third respondent to dismiss them.

[27] In the arbitration, the applicants also raised a case of inconsistency, in respect of an employee Moiane (the second respondent in his award refers to this person as Molana), which will be more fully dealt with hereunder. The second respondent found that the circumstances of Moiane was different from that of the applicants and that Moiane had in fact been given permission to leave early. The second respondent found that there was no inconsistency.

[28] Finally, and pursuant to a procedural issue raised by the applicants as to the disciplinary hearing being chaired by an external chairperson and not an internal member of Exco, the second respondent found that there was no prejudice proven to have accrued to the applicants because of this, and thus the dismissal of the applicants was procedurally fair.

The grounds of review of the applicants

[29] The applicants have to make out their case for review in their founding affidavit, as the applicants have elected not to supplement their notice of motion and founding affidavit in terms of Rule 7A(8).[20] In *Betlane v Shelly Court CC,*[21] 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*[22] 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

[20] 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*.'

[21] 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)

[22] (2011) 32 ILJ 2506 (LC)

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*[23] where the Court specifically in a review application said: 'It is trite that an applicant must make out its case in its founding papers'.

[30] What are the grounds of review then properly raised by the applicants in their founding affidavit? The applicants raise the following individual grounds of review: (1) The second respondent did not appreciate that the charges against the three applicants were not the same and varied in content, as the second respondent considered the misconduct basically as one charge; (2) the second respondent committed a gross irregularity when he did not allow all the applicants to testify and only allowed one applicant to testify on behalf of all the others; (3) the second respondent erred by rejecting the version of the applicants regarding the clocking history and when they knocked off duty and that they returned to work; (4) the second respondent failed to apply his mind to the issue that Henery, who reported the misconduct, only did so after a grievance against him had been lodged by the applicants; (5) the second respondent failed to apply his mind to the issue of inconsistency in respect of Moiane, and all the facts relating to this contention, and in fact erroneously referred to the employee as Molana; (6) the second respondent committed a gross irregularity by finding that the appointment of an external chairperson did not cause the applicants prejudice; (7) the second respondent did not consider the closing submissions of the applicants.

[31] I will now determine the applicants' review application based on the above individual grounds of review actually raised.

[23] (2011) 32 ILJ 730 (LC) at para 9.

Merits of the review

[32] The first step is to decide whether there actually exist any irregularities in the award of the second respondent, on the basis as contended in the grounds of review raised by the applicants as set out above. This determination is done by way of a comparison of the entire record of the evidence in the arbitration proceedings to the award of the arbitrator (second respondent). If I find that irregularities indeed exist, I will then determine whether despite these irregularities, the outcome arrived at by the second respondent was still a reasonable outcome.

[33] Three of the review grounds raised by the applicants can immediately be disposed of based on the second part of the review test. In this regard, and assuming for the purposes of this determination that the second respondent did commit irregularities[24] in (1) not appreciating that the charges against the three applicants were not the same and varied in content and then considering the misconduct basically as one charge for all three applicants; (2) that he did not apply his mind to the issue that Henery, who reported the misconduct, only did so after a grievance against him had been lodged by the applicants; and (3) he did not consider closing submissions of the applicants, the simple answer must be that in the absence of these irregularities, the outcome arrived at by the second respondent would still be a reasonable outcome. Therefore, these irregularities are not a *sine qua non* for the outcome the second respondent arrived at. It is simply not material to the outcome if the second respondent appreciated the varied charges or not. What the second respondent clearly did appreciate was that at the heart of the charges against all three the applicants was the existence of dishonest conduct by claiming for overtime and being paid for overtime, for a full working shift, when they did not work that full shift. This appreciation by the second respondent is undoubtedly reasonable and actually correct, and fully

[24] I may point out that it is in fact my view that the second respondent did not commit any irregularities in this regard.

supports the outcome he came to in his award as a reasonable outcome. The same contention applies to the issue of the grievance against Henery. The fact is that whether this grievance existed or whether it was considered, simply cannot effect the conclusion that the outcome arrived at by the second respondent was still a reasonable outcome. As to the issue of the closing argument, surely this cannot have any material impact on the outcome, as it is not even evidence. I am however compelled to point out that on the record, and at the conclusion of the matter, the second respondent in fact called on both parties to submit written closing argument within seven days, and there is not one shred of evidence to indicate that once he received the same, he did not consider it. Accordingly, there is simply no substance in these three grounds of review raised by the applicants.

[34] I will next deal with the ground of review, which is in essence the applicants taking issue with the rejection of the version of the applicants by the second respondent. Some general observations must immediately be made. Where the second respondent prefers the evidence of the third respondent's witnesses over that of the applicants, this is in essence a finding of credibility. As was said in *Sasol Mining (Pty) Ltd v Ngqeleni NO and Others:*[25] '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 why such a credibility finding should be interfered with this instance, and such a case needed to be specifically made out by the applicants on review.[26] In this regard, I also refer to *Standerton Mills (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[27] where the Court said:

'The adverse credibility findings against Twala appear to have been justified and

[25] (2011) 32 ILJ 723 (LC) at para 9.
[26] See *Rex v Dhlumayo* and Another 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).
[27] (2012) 33 ILJ 485 (LC) at para 18.

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.'

[35] I have had the opportunity to consider the very issue of the challenge of credibility findings of arbitrators in review proceedings, in the matter of *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others*[28] 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

[28] (2013) 34 ILJ 945 (LC) at para 31.

> 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 same reasoning equally applies to the current matter, and there is simply no basis to interfere with the second respondent having preferred any evidence by the third respondent over that of the applicants.

[36] The applicants' case on the issue of the determination of the evidence by the second respondent has another serious difficulty. In this regard, the critical evidence by the third respondent's witnesses that two of the applicants each left in their own vehicles before the end of the shift, the fact that all three applicants clocked out from underground long before the end of their shift, and that there was in fact no surface work to be done on that day, was never challenged under cross-examination and no alternative version by the applicants was put to the third respondent's witnesses in this regard. As a principle of law, where such issues are not put by the applicants to the third respondent's witnesses in cross-examination, the third respondent's evidence must be accepted as true, and reference is made to *ABSA Brokers (Pty) Ltd v G N Moshoana N.O. and Others,*[29] where it was held as follows:

[29] (2005) 26 ILJ 1652 (LAC) at para 39; See also *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 452 (LC) footnote 13; *Masilela v Leonard*

> 'It is an essential part of the administration of justice that a cross-examiner must put as much of his case to a witness as concerns that witness (see *van Tonder v Killian NO en Ander* 1992 (1) SA 67 (T) at 72I). He has not a right to cross-examination but, indeed, also a responsibility to cross examine a witness if it is intended to argue later that he evidence of the witness should be rejected. The witness' attention must first be drawn to a particular point on the basis of which it is alleged that he is not speaking the truth and thereafter be afforded an opportunity of providing an explanation (see *Zwart and Mansell v Snobberie (Cape) (Pty) Ltd* 1984 (1) PH F19(A)). A failure to cross-examine may, in general, imply an acceptance of the witness' testimony….'

[37] Sennya, who testified for the applicants, offered the explanation that Potelo and Phakoe left earlier with the permission of Henery to purchase refreshments to celebrate the promotion of Henery to mine overseer. This was put to Henery under cross-examination, and was disputed by him. This version, in my view, in any event has little truth in it. If the two applicants were given permission to leave to buy refreshments for a celebration, why did they each leave in their own vehicle, and further why did they not return? If they left the premises for the specific purpose to purchase refreshments so they could celebrate with Henery, why did this celebration with Henery then actually never happen? There is no answer for this. Finally, and if all the events on 9 August 2009 was above board, why did someone else clock out for the applicants at the end of the shift. There is simply no acceptable case or version to contradict the evidence by the third respondent.

[38] Having had regard to the record of evidence in the arbitration as a whole, I also accept that the evidence of Henery was in all material respects corroborated by the evidence of Minnaar. A reading of the record also shows that their evidence remained consistent and in essence unscathed under cross-examination. As opposed to that, the evidence of Sennya was not satisfactory. Under cross-

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Dingler (Pty) Ltd (2004) 25 ILJ 544 (LC); *Trio Glass* (supra) at para 41.

examination, he gave several new answers never put to the third respondent's witnesses. In some instances, his answers were evasive. There were also several instances where he was assisted by the other applicants when giving answers, which the third respondent actually objected to. A consideration of the record thus in my view confirms that there is simply no basis to assail any determination by the second respondent preferring the evidence of witnesses as decided by the second respondent. The conduct of the second respondent in rejecting the versions and evidence by the applicants is reasonable and properly arrived at. Therefore any ground of review based on the rejection by the second respondent of any version offered by the applicants or evidence presented by the applicants has no substance and must be rejected.

[39] A proper consideration of the award of the second respondent shows that in determining the evidence, he also considered probabilities, as he was supposed to do.[30] In *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport,*[31] it was held that the inference drawn from the evidence just has to be "the most natural or acceptable inference", and not the only inference.[32] In *Bates and Lloyd Aviation (Pty) Ltd v Aviation Insurance Co,*[33] it was held as follows:

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

[30] See *SFW Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para 5 where it was 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.'
[31] (2000) 21 ILJ 2585 (SCA) at para 9.
[32] See also *Govan v Skidmore* 1952 (1) SA 732 (N) at 734A-C; *Food and Allied Workers Union and Others v Amalgamated Beverage Industries Ltd* (1994) 15 ILJ 1057 (LAC) at 1064C-E
[33] 1985 (3) SA 916 (A) at 939I-J.

In my view, which was also the conclusion of the second respondent, the probabilities overwhelmingly favoured the case of the third respondent. All three applicants clocked in underground and clocked out underground at the same time. There was no surface work on that day, with the only work being supervisory duties underground. The applicants in fact only actually worked some two hours underground but claimed and were paid for 12 hours. Two of the applicants left each in their own vehicles long before the end of the shift and never returned. Some unknown person however still proceeded to clock the applicants out at the end of the shift, when they were not there. Finally, two of the applicants in fact on their own version conceded they left as the third respondent said they did, and the reason they provided for doing so, based on the assessment of the evidence referred to above, must be rejected. This in the end only leaves one natural plausible and logical conclusion being that, the applicants together committed dishonest conduct by reporting for work for a 12 hour overtime shift, then not working most of the shift, but claiming for overtime pay for the whole shift. That being the case, they invited dismissal. The second respondent's conclusions in this respect, is in my view, not only a reasonable outcome to this matter, but actually correct.

[40] In conclusion, therefore, and in respect of the applicants' review ground relating to the second respondent acting irregularly in determining the evidence, this review ground must fail. The second respondent properly, rationally and reasonably determined and assessed the evidence, and considered probabilities. The second respondent's conclusions in this regard must therefore be sustained.

[41] The next issue to consider is the contention that the second respondent precluded the applicants from calling two of the applicants as witnesses. This contention is not in any manner supported by the record. In fact, the written argument submitted by the applicants at the conclusion of the arbitration proceedings actually contradicts this contention, as the applicants record therein, with specific reference to the proceedings in the CCMA, that 'The Applicants

were then duly represented by Sennya. He gave evidence on behalf of the three applicants…' In its answering affidavit, the third respondent specifically disputed that the second respondent ever prevented two of the applicants from testifying, and specifically contended that the applicants decided of their own accord that only Sennya will testify for all of them.[34] In the replying affidavit, the applicants do not specifically answer what the third respondent said in its answering affidavit. The only answer raised for the first time on reply, is that, the second respondent had said 'off the record' that only one witness can testify. In resolving this factual dispute, the normal principles to resolve factual disputes in motion proceedings where final relief is sought as enunciated in *Plascon Evans Paints v Van Riebeeck Paints*[35] must be applied. In *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another*[36] this test was most aptly described, where the Court said: 'The applicants seek final relief in motion proceedings. Insofar as the disputes of fact are concerned, the time-honoured rules …. are to be followed. These are that where an applicant in motion proceedings seeks final relief, and there is no referral to oral evidence, it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants' founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent's version are bald or uncreditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected.' None of the considerations which would negate accepting the third respondent's version in terms of the *Plascon Evans* test exist in this instance, and therefore, in terms of this test, the version of the third respondent must be accepted. Added to this, and on the basis of the authorities already

[34] Answering affidavit para 24
[35] 1984 (3) SA 623 (A) at 634E-635C ; See also *Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259C – 263D; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) paras 26 – 27 ; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 ILJ 2031 (LAC) para 38 ; *Geyser v MEC for Transport, Kwazulu-Natal* (2001) 22 ILJ 440 (LC) para 32 ; *Denel Informatics Staff Association and Another v Denel Informatics (Pty) Ltd* (1999) 20 ILJ 137 (LC) para 26
[36] 2009 (3) SA 187 (W) para 19

referred to above, any new matter in the applicants' replying affidavit must be excluded. Therefore, and since the record does not substantiate this ground of review of the applicants, that the applicants' own argument in the CCMA also contradicts this ground of review it, and with the version of the third respondent being accepted, the only conclusion that can be reached is that there is no truth or substance in this ground of review. Thus the second respondent never refused to allow two of the applicants to testify. I accordingly reject this ground of review as well.

[42] This is however not the end of the consideration of the issue of the allegation that the second respondent refused to allow the two applicants to testify. What must now be considered, and since this version is clearly a fabrication, is why was it fabricated. The answer to this is simple, being an attempt to try and avoid the consequences to the case of the applicants because they did not testify. In *ABSA Investment Management Services (Pty) Ltd v Crowhurst*[37] it was said: '.... it is long established that the failure of a party to call an available witness may found an adverse inference, the inference being that the witness will not support - and may even damage - that party's case. Compare Zeffertt et al SA Law of Evidence (5 ed) at 128-30.' In *General Food Industries Ltd v Food and Allied Workers Union,*[38] the following was said, which in my view can equally be applied in the current matter: 'In my view, if the respondent wanted to challenge the appellant's version of what transpired at certain meetings and union officials or shop stewards were present at such meetings, it should have adduced their evidence. ….'. The Court in *Simelane and Others v Letamo Estate*[39] adopted a similar approach and said: 'Failure to produce a witness who is available and who is clearly able to give relevant evidence leads to an adverse inference being drawn by the court ….'. I make a final reference in this respect to *United People's Union of SA on behalf of Khumalo v Maxiprest Tyres (Pty) Ltd*[40] where it was held as follows, which in my view is directly applicable to

[37] (2006) 27 ILJ 107 (LAC) at para 14.
[38] (2004) 25 ILJ 1260 (LAC) at para 46.
[39] (2007) 28 ILJ 2053 (LC) at paras 22 and 23.
[40] (2009) 30 ILJ 1379 (LC) at para 29.

the current matter:

> 'Thus in my view the respondent having put forward a prima facie case that Mr Ntsoane for the union and the applicant had conceded in correspondence to what transpired between the parties, it was for the union to have called him to clarify these issues, failing which to provide an explanation for such failure. There was no explanation why Mr Ntsoane was not produced as a witness and therefore the inference to be drawn is that the applicant feared that he would give adverse evidence against the applicant or for that matter confirm the version of the respondent. It is a well established principle of our law that failure to produce a witness who is available and able to testify and give relevant evidence, may lead to an adverse inference being drawn. ….'

Based on the above principles, I am compelled to conclude that the two applicants did not testify because they would in fact damage the applicants' case by testifying. In my view, they wanted to avoid having to explain why they left in two separate vehicles long before the end of the shift and why the video footage showed that they never returned. Considering what the third respondent's witnesses had testified to in this regard, coupled with no explanation as to why the applicants did not testify, such an inference is irresistible. As the Court said in *East Rand Gold and Uranium Co Ltd v National Union of Mineworkers,*[41] which in my view would be of application *in casu*:

> 'Failure to call witnesses who are available and able to elucidate the facts leads to the inference that the litigant in question fears that such evidence will expose facts unfavourable to him. See *Elgin Fireclays Ltd v Webb* 1947 (4) SA 744 (A). There can be no doubt that members of the union's negotiating team were available to the union as witnesses. They have personal first-hand knowledge of the state of their minds as representatives of the union and this evidence would have elucidated the facts on this point. They were not called. Ergo obviously could not call them.

[41] (1989) 10 ILJ 683 (LAC) at 694H – 695B

> In the result, in the absence of an explanation, the complaints touched on, cumulatively, lead to the conclusion that the union did not negotiate in a bona fide manner.'

The issue of inconsistency

[43] I now turn to the review ground relating to the issue of inconsistency. In presenting argument to me on behalf of the applicants, Mr Viljoen, who represented the applicants, stated that this was the principal case of the applicants on review. I will therefore afford it detailed attention.

[44] The whole inconsistency issue centers around a contention by the applicants that Moiane who was charged and disciplined for similar misconduct as the applicants was never dismissed. It may be pointed out immediately that Sennya, who testified for the applicants, had no personal knowledge of the circumstances of the disciplinary proceedings of Moiane or the events relating to his misconduct, and did not testify about it. The applicants also never called Moiane to testify to substantiate their contention.

[45] The above being said, and in the judgment of *Frans Mashubele v Public Health and Social development Sectoral Bargaining Council and Others,*[42] it was held as follows:

> 'Mr S M Shaba, representing the third respondent, contended that the applicant had the evidentiary burden to at least prove a prima facie case of inconsistency, before the third respondent could be expected to answer the same. Mr Shaba stated that in this instance, the applicant failed to even provide prima facie evidence to establish inconsistency and consequently the third respondent had nothing to answer. Mr Shaba stated that the applicant should have led evidence, and only has himself to blame for not doing so. I agree with these submissions of Mr Shaba. The applicant had to at least have provided a prima facie evidentiary platform to support his contentions of inconsistency.'

[42] Unreported judgment dated 17 January 2013 under case number JR 1151 / 2008 at para 29.

The point is that the applicants, if they wanted to properly raise the issue of inconsistency in the arbitration, had to properly establish a *prima facie* case through evidence. They simply, in my view, did not do so. The situation is exacerbated by the fact that no such case was presented in the disciplinary hearing so as to alert the third respondent thereto. This in itself should prove fatal to an inconsistency case.

[46] I also refer to what was said in *SA Municipal Workers Union on behalf of Abrahams and Others v City Of Cape Town and Others:*[43]

> 'This situation is, in my view, akin to the question of inconsistency where an employee alleges inconsistency. The employee must show the basis thereof, for example he must reveal the name of the concerned employee and also the circumstances of the case. This is necessary for the employer to respond properly to the allegation. Failure to do so may lead to a finding that no inconsistency exists or was committed by the employer. This situation never shifts the onus from the employer to the employee to prove that there is no consistency.'

[47] Having said the above, and in the interest of a comprehensive determination of this issue, considering it is the applicants' 'main case', I will nonetheless determine whether any case of inconsistency can be substantiated on the basis of what could possibly be considered to be evidence on the record. In this regard, the factual matrix in support of this contention seems to be the following: (1) Moiane was the production supervisor responsible to countersign and approve the overtime list, and it was Moiane who added Sennya to the list; (2) Moiane had also clocked out and left the workplace before the end of the shift; (3) Moiane

[43] (2011) 32 ILJ 3018 (LC) para 50. See also *Minister of Correctional Services v Mthembu No and Others* (2006) 27 ILJ 2114 (LC) at para 13 where it was said: 'The third respondent placed in issue the fairness of the decision to dismiss him and pertinently raised the issue of consistency. He established a basis therefor by presenting evidence with sufficient particularity in order to have enabled the applicant to deal therewith. Faced with a challenge to the consistency of the applicant's treatment of employees, the applicant, who bore the onus of proving the fairness of the dismissal (s 192(2) of the Act), elected not to place any evidence before the first respondent demonstrating that there was no inconsistent disciplining of employees.'

was also charged with dishonesty for his conduct and was dismissed following a disciplinary hearing; (4) Moiane appealed against his dismissal and at an appeal hearing, his dismissal was changed to a final written warning.

[48] The above events cannot be considered in isolation, and just as it is. The third respondent's witnesses in fact further testified about the events regarding Moiane based on their personal knowledge. Henery testified that Moiane had included the name of Sennya on the overtime list because he was intimidated to do so. Henery gave this testimony on the basis that that was what was actually said to him by Moiane. Henery further testified that Moiane had in fact come from underground directly to him in his office, and asked permission to leave the mine premises early because he received a telephone call from his wife that she was seriously ill. Henery testified that he gave Moiane permission to leave the mine to take his wife to hospital. Under cross-examination, Henery in fact explained that it was security who charged Moiane for leaving the mine premises despite the fact that he had permission, and when it was properly established that he had asked permission from Henery which had been given, his dismissal was reversed. Minnaar testified that the he was the complainant in the disciplinary hearing of Moiane and attended the entire hearing. Minnaar confirmed that in the disciplinary hearing, Moiane explained that he was intimidated by Sennya into putting his name on the overtime list, and he explained in the hearing that he left the mine early to attend to his sick wife with the permission of Henery. Minnaar also testified that Moiane in fact later returned to the mine. Minnaar stated that considering all these explanations by Moiane, he was ultimately given a final written warning on appeal. Sennya led no testimony in giving his evidence in chief on behalf of the applicants about the issue of inconsistency relating to Moiane.

[49] Considering the relevant legal principles at stake, the principle of inconsistency is also referred to in law as the so-called "parity principle". The judgment in *SA*

Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd,[44] aptly determined the principles applicable, as follows:

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

[50] In my view, the ratio in the judgment in *Irvin and Johnson* is clear. The following

[44] (1999) 20 ILJ 2302 (LAC) at para 29.

principles apply to the determination of the issue of inconsistency so as to ensure inconsistency as a basis of unfair treatment is not found to exist in the case of dismissal of employees: (1) Employees must be measured against the same standards (like for like comparison); (2) The chairperson of the disciplinary enquiry must conscientiously and honestly determine the misconduct; (3) The decision by the employer not to dismiss other employees involved in the same misconduct must not be capricious, or induced by improper motives or by a discriminating management policy (this conduct must be *bona fide*); (4) A value judgment must always be exercised.

[51] In *Minister of Correctional Services v Mthembu NO and Others,*[45] it was found as follows:

> 'The consideration of consistency of equality of treatment (the so-called parity principle) is an element of disciplinary fairness.... When an employer has in the past, as a matter of practice, not dismissed employees or imposed a specific sanction for contravention of a specific disciplinary rule, unfairness flows from the employee's state of mind, ie the employees concerned were unaware that they would be dismissed for the offence in question. When two or more employees engaged in the same or similar conduct at more or less the same time but only one or some of them are disciplined or where different penalties are imposed, unfairness flows from the principle that like cases should, in fairness, be treated alike. However, as stated by Conradie JA in the *Irvin and Johnson* case at 2313C-J, the principle of consistency should not be applied rigidly....
>
> ….Consistency is therefore not a rule unto itself, but rather an element of fairness that must be determined in the circumstances of each case….'

[52] In *SRV Mill Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[46] the Court said:

[45] Above n43 at paras 8 – 9.
[46] (2004) 25 ILJ 135 (LC) at paras 18; 23; 26; 31.

'The general requirement that there should be parity of treatment in a disciplinary context is well established. See for instance *National Union of Metalworkers of SA and others v Henred Fruehauf Trailers (Pty) Ltd* 1995 (4) SA 456 (A) at 463G-J; (1994) 15 ILJ 1257 (A). That has gone hand in hand with the recognition that differing circumstances may warrant different outcomes in respect of particular employees. See *NUM v Amcoal Collieries and Industrial Operations Ltd* (1992) 13 ILJ 1449 (LAC) at 1452I-1453B....

An important feature of these passages is that they reassert the primacy of the criterion of fairness, this being a value judgment to be exercised on the facts of the particular case that presents itself for decision....

As is clear from these passages, it is not part of the law on consistency that bias or ulterior purpose must be established before a disciplinary outcome can be said to be inconsistent to the point that it impacts on the requirement of fairness. One of the reasons underlying the need for consistency is that the perception of bias should be avoided....

Ultimately, questions of fairness and, perhaps particularly, issues of inconsistency require the exercise of a value judgment.'

[53] In *Consani Engineering (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[47] it was held as follows:

'The requirement of consistency is not a hard and fast rule. It is something to be kept in mind as an aspect of disciplinary fairness. Flexibility in adapting to a changing environment is equally important. Shifts in policy inevitably introduce standards not consonant with past practices. The applicant's change in policy to one of zero tolerance hence can be fairly regarded as a legitimate modification of the operational means for protecting the company from ongoing stock losses. Any ensuing element of inconsistency cannot be considered arbitrary or in bad faith in the circumstances.'

[47] (2004) 25 ILJ 1707 (LC) at para 19.

[54] Of relevance to the current matter, the Court in *Chemical Energy Paper Printing Wood and Allied Workers Union v National Bargaining Council for the Chemical Industry and Others,*[48] concluded:

> 'An employer can only be accused of selective application of discipline if, having evidence against a number of individual employees, it arbitrarily selects only few to face disciplinary action.' (emphasis added)

The Court then specifically referred to the passage from the *Irvin and Johnsson* judgment referred to above, and concluded that:[49]

> 'Hence, where a number of employees is dismissed consequent upon collective wrongful conduct, a wrong decision by the employer resulting in an acquittal of an employee who did commit the wrong can only be unfair if it is a result of some discriminatory management policy.'

[55] Two more recent judgments of the Labour Court, which were both review applications where the Court was specifically dealing with the principle of inconsistency *per se*, after the judgment in *Sidumo*, are of importance. In both these judgments, the awards of arbitrators which found inconsistency to exist was actually reviewed and set aside by the Labour Court. Firstly, in *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others,*[50] the Court held as follows:

> 'It is evidently clear from the ratio of *Irvin and Johnson* that when deciding the issue of parity, the gravity of the misconduct of the employee who seeks to rely on that principle should receive serious attention.
>
> In this case as indicated earlier the employee was found guilty of a serious offence of dishonesty and dismissed, whereas Mr Cassim was found guilty of a lesser charge of failing to follow company policy....

[48] (2010) 31 ILJ 2836 (LAC) para 20.
[49] Id at para 21.
[50] (2008) 29 ILJ 1180 (LC) at paras 36; 40; 41 and 42.

> …Thus, even on the employee's own version the offence committed by Mr Cassim was not only different but also of a less serious nature than that committed by her.
>
> Turning to the issue of the seriousness of the offence, the presence of dishonesty tilts the scales to an extent that even the strongest mitigating factors, like long service and a clean record of discipline are likely to have minimal impact on the sanction to be imposed. In other words whatever the amount of mitigation, the relationship is unlikely to be restored once dishonesty has been established in particular in a case where the employee shows no remorse. The reason for this is that there is a high premium placed on honesty because conduct that involves corruption by the employees damages the trust relationship which underpins the essence of the employment relationship.'

[56] The second judgment is *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[51] where the Court said the following:

> 'The courts have distinguished two forms of inconsistency - historical and contemporaneous inconsistency. The former requires that an employer apply the penalty of dismissal consistently with the way in which the penalty has been applied to other employees in the past; the latter requires that the penalty be applied consistently as between two or more employees who commit the same misconduct.
>
> A claim of inconsistency (in either historical or contemporaneous terms) must satisfy a subjective element - an inconsistency challenge will fail where the employer did not know of the misconduct allegedly committed by the employee used as a comparator (see, for example, *Gcwensha v CCMA and Others* [2006] 3 BLLR 234 (LAC) at paras 37-38). The objective element of the test to be applied is a comparator in the form of a similarly circumstanced employee subjected to different treatment, usually in the form of a disciplinary penalty less severe than that imposed on the claimant. (See *Shoprite Checkers (Pty) Ltd v*

[51] (2010) 31 ILJ 452 (LC) at paras 10–11.

CCMA and Others [2001] 7 BLLR 840 (LC) at para 3). Similarity of circumstance is inevitably the most controversial component of this test. An inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of inter alia differences in personal circumstances, the severity of the misconduct or on the basis of other material factors.

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

[57] In then applying the above legal principles to the facts of this matter, it is clear firstly that on a like to like comparison, the cases of the three applicants and Moiane are simply not the same. The most critical distinction is that Moiane actually first asked and obtained permission to leave the premises, and then after having completed his personal affairs actually returned. This conduct is entirely inconsistent with an employee being dishonest, as was the case with the applicants. Added to this is the fact that Moiane actually had a proper reason and explanation for leaving, as compared to the applicants whose explanation was simply untruthful. In the end, at the core of the differentiation lies the fact that the applicants were dishonest, whilst Moiane was not.

[58] Also, and considering the basis on how the differentiation came about, it is clear that it was based on objective grounds and not based on some arbitrary grounds or discriminatory management consideration or policy. There is nothing to suggest that the third respondent's decision following a proper appeal hearing to reverse the initial dismissal of Moiane and substitute it with a final written was not *bona fide*. The applicants could produce no evidence as to what actually transpired in the disciplinary proceedings of Moiane and that such proceedings were in any way irregular. In fact, the only proper evidence in this regard was by Minnaar, who was present in the disciplinary hearing of Moiane, and who confirmed that Moiane indeed offered the explanations in defence to the charges against him, as set out above. Minnaar further offered his view under cross-

examination on the issue that, as far as he was concerned, and considering the explanation offered, Moiane should never have been dismissed in the first place. In my view, the conduct of the third respondent, far from being objectionable, in fact illustrated one of the primary objectives in applying discipline, being the ability to be flexible and fair with reference to particular circumstances, properly being applied. The point is that it would have been easy for the third respondent to simply dismiss all four employees (including Moiane) and avoid this whole issue. The third respondent did not do so, and properly considered each case on its own merit. A final consideration in this regard is that Moiane actually attended and participated in the disciplinary proceedings against him and offered an explanation, whilst the applicants refused to participate in their disciplinary proceedings and left. For these reasons as well, the differentiation between Moiane and the applicants was entirely proper and justified.

[59] Finally, and even if the third respondent was wrong in not dismissing Moiane, the applicants simply cannot benefit from this. The proposition of the applicants simply is that because Moiane was wrongly treated differently, they should profit from this. This is however not a correct proposition. The fact is that even if an employer is wrong in its differentiation, the proper question is whether this was based on *mala fide* conduct or arbitrary behaviour or worse still, a discriminatory management policy or consideration. There is no evidence of this in this case. There is no indication that the third respondent did not conscientiously, objectively and honestly apply discipline. I accept that no wrongdoing existed on the part of the third respondent in this respect. In the end, and to put it simply, what the applicants say is that because Moiane was not dismissed, they should not be dismissed. This cannot be, and I do not accept this case of the applicants as having any substance in fact or in law.

[60] I therefore conclude that where it came to the application of the relevant legal provisions with regard to the issue of inconsistency, and then the application of the facts to such legal principles, the second respondent simply committed no

irregularity as contemplated by the review test I have set out above. The second respondent appreciated the enquiry he was required to make and clearly understood what was needed to establish unfair treatment of the applicants as required by the principles relating to inconsistency. The second respondent's reasoning is certainly reasonable and proper, and consequently entirely sustainable.

The issue of procedural fairness

[61] The issue of procedural unfairness only relates to the disciplinary hearing being chaired by an external chairperson. The second respondent rejected this contention on the basis that the applicants suffered no prejudice. The applicants differ from this conclusion, and contend that they were indeed prejudiced. Although I do not consider this to be the case, I will decide this issue on the basis of assuming that the applicants were prejudiced by the appointment of an external chairperson and that an external chairperson should not have been appointed, and this constitutes an irregularity. I actually intend to dispose of the issue of procedural unfairness on an entirely different basis, being the reasonable outcome part of the review rest as set out above.

[62] On the undisputed evidence, the applicants did not participate in their disciplinary hearing and left. The hearing was in fact initially postponed to afford the applicants a proper opportunity to participate therein. The applicants were specifically warned of the consequences should they decide not to participate, but they still left. Even where the applicants had some or other objection about the process and/or the chairperson, which was overruled, as was the case in this instance, they should still have remained in the disciplinary enquiry and have participated in the same. The fact that they decided not to do so has the simple consequence that they cannot complain about procedural unfairness in subsequent arbitration proceedings. In this regard, the Court in *Chemical Energy*

Paper Printing Wood and Allied Workers Union and Others v Metrofile (Pty) Ltd,[52] dealt with employees not participating in disciplinary proceedings in the case of misconduct and said:

> '…. once an employer institutes disciplinary action and gives the affected employee notice thereof, it is open to the employee to attend or refuse to attend the enquiry. Should the employee refuse to attend the enquiry such employee must be prepared to accept the consequences thereof, one of which is that the enquiry will proceed in his absence and adverse findings may be made.'

[63] Similarly and in *Fidelity Cash Management Service,*[53] it was held at follows:

> 'The reason why, generally speaking, an employee is not obliged to attend his disciplinary hearing is that a disciplinary hearing is there to comply with the *audi alteram partem* rule before the employer may take a decision that may affect the employee or his rights or interests adversely. An employee can make use of that right if he so chooses but he can also decide not to exercise it. However, if he decides not to exercise that right after he has been afforded an opportunity to exercise it and a decision is subsequently taken by the employer that affects him in an adverse manner, he cannot be heard to complain that he was not afforded an opportunity to be heard.
>
> The fear that the employer may take an adverse decision against the employee without the employee stating his side of the story is the reason why employees normally attend their disciplinary hearings. All an employer can do, if an employee fails to attend his disciplinary enquiry, is to proceed with the disciplinary enquiry in the employee's absence and make such decision as he considers to be right in the light of all the evidence before him.'

[64] The judgment in *Old Mutual Life Assurance Co SA Ltd v Gumbi*[54] can also be equally applied to the current matter and I refer to the following pertinent extract

[52] (2004) 25 ILJ 231 (LAC) at para 55.
[53] *Fidelity Cash Management Service* (supra) at paras 40 – 41.
[54] (2007) 28 ILJ 1499 (SCA) at para 16.

from the judgment:

> 'All these facts ineluctably lead to the conclusion that the employee wanted to have the hearing aborted so as to prevent the fulfillment of the condition - a fair disciplinary hearing - upon which dismissal by the employer was contractually dependent. In our law a contractual condition is deemed to have been fulfilled where a party deliberately frustrates its fulfilment. By analogy this may also be the position in a statutory setting. In *Scott and Another v Poupard and Another* 1971 (2) SA 373 (A) Holmes JA said at 378G-H:
>
> > "I come now to the issue of fictional fulfilment of the condition upon the occurrence of which the money was to be paid and the shares to be transferred to Poupard and Lobel, ie to say, the grant of mining rights….
> >
> > In essence it is an equitable doctrine, based on the rule that a party cannot take advantage of his own default, to the loss or injury of another. The principle may be stated thus: Where a party to a contract, in breach of his duty, prevents the fulfilment of a condition upon the happening of which he would become bound in obligation and does so with the intention of frustrating it, the unfulfilled condition will be deemed to have been fulfilled against him."
>
> See also *SA Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) in paras 33-36.' (emphasis added)

The point is that the applicants cannot seek to rely on failures in the disciplinary process where they themselves were the instigator and cause of the most material of any such failures.

[65] As to the concerns by the applicants about the conduct of the disciplinary proceedings by the third respondent and the appointment of the chairperson, I wish to refer to what the Court held in *Foschini Group v Maidi and Others*[55] which I respectfully agree with and conclude can be applied directly to the current

[55] (2010) 31 ILJ 1787 (LAC) at para 58.

matter:

> 'On the evidence accepted by the arbitrator, the respondents' refusal to attend the disciplinary hearing was unreasonable. Assuming the objection to a material witness, being the enquiry initiator, to be a valid one, the respondents should nonetheless have participated in the hearing and placed their objections on record. It is a trite principle in our law that a party who chooses not to attend a hearing, does so at his or her own peril, and is precluded from later complaining about the outcome of the hearing.'

[66] Based on the above, the outcome arrived at by the second respondent on the issue of procedural fairness is simply an outcome a reasonable decision maker could come to if the facts of this matter is considered as a whole. Whether the second respondent determined the issue on the basis of a lack of prejudice to the applicants simply does not matter. I may however state that the finding of a lack of prejudice as a general principle would equally be sustained by the refusal by the applicants to participate in the disciplinary proceedings. The finding of the second respondent on the issue of procedural fairness must be sustained.

Conclusion

[67] Therefore, and having regard to what I have set out above with regard to the merits of the applicants' review application, and based on the application of the review test as I have also set out above, the first step in the review enquiry in this matter must be answered to the effect that the second respondent simply committed no irregularities, and even where it can be assumed that irregularities indeed exist, the outcome arrived at by the second respondent remains a reasonable outcome. I am satisfied 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. The second respondent certainly dealt with the substantial merits of the dispute.

[68] The second respondent's award therefore must be upheld, and his conclusion that the third respondent fairly dismissed the applicants must be sustained, and I accordingly so determine.

[69] In dealing with the issue of costs, I can see no reason why costs should not follow the result. Certainly, no compelling considerations were presented to me why this should not be the case. I in any event have a wide discretion where it comes to the issue of costs, and in exercising this discretion in the current matter, I do believe a costs order against the applicants is appropriate.

Order

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

The applicants' review application is dismissed with costs.

_____

Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANTS:	Advocate J C Viljoen
	Instructed by: Fick Attorneys
FOR THE THIRD RESPONDENT:	Advocate L Hollander
	Instructed by Webber Wentzel Attorneys