REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 2650/2010

In the matter between:

TIGER BRANDS FIELD SERVICES (PTY) LTD **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

COMMISSIONER MARTINUS VAN AARDE N.O. **Second Respondent**

JOSEPH MPHUTHI **Third Respondent**

Heard: **16 July 2013**

Delivered: **13 August 2013**

Summary: **CCMA arbitration proceedings – Review of proceedings, decisions and awards of commissioners – Test for review – Section 145 of LRA 1995 – Requires the commissioner rationally and reasonably consider the evidence as a whole – determinations of commissioner compared with evidence on record –**

commissioner's decision irregular and unsustainable – award reviewed and set aside

CCMA arbitration proceedings – Review of proceedings, decisions and awards of commissioners – assessment of evidence by commissioner – commissioner failing to determine evidence reasonably and rationally – award set aside

Sanction of dismissal – principles applicable – requires consideration of totality of circumstances – no fair and reasonable consideration of principles by commissioner – no regard had to critical issue of remorse

Misconduct – unprotected strike action – principles applicable – conduct of the employee constituting gross misconduct – dismissal justified

Bias – conduct by commissioner during arbitration – principles relating to reasonable apprehension of bias – conduct by commissioner not such as to constitute reasonable apprehension of bias

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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 applicant dismissed the third respondent on 28 May 2010 on a charge of in essence participation in unprotected strike action, inciting other merchandisers to strike, and as a result of this conduct, also bringing the company name into

[1] No 66 of 1995.

disrepute. The third respondent pursued his dismissal as an unfair dismissal dispute to the CCMA and the matter came before the second respondent for arbitration on 7 September 2010 and 1 October 2010. As the issue concerned the fairness of a dismissal for unprotected strike action, there was an initial issue before the second respondent as to the jurisdiction of the CCMA, pursuant to which both parties agreed to the jurisdiction of the CCMA to determine the matter. The second respondent then properly assumed jurisdiction, the matter was arbitrated on the merits thereof and in an award dated 1 October 2010, the second respondent determined that the dismissal of the third respondent by the applicant was substantively unfair, and he consequently made a determination in terms of which the applicant was directed to reinstate the third respondent without any back pay. 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 17 November 2010.

Background facts

[3] The third respondent was employed by the applicant as a merchandiser. Something must be said about the particular duties of the applicant's merchandisers. These merchandisers do not work at the premises of the applicant itself, but are deployed to the various retail stores of the applicant's customers where these merchandisers then ensure that the applicant's products are properly merchandised in the retail store of the customer. The merchandiser, to use the words of Mr Bleazard who represented the applicant, is the "ambassador" of the applicant in the retail store of its customer. The merchandiser is also not subject to the day to day to day supervision one would normally find in the case of employees dedicated to working premises of a single employer, and a particular degree of trust is placed in such merchandiser to properly report for work and properly discharge his or her own duties in the retail store where the merchandiser is posted.

[4] In addition to all of the above, the position of a merchandiser has the further unique characteristics of the merchandiser actually working under the direct supervision of someone who is not his or her employer, being the management of the retail store, and of the merchandiser working with fellow "employees" (merchandisers), so to speak, doing the same kind of merchandising work but not employed by such employee's own employer as these other employees are employed by a variety of other merchandising employers. This scenario clearly adds to the emphasis of trust and responsibility placed on the applicant's merchandisers.

[5] The third respondent was deployed as the applicant's merchandiser at the Pick 'n Pay Bethlehem retail store. In this store, the third respondent was the only employee of the applicant. The third respondent however worked with some 15 other merchandisers from a variety of other employers, including companies such as VMS, Pack 'n Stack and SMS. All these merchandisers were managed and supervised, as to their actual daily work activities only, by the Pick 'n Pay Bethlehem store management.

[6] At the applicant as his employer, the third respondent directly reported to Ben Madolo (Madolo"), the applicant's relevant area manager. The third respondent was required to raise all employment issues or disputes or problems he may have, from time to time, with Madolo, who would then attend to the same. The third respondent had Madolo's cellphone number and an open line communication to him. Madolo would also from time to time visit the third respondent in the Pick 'n Pay Bethlehem store. It was common cause that there were no outstanding issues or disputes or problems between the third respondent, and his employer the applicant.

[7] The incident giving rise to the current matter took place on 5 May 2010 in the Pick 'n Pay Bethlehem store. The third respondent was on duty on that day and was actually in the store carrying out his duties. On the third respondent's own

evidence, he said that he received a "message" whilst he was still working that another merchandiser had been chased out of the store by one of the managers, one Schalk, for something this merchandiser had done wrong the previous day. It is unclear as to why such a "message" would be conveyed to the third respondent, as this in essence had nothing to do with him or his employment. On the evidence, it became apparent that this other merchandiser was one "Sticks" and he was employed by another merchandiser, Pack 'n Stack, and had no relationship at all with the applicant or its business, or for that matter the third respondent.

[8] The third respondent, despite this not being any of his concern, proceeded to take the matter up with the store manager, Isaac Hlalele ("Hlalele"). According to the third respondent he discussed the situation of Sticks with Hlalele, who then asked the third respondent to call Sticks back, which the third respondent did. I may point out at this stage, which will be further addressed hereunder, that there was a material contradiction between the evidence of the third respondent and his own witnesses with regard to these events, but for the purposes of this background, I will only refer to the evidence of the third respondent himself.

[9] According to the third respondent, he went back to his work, but after a few minutes, Sticks came back to him and reported that Schalk had chased him out of the store again, and the third respondent again and of his own accord and in a matter that had nothing to do with him went to Hlalele, but this time Hlalele referred the third respondent to Schalk. The third respondent then stated that all the other merchandisers then spontaneously came to him to enquire about that was happening to Sticks and the third respondent said to them 'I have tried to talk to those people like this and this'.[2] According to the third respondent, all the merchandisers then decided that '…. If they are like that we should stop working and

[2] Record page 57 line 4

go to the receiving, and wait for them to come to us and talk.'[3]

[10] The third respondent then contended that he was waiting at receiving to be spoken to, together with the other merchandisers. Significantly, the third respondent specifically disputed, as did all of his witnesses that they were embarking on an unprotected strike. They contended that this nothing else but a normal meeting in the context of normal meeting procedures applicable inside the store, and they were just waiting to discuss the issue of Sticks with the store management.

[11] The third respondent stated that he was elected as the spokesperson for the merchandisers, and he was the one who spoke to the store management about Sticks. The third respondent stated that the "meeting" lasted about 15 – 20 minutes before the issue was resolved and all the merchandisers went back to work.

[12] What however further came out of the evidence of the third respondent is that whilst standing with the group of merchandisers, one of the store managers, Sifiso, came to him and instructed only him to go back to work, and the "whole group" then answered Sefiso that the third respondent will not go back to work until the issue with Sticks had been resolved. According to the third respondent, he then did not go back to work and remained with the group.

[13] According to the third respondent, he never sought to contact Madolo to report the situation to him or to request his assistance. In fact and according to the third respondent he decided to do this because 'I did not see him getting involved' (referring to Madolo).[4] In fact, it was clear that neither Madolo nor the applicant could do anything to resolve the matter, as Sticks was not employed by the applicant and the applicant has no control whatsoever over the situation.

[3] Record page 57 line 5 – 6
[4] Record page 69 line 13

[14] In the end, and on the evidence, and after a period of between 15 and 30 minutes, the manager from Pack 'n Stack, one Wayne, resolved the issue with the management of the store, and the merchandisers, including the third respondent, went back to work.

[15] The third respondent was then notified to attend a disciplinary hearing to be held on 26 May 2010 in respect of three charges against him, the first being gross misconduct due to his participation in unprotected strike action, the second being gross misconduct because he incited the other merchandisers to participate in the unprotected strike action, and the third charge being that of bringing the company name into disrepute as a result of the above misconduct.[5]

[16] The disciplinary hearing then took place on 26 May 2010. The third respondent maintained in the disciplinary hearing that he did not commit any of the misconduct with which he had been charged. Even after having been found guilty in the disciplinary hearing, the third respondent maintained this view.[6] The third respondent was then dismissed pursuant to these disciplinary proceedings.

[17] As against the above evidence, the second respondent found that the third respondent indeed participated in unprotected strike action on 5 May 2010 as a result of the expulsion of "Sticks" from the store.[7] The second respondent further accepted that the third respondent's participation in the strike action was "questionable" and showed a "flagrant disregard" for pre-strike procedures.[8] The second respondent however concluded, based on a number of factors as will be addressed hereunder, that the sanction of dismissal for this misconduct was not appropriate. The second respondent found, as to the second charge, that the third respondent did not incite the other employees to strike and this was a "collective" decision by all the merchandisers. As to the third charge, the second

[5] Documents Record page 11
[6] Documents Record page 34
[7] Pleadings page 28 para 5.3.1.3
[8] Pleadings page 30 para 6.3.1.4(b) and (c)

respondent found that the third respondent's conduct did not bring the company name into disrepute. The second respondent then found the third respondent's dismissal to be substantively unfair and afforded him reinstatement at any service point in the Bethlehem area of the applicant, which finding then giving rise to these proceedings.

The relevant test for review

[18] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[9] Navsa AJ held that in the light of the constitutional requirement (in s 33 (1) of the Constitution) that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, 'the reasonableness standard should now suffuse s 145 of the LRA'. The majority of the Constitutional Court set the threshold test for the reasonableness of an award or ruling as the following: 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'[10] In *CUSA v Tao Ying Metal Industries and Others,*[11] 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.'

[19] The Labour Appeal Court had the occasion to fully ventilate the issue again in *Herholdt v Nedbank Ltd.*[12] In this judgment, the Court concluded:[13]

> '…Where a commissioner fails to have regard to material facts, this will constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner would have unreasonably failed to perform his or her mandate and thereby have prevented the aggrieved party from having its case fully and fairly determined. Proper consideration of all the relevant and material facts and issues

[9] (2007) 28 ILJ 2405 (CC) at para 106.
[10] Id at para 110.
[11] (2008) 29 *ILJ* 2461 (CC) at para 84.
[12] (2012) 33 ILJ 1789 (LAC).
[13] Id at paras 36 and 39.

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

[20] The judgment in *Herholdt v Nedbank Ltd* is in any event in line with what Labour Appeal Court had earlier said in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[14] when specifically interpreting the *Sidumo* test. The Court held that: '[t]o this end a CCMA arbitration award is required to be reasonable because, if it is not reasonable, it fails to meet the constitutional requirement that an administrative action must be reasonable and, once it is not reasonable, it can be reviewed and set aside.'

[21] As the Labour Appeal Court in *Herholdt v Nedbank Ltd* referred with approval to the judgment in *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[15] reference is made to the following extract from such judgment, where it was held as follows:

[14] (2008) 29 ILJ 964 (LAC) at para 92.
[15] (2010) 31 ILJ 452 (LC) at para 17.

> 'In summary, s 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness, but this does not preclude this court from scrutinizing the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.'

[22] In *Lithotech Manufacturing Cape - A Division of Bidpaper Plus (Pty) Ltd v Statutory Council, Printing, Newspaper and Packaging Industries and Others,*[16] the Court held:

> 'Even where the reasoning of the arbitrator may be criticized, this in itself does not render the award reviewable particularly where the ultimate result arrived at by the arbitrator is sustainable in the light of the record. I must, however, qualify this statement by pointing out that there may be cases where, although the ultimate conclusion reached by the commissioner or arbitrator is reasonable, the reasoning adopted by the arbitrator or commissioner is so flawed (even if the ultimate result is reasonable), that it cannot be concluded that the arbitrator duly exercised his or her functions as an arbitrator by taking due consideration of matters that are vital to the dispute. In such circumstances the reviewing court may well be inclined to review and set aside the award.'

[23] Against the above principles and test, the award of the second respondent in this instance must be determined.

<u>The issue of misconduct by the arbitrator</u>

[16] (2010) 31 ILJ 1425 (LC) at para 18.

[24] The applicant has raised from the outset in its review application that there is an instance of misconduct of the second respondent in the course of the arbitration proceedings which misconduct according to the applicant constitutes perceived bias on the part of the second respondent and which in itself vitiates the entire proceedings. I shall therefore deal with this issue first, because if there is merit in the same, there is no need to consider the other grounds of review.

[25] The issue at stake in this regard involves certain events that took place at the second sitting of the arbitration proceedings, which were at that stage part heard. These proceedings took place on 1 October 2010. According to the applicant's founding affidavit, its representative at the arbitration noticed, prior to the commencement of the proceedings, the arbitrator talking with the representative of the third respondent, the third respondent, and his witnesses. The conversation took place out of earshot of the applicant's representative and endured for about 15 minutes. It is stated that the applicant's representative was "most concerned" about this, but because this representative was a lay person, she did not know to raise the concern at the arbitration.[17]

[26] The second respondent filed no answering affidavit to these contentions. The third respondent's answering affidavit contains nothing more than bald denial by a deponent that was not present in the proceedings on 1 October 2010 and no confirmatory affidavit has been attached to the answering affidavit from any person on behalf of the third respondent who was actually there on the day. For these reasons, and in determining this point made by the applicant, I will only consider the contents of the applicant's founding affidavit referred to.

[27] What I am therefore left with, in respect of this point of the applicant, is a conversation between the third respondent, his representative and witnesses, and the commissioner (second respondent), lasting some 15 minutes. I do not

[17] See Pleadings page 8 – 9 para 14 – 15

know what the conversation was about. In addition, the issue was never raised before the commissioner (second respondent) in the arbitration, which in my view, if it was "most" concerning, would have happened, even if the applicant's representative was a lay person. That is the sum total of the evidence in this respect.

[28] Considering then the above facts, what are the relevant legal principles? The legal issue is clearly that of an alleged lack of partiality on the part of the adjudicator, or simply put, alleged bias. The principal test for bias can be found in the SCA judgment of *BTR Industries SA (Pty) Ltd and Others v Metal and Allied Workers Union and Another*[18] where the Court said the following:

> 'For present purposes there may be adopted the definition of 'bias' stated in the House of Lords by Lord Thankerton in Franklin v Minister of Town & Country Planning 1948 AC 87 (HL) at 103. It was there said that the proper significance of the word- 'is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office or those who are commonly regarded as holding a quasi-judicial office'.

[29] In *BTR Industries* the Court further determined that all that is required is a reasonable suspicion of bias to satisfy the above test. It was said:[19]

> '… Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If a suspicion is reasonably apprehended, then that is the end of the matter.'

[18] (1992) 13 ILJ 803 (A) 817F-I
[19] Id at 822A-B

[30] Also in *SA Commercial Catering and Allied Workers Union and Others v President, Industrial Tribunal and Another*[20], the SCA again confirmed the test to determine bias. It was held as follows:

> 'The existence of a reasonable suspicion of bias satisfies the test (Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service 1996 (3) SA 1 (A) at 8H-I). It is beyond question that members of the tribunal had to act impartially. It is, moreover, not only actual bias, but the outward appearance of bias, that may vitiate the decision of a body such as the tribunal as justice must be seen to be done'

[31] In *SA Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)*[21] the Court held:

> 'The Court in *Sarfu* further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in *S v Roberts*, decided shortly after *Sarfu*, where the Supreme Court of Appeal required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds.
>
> It is no doubt possible to compact the "double" aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance.

[20] (2001) 22 ILJ 1311 (SCA) para 10
[21] (2000) 21 ILJ 1583 (CC) para 14 – 16

> The "double" unreasonableness requirement also highlights the fact that mere apprehensiveness on the part of a litigant that a Judge will be biased - even a strongly and honestly felt anxiety - is not enough. The court must carefully scrutinize the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value and thereby decides whether it is such that it should be countenanced in law.'

[32] The crisp question now is whether the above conduct of the second respondent, as established by the applicant, satisfies this test, namely does it create the existence of a reasonable apprehension of bias. In determining this issue, the very nature of CCMA proceedings must be considered. In the CCMA, proceedings are principally informal. There is really no actual separation between the parties and the adjudicator beforehand, in a physical sense, which one would find in the case of a presiding officer in a court of law. The CCMA conducts arbitrations in meeting rooms no different than the average board room, with all the parties and commissioners moving about in common passages. It is not a rare occurrence that the one party may come into direct contact with a commissioner without the other and that discussions would ensue. This kind of scenario surely cannot mean that the mere existence of a discussion between a commissioner and one of the parties could constitute a reasonable apprehension of bias on the part of a litigant in the CCMA. Some guidance can be found in the following dictum of Van Niekerk J in *Protech Khuthele (Pty) Ltd and another v Wabile NO and Others*[22] where it was said:

> '…. The diversity of commissioners, drawn as they are mainly from the ranks of persons engaged in one way or another in the industrial relations community, and the diversity and richness of their experience, is no doubt an

[22] (2013) 34 ILJ 1246 (LC) at para 18

integral component of the CCMA's success as a statutory dispute-resolution agency. But what remains fundamental and what is required in each and every arbitration hearing is that commissioners conduct proceedings and issue awards without fear or favour, according to the facts and the law, without allowing their personal views to intrude on their decision making.'

[33] In fact, the Court in *Protech Khuthele* dealt with similar contention by a review applicant about the commissioner not answering what was said in the review application about his conduct, similar to the contentions of the applicant in the current matter, and the Court said:[23]

'Finally, I deal with the applicants' submission that the failure by the CCMA and the commissioner to oppose these proceedings and in particular, to take issue with what are referred to as 'damning allegations' made against the commissioner necessarily have the consequence that the court should accept what the applicants aver concerning the commissioner and his conduct. The CCMA filed a notice of intention to abide, reflecting that the commissioner had read the notice of motion and supporting affidavit, and that he stands by the reasons for his decision and abides by the decision of this court. In my view, this means no more than that the first and second respondents, the commissioner and the CCMA respectively, do not dispute the facts deposed to in the founding affidavit. Insofar as the deponent to the founding affidavit has sought to draw inferences from those facts, whether or not those inferences are capable of being sustained is a matter for the court to determine.'

[34] In dealing with an issue of what was private discussions between a chairperson and one of the parties, the Court in *Nel v Ndaba and Others*[24] held that:

'…. It is contended that at the arbitration Smith could not deny the employee's version that she was with two witnesses for the company for at least 20

[23] Id at para 20
[24] (1999) 20 ILJ 2666 (LC) at para 12

> minutes before the commencement of the enquiry. This contention is simply not borne out by the transcript of the arbitration proceedings. The transcript reflects that Smith admitted to being in the presence of Green, prior to the commencement of the enquiry, 'for a minute or two'. Putting the matter at its highest for the employee, the evidence goes no further than establishing peripheral contact between the chairperson of the enquiry and a witness for an insubstantial period of time. While it is undesirable for those charged with adjudicatory functions to conduct themselves in any manner which might create a reasonable apprehension of bias …. the facts of the present case are not such as to create an apprehension which is reasonable.'

[35] The one issue that I must mention is that the transcript of the record of the proceedings does not indicate an arbitrator with a pre-disposition in favour of one of the parties. A reading of the record as a whole in my view indicates an even handed approach by the second respondent without favour of one party over the other. In any event, if there is any doubt about this, it has to be dispelled by the fact that the second respondent, on the merits of the matter found in favour of the applicant in respect of the main charge, which would not have been the case if he was pre-disposed against the applicant, following some or other irregular discussion. Similar to what the Court said in *Protech Khuthele*, nothing turns on the fact that the second respondent did not pertinently take issue with what is said in the founding affidavit, for the same reasons as set out in that judgment

[36] Finally, and what has to be the death knell to this part of the applicant's case has to be the fact that the issue was not raised in the arbitration and no application was made for the recusal of the second respondent. If the representative of the applicant was genuinely so aggrieved at this conduct of the second respondent at the arbitration, lay person or not, she would have raised it. She would have voiced her complaints, recorded them, and asked the second respondent to explain. No mention was made of this at any stage – not even in closing

argument. The representative of the applicant did not even seek to ask the third respondent's representative what he was doing and what he was talking to the second respondent about. It is this kind of conduct at the stage of the arbitration that would indicate a reasonable apprehension of bias on the part of a reasonable litigant in the CCMA. Although it may be undesirable for a commissioner to have an ex parte discussion with one of the parties, it does not automatically mean a reasonable apprehension of bias per se. There must be more, and in particular there must at least be a complaint raised in the proceedings or an application made for the recusal of the arbitrator.[25] In my view, this case of the applicant is nothing more than clever lawyering after the fact to bolster the applicant's challenge of the arbitration award, rather than a genuine reasonable apprehension of bias.

[37] I therefore conclude that there is no merit in the case of the applicant with regard to the issue of the alleged bias of the second respondent and I accordingly reject the same. I will accordingly proceed to deal with the applicant's review application on the merits thereof.

Merits of the review: substantive fairness

[38] The applicant raised a number of issues as to why the second respondent committed a reviewable irregularity in finding that the dismissal of the second applicant was substantively unfair. In broad terms, the applicant contends that the second respondent did not evaluate and determine the evidence properly and the second respondent failed to have regard to the relevant legal principles, in particular concerning the issue of an appropriate sanction.

[39] As I have already referred to above, the second respondent, despite persistent denials of the third respondent, accepted the existence of the principal

[25] See for example *Buckas v eThekwini Municipality and Others* (2003) 24 ILJ 1962 (LC) at para 14

misconduct of the third respondent in respect of his participation in unprotected strike action on 5 May 2010. Although the second respondent also found that the third respondent did not incite the fellow merchandisers to strike, nothing in my view turns on this issue in this matter and for the purposes of this judgment, I do not intend to deal with it any further, and will regard the second respondent's finding in this regard as unassailable.

[40] In the end, the principal basis for the finding of the second respondent in favour of the third respondent is on the issue of the fairness of the sanction, as the second respondent, as stated, accept the existence of the misconduct.

[41] The powers and functions of CCMA commissioners when dealing with the issue of the fairness of the sanction of dismissal, as currently prescribed in law, was firstly articulated in the judgment of *Sidumo*.[26] Ironically, and because the judgment in *Sidumo* also dealt with the much more prevalent issue of the appropriate test for the review of arbitration awards, the issue of the interpretation and application of this judgment where it came to the issue of the fairness of the sanction of dismissal in unfair dismissal disputes in my view enjoyed secondary attention. The issue was never considered or dealt with in the necessary detail, which is one of the causes of the current plethora of review applications where CCMA commissioners accept that the misconduct for which an employee was dismissed indeed exists, but the dismissal is nonetheless found to be unfair because the commissioner is of the view that the sanction of dismissal is inappropriate. More often than not, these determinations are accompanied by an award of reinstatement without back pay, as some or other legal compromise by the commissioner to both parties.

[42] It is my view that as a matter of general proposition, the unfortunate situation is that commissioners often misinterpret and misapply the actual duty that rests on

[26] (*supra*) footnote 9

them in terms of the judgment in *Sidumo* where it comes to the issue of the fairness of the sanction of dismissal. The primary reason for this is the dictum of Navsa AJ in *Sidumo*[27] where it was said 'Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view.' This dictum cannot be considered in isolation, as is often unfortunately the case. Navsa AJ went further and said:[28] 'In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair.' Therefore, and in terms of *Sidumo,* what the commissioner has to do is to determine if the employer in dismissing the employee acted fairly. This means the fairness of the conduct of the employer as a whole must be considered in order to determine if the decision arrived at by the employer in dismissing the employee was fair, which is more than just the commissioner applying his or her own sense of fairness in deciding the issue.

[43] As stated, commissioners however do not do this. What commissioners in fact do is to determine whether the particular commissioner, applying his or her own sense of fairness, would dismiss the employee or not. The commissioner thus does not consider the fairness of the conduct of the employer, but rather what the commissioner thinks or believes is fair. There is a vast difference between the two scenarios. To explain it simply – if a commissioner determines what an employer did in dismissing an employee was fair, then the conduct of the employer in arriving at this conclusion must be compared against the principles set out in the judgment of *Sidumo*, and it is then determined by the commissioner if all these principles have been considered and applied by the employer in a manner that is overall considered to be fair. What commissioners however do is to take the *Sidumo* principles and then exercise their own value judgment and sense of fairness to in essence populate these principles to come to their own

[27] Id at para 75
[28] Id at para 79

conclusion of what is fair, and the issue of the fairness of the actual conduct of the employer is then completely lost in this process. This could never have been what the legislature intended. As was said by Ngcobo J in *Sidumo*:[29] '…. the commissioner …. does not start with a blank page and determine afresh what the appropriate sanction is. The commissioner's starting-point is the employer's decision to dismiss. The commissioner's task is not to ask what the appropriate sanction is but whether the employer's decision to dismiss is fair'. Ngcobo J, with respect, went further and said:[30] 'But it could not have been the intention of the law-maker to leave the determination of fairness to the unconstrained value judgment of the commissioner. Were that to have been the case the outcome of a dispute could be determined by the background and perspective of the commissioner. The result may well be that a commissioner with an employer background could give a decision that is biased in favour of the employer, while a commissioner with a worker background would give a decision that is biased in favour of a worker. Yet fairness requires that regard must be had to the interests both of the workers and those of the employer. And this is crucial in achieving a balanced and equitable assessment of the fairness of the sanction.'

[44] The consequence of the wrong approach by commissioners in this regard is that it amounts to the issue of the appropriate sanction being deferred in toto to the commissioner, which is precisely what Ngcobo J in *Sidumo* said should not be the case. Just as the Court in *Sidumo*, and in my respectful view correctly so, held that the issue of the appropriateness of the sanction of dismissal could not be deferred to only the employer as was previously the case[31], then surely the pendulum cannot now be permitted to swing completely to the other side to always leave the employer at the mercy of a commissioner applying his or her own sense of fairness in coming to the decision whether the sanction of dismissal is fair without any consideration or regard to whether the employer acted fairly. If that is the case, then why should an employer even in the disciplinary

[29] Id at para 178
[30] Id at para 180
[31] See the judgment of Navsa AJ at para 61 and Ngcobo J at para 178

proceedings fully deal with and ventilate and determine the issue of an appropriate sanction because, in essence, it means nothing in assessing the fairness of the sanction of dismissal. This would in any event fly in the face of the following dictum of Ngcobo J in *Sidumo*:[32] 'Where an employer has developed and implemented a disciplinary system, it is not for the commissioner to set aside the system merely because the commissioner prefers different standards. The commissioner should respect the fact that the employer is likely to have greater knowledge of the demands of the business than the commissioner.'

[45] Added to the above, the commissioner must consider the "totality of circumstances", specifically referring to all the sanction principles identified in the judgment of *Sidumo*. Once again, and unfortunately regularly so, commissioners would not do this. It is often the case that in an award, commissioners would only deal with those *Sidumo* principles consistent with the commissioner's own sense of fairness and to the exclusion of all others. Regularly, some of the principles are simply not dealt with or ignored. The application of all the prescribed principles is an imperative in coming to a proper and reasonable conclusion as whether dismissal, seen on the basis of a holistic picture and the conduct of the employer, is fair. In *Sidumo,* Navsa AJ said:[33] 'In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.'

[32] Id at para 181
[33] Id at para 78

[46] In applying *Sidumo*, the LAC in *Fidelity Cash Management Service and Others v CCMA and Others*[34] held as follows:

> 'In terms of the Sidumo judgment, the commissioner must -
> (a) "take into account the totality of circumstances' (para 78);
> (b) "consider the importance of the rule that had been breached' (para 78);
> (c) "consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal' (para 78);
> (d) consider "the harm caused by the employee's conduct' (para 78);
> (e) consider "whether additional training and instruction may result in the employee not repeating the misconduct';
> (f) consider "the effect of dismissal on the employee' (para 78);
> (g) consider the employee's service record.
>
> The Constitutional Court emphasized that this is not an exhaustive list. The commissioner would also have to consider the Code of Good Practice: Dismissal and the relevant provisions of any applicable statute including the Act.'

[47] Further principles that require determination in assessing whether the sanction of dismissal is fair is the consideration of the issue of the breakdown or not of the trust relationship, the existence or not of dishonesty, the possibility of progressive discipline, the existence or not of remorse, the job function and the employer's disciplinary code and procedure.[35]

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[34] (*supra*) footnote 14

[35] See *Sidumo* para 116 – 117 ; *Eskom Holdings Ltd v Fipaza and Others* (2013) 34 ILJ 549 (LAC) para 54 ; *Harmony Gold Mining Co Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 912 (LC) para 22 ; *Trident SA (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others* (2012) 33 ILJ 494 (LC) para 16 ; *Taxi-Trucks Parcel Express (Pty) Ltd v National Bargaining Council for the Road Freight Industry and Others* (2012) 33 ILJ 2985 (LC) para 18 ; *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others* (2011) 32 ILJ 1057 (LAC) para 34 ; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 1189 (LC) para 26 – 27 ; *City of Cape*

[48] Despite all the above principles, the judgments of the Labour Court and the Labour Appeal Court remain permeated with what is in my view simple and mere references to the commissioner being required decide the issue of the fairness of the sanction of dismissal in accordance with his or her sense of fairness.[36] This is, as I have hopefully fully illustrated above, simply not the complete picture, as what is actually required is for the commissioner to apply this sense of fairness within a particular and prescribed context. This context is critical to a proper, fair and reasonable determination of this issue. The difficulties caused by the current state of affairs has been recognized by the Labour Court in the judgment of *Theewaterskloof Municipality v SA Local Government Bargaining Council (Western Cape Division) and Others*[37] where the Court said:

> 'In this context, some supplementary observations on the nature of a value judgment and the practicalities of its application may not be out of place. As indicated by Ngcobo J in the passage quoted above, the 'value' element does not mean that commissioners may simply import their own values as the basis for deciding a dismissal dispute. Very often, that may be easier said than done because a commissioner must at the same time bring to bear his or her own sense of fairness in reaching a conclusion. In order to maintain the necessary distinction, some assistance may be drawn from the perspective that a typical arbitration comprises essentially two phases. The first is the receipt and evaluation of evidence in order to make factual findings. That phase is governed by the ordinary rules of evidence and procedure and no value judgment is involved. If the employee's guilt is established, the second phase arises, being the identification and weighing of the factors relevant to the

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Town v SA Local Government Bargaining Council and Others (2) (2011) 32 ILJ 1333 (LC) para 27 – 28 ; *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO and Others* (2010) 31 ILJ 901 (LAC) para 37 – 38

[36] See *National Commissioner of the SA Police Service v Myers and Others* (2012) 33 ILJ 1417 (LAC) para 85 ; SA Breweries Ltd v Commission for Conciliation, Mediation & Arbitration & others (2012) 33 ILJ 2945 (LC) para 26 ; *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others* (*supra*) para 33 ; *Fidelity Cash Management Service and Others v CCMA and Others* (*supra*) para 93 ; *Lithotech Manufacturing Cape - A Division of Bidpaper Plus (Pty) Ltd v Statutory Council, Printing, Newspaper and Packaging Industries and Others* (*supra*) para 21 ; *Worldnet Logistics (Cape) (Pty) Ltd v Maritz NO and Others* (2009) 30 ILJ 1144 (LC) para 22 – 23

[37] (2010) 31 ILJ 2475 (LC) para 19

> determination of sanction. Various components must be placed in the scales: an objective analysis of the particular facts of the case; adequate regard to the applicable statutory and policy framework; and adequate regard to the pertinent jurisprudence as developed by the courts. Only then can a value judgment, properly so called as a comparative balancing of competing factors, be made by the commissioner, producing as an end result an impartial answer to the central question whether or not the dismissal was fair. Reaching a value judgment in relation to competing factors will in many cases be fairly straightforward but in others it may be helpful to conduct the comparison process with reference to a common question, being how the factor relates to the relevant features of the employer's operational requirements. A proper assessment of those requirements underlies the determination of what is fair and at the same time provides an objective framework for a value to be placed on one factor and another.'

[49] The current difficulty is that commissioners in applying the value judgment referred to above apply their own personal value judgments to the exclusion of the employer's operational requirements, and without consideration of what the employer in fact did and considered in deciding to dismiss the employee, resulting in an improper balance of competing factors. The analogy, although not maybe precisely in point, of the commissioner actually being required to review the determination of the employer to dismiss the employee in order to determine if it is fair on the basis of principles similar to a review application, cannot be lost. In fact, and in addressing the issue of what a review court must consider in determining whether the determination of an arbitrator on the issue of the sanction imposed is reviewable, the Court in *National Commissioner of the SA Police Service v Myers and Others*[38] said the following:

[38] (2012) 33 ILJ 1417 (LAC) at para 99

> 'The important considerations that a review court must take into account when deciding whether or not the sanction imposed by the arbitrator is reviewable is to test whether (i) the sanction is that of the arbitrator (the sanction must be one that the arbitrator him/herself has decided or upheld as being appropriate); and whether (ii) on the evidence presented at the arbitration and on the facts and circumstances properly made available to the arbitrator, the sanction is one that could reasonably be imposed or upheld.'

In my view, the same considerations should be applied by commissioners when making their value judgments in determining the fairness of the sanction imposed by an employer. From a practical perspective, and what a commissioner must do, is take all the facts and circumstances and considerations placed before the commissioner by the employer which motivated the employer's decision to dismiss the employee, and the commissioner must then measure these against what can now be called the *Sidumo* principles on sanction, in order to determine whether the employer's decision to dismiss was fair and reasonable. Such an approach will always lead to the evaluation of the employer's reasoning as against the primary objective of fairness to both parties[39], and not the application of the commissioner's own subjective sense of fairness and what the commissioner himself or herself would do in the circumstances which in my view is simply the wrong approach.

[50] In determining whether the award of the second respondent is reviewable on the issue of an appropriate sanction, I intend to apply the approach as I have set out above. This approach must lead to the determination of the following questions: (a) did the commissioner determine whether the employer's conduct in dismissing the employee was fair; (b) did the commissioner exercise a value judgment that contemplated fairness to both parties; (c) did the commissioner

[39] See *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others* (1996) 17 ILJ 455 (A) 476D-E ; *National Education Health and Allied Workers Union v University of Cape Town and Others* (2003) 24 ILJ 95 (CC) para 40 ; *Sidumo* para 66

consider the totality of circumstances and factors placed before the commissioner; and (d) in the light of the answers of the preceding three questions, whether the determination then made by the commissioner on the issue of sanction was one that could be reasonably imposed. If the determination of the second respondent on the issue of sanction could pass muster in the light of these four questions, then his determination would be sustainable and thus not reviewable.

[51] Dealing with the first question, namely whether the second respondent determined whether the conduct of the applicant was fair, an initial reading of the award seems to indicate that the second respondent indeed did this. The second respondent records in his award, in referring to the issue of sanction, that 'I am of the opinion that the Respondent (referring to the current applicant) failed to apply its mind to the relevant issues before them ….'[40] which would be a determination of the conduct of the applicant as employer. The problem however is that the second respondent then records that he will further address the issue later on in his award, but then never does. Despite making the statement as aforesaid, the second respondent unfortunately does not refer to the considerations and factors taken into account by the applicant in deciding to dismiss the third respondent and then address and evaluate this conduct in his award. In the end, the second respondent has his own opinion on the fairness (in this case the unfairness) of the sanction of dismissal, a conclusion which he in the end expressly records in his award.[41] In my view, the second respondent, despite initially being on the right path, then unfortunately strayed from this path and defaulted to his own personal views on sanction. That, in my view, constitutes reviewable conduct.

[52] However, and should I be wrong in the above conclusion, I will still deal with the questions relating to the exercise of the value judgment and the consideration of the totality of circumstances and factors considered, being the second and third

[40] Pleadings page 31 para 5.3.1.5
[41] Pleadings page 32 para 5.4.1

questions referred to. Where it comes to the value judgment, a reading of the award of the second respondent seems to be rather bare where it comes to the interests of the applicant as employer. There is simply insufficient reasoning in the award of the second respondent to enable me to properly determine on what basis the second respondent exercised his value judgment. Now I accept that commissioners are not expected to provide detailed reasoning for their conclusions[42] but this simply does not mean that commissioners must not at least provide sufficient reasons so as to reasonably enable any third party (including a reviewing judge) to ascertain from a reading the award why the commissioner found as he or she did. In *Maepe v Commission for Conciliation, Mediation and Arbitration and Another*[43] 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.' The lack of proper reasoning can thus give rise to the inference that the second respondent did not exercise of proper value judgment as required, which in my view is then the case in this instance.

[53] Dealing then with the totality of circumstances and factors considered, what did the second respondent then actually consider? The second respondent considered the following, as appears from his award: (a) participation in an unprotected strike does not automatically lead to dismissal; (b) the striking

[42] As was said in *County Fair Foods (Pty) Ltd v CCMA and Others* (1999) 20 ILJ 1701 (LAC): 'Awards are expected to be brief. It seems to me to be destructive of the whole concept of CCMA arbitrations over individual dismissals that a commissioner should be held not to have applied his mind to a particular fact because it is not explicitly dealt with in his award.'
43 (2008) 29 ILJ 2189 (LAC) para 8.

merchandisers did not receive any warning or reprimand for their conduct at the time; (c) the strikers did not bring damage or real loss to Pick ‘n Pay and behaved in a “good manner”; (d) the duration of the strike was short; and (e) the other service providers did not view the matter as the applicant did because their employees were not disciplined. It is clear from this limited list that there are several and in fact critical factors the second respondent never considered, in particular the nature of the misconduct in this case, the complete absence of remorse, the nature of the business and interest of the applicant, and the issue of the trust relationship. Therefore, it is clear that the second respondent did not consider the totality of circumstances as required, which in my view is in itself a reviewable irregularity.

[54] Dealing then with some individual factors not considered by the second respondent, the first issue is that of the complete lack of remorse of the third respondent, which in my view is a critical factor in this matter. What is clear from the record in this matter is that the third respondent persisted in his denial that he participated in any strike action. The third respondent never acknowledged or accepted any wrongdoing. Even in the arbitration proceedings, the third respondent persisted with what was clearly a false defense 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 is really the only viable option. As the Court said in *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[44]:

> ‘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

[44] (2000) 21 *ILJ* 1051 (LAC) at para 25

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*[45]:

'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 Union of SA on behalf of McKay and Others*[46] 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 third respondent did none of this. The third respondent exhibited no attempt to rebuild the trust relationship. Instead, he persisted with a course of action of denying any

[45] (2008) 29 ILJ 1167 (LC) para 34
[46] (2013) 34 ILJ 143 (LC) 146

wrongdoing.

[57] Furthermore, what was also said in *De Beers*[47] is most apposite, where it was held as follows: 'Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise'. Also and in *Miyambo v CCMA and Others*[48] it was held that: 'It is appropriate to pause and reflect on the role that trust plays in the employment relationship. Business risk is predominantly based on the trustworthiness of company employees. The accumulation of individual breaches of trust has significant economic repercussions. A successful business enterprise operates on the basis of trust.' In this context, the evidence on record was that the applicant's merchandisers, as has been set out above, are in a particular position of trust and confidence because they are to a large extent left to their own devices. They do not work under the direct control of the applicant and are posted at the premises of customers on a widely geographically spread basis. It is not possible for the applicant to readily and immediately intervene in matters such as the current matter. Clearly also, the operational requirements of the applicant in this case, and with it the trust relationship, is an important factor which supports dismissal as a fair sanction, and which the second respondent unfortunately had no consideration to.

[58] The third respondent's conduct in the disciplinary hearing and arbitration cannot be ignored. Despite having been "caught out", so to speak, the third respondent in the disciplinary hearing persists in what was clearly an untrue defense. In the arbitration, the third respondent still persists with this approach, and in fact calls a number of witnesses to support this false defense. As stated, the second

[47] Id at para 22; See also *Theewaterskloof Municipality* (*supra*) para 37
[48] (2010) 31 ILJ 2031 (LAC) para 13

respondent himself rejects this defense. In *National Commissioner of Police and Another v Harri NO and Others*[49] 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 & 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:[50]

> '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.'

[59] This kind of conduct of persistently pursuing a false defense in fact constitutes an act of dishonesty on the part of the third respondent. In *City of Cape Town v SA Local Government Bargaining Council and Others (2)*[51] the Court, in referring to the conduct of an employee in showing no remorse and persisting with a false defense, 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

[49] (2011) 32 ILJ 1175 (LC) para 50
[50] Id at para 52
[51] (2011) 32 ILJ 1333 (LC) para 21 – 22

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:[52] '….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.'

[60] In *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO and Others*[53] it was said that: 'It was also significant that the third respondent elected not to own up to his misdemeanour. In other words, he showed a complete lack of remorse or contrition for what he did. Instead, he attempted to shift the blame to the site manager whom the third respondent apparently induced to signing the falsified timesheet.' This is in essence exactly what the third respondent did in this instance, in that he sought to blame everyone else for what happened, without accruing any responsibility to himself. In the end, in this regard, I conclude with the following apposite *dictum* in *Timothy v Nampak Corrugated Containers (Pty) Ltd*[54] where the Court said, with specific reference to contentions on behalf of the employee party in that case that the employee had an unblemished record and there was no indication of any dishonesty or any impropriety prior to the events that gave rise to this dispute and thus a form of progressive sanction would have been more appropriate, the following:

[52] Id at para 29 – 30
[53] (2010) 31 ILJ 901 (LAC) para 37
[54] (2010) 31 ILJ 1844 (LAC) 1849F-1850B

> 'I have no doubt that these arguments would have carried far greater weight had there been a scintilla of recognition by the appellant of his wrongdoing. …. Throughout the disciplinary hearing and the hearing before third respondent appellant continued to take the view that the allegations brought against him were no more than lies. Appellant showed no remorse, no recognition of misconduct, save for a blatant and clearly dishonest denial. That places this case into an order of different magnitude from those urged upon us by Ms Bezuidenhout. …. In other words, in a case such as the present, where there is an egregious act of dishonesty, and I use that word advisably because, as I have already indicated, appellant's conduct throughout this dispute constituted a perpetuation of the dishonesty, by way of a denial, conversely a complete lack of acknowledgment of any wrongdoing, there is a formidable obstacle in the way of the implementation of a progressive sanction. Progressive sanctions were designed to bring the employee back into the fold, so as to ensure, by virtue of the particular sanction, that faced with the same situation again, an employee would resist the commission of the wrongdoing upon which act the sanction was imposed. The idea of a progressive sanction is to ensure that an employee can be reintegrated into the embrace of the employer's organization, in circumstances where the employment relationship can be restored to that which pertained prior to the misconduct.'

[61] Therefore, and applying the above legal principles to the facts of this matter, the third respondent thus showed no remorse or acknowledgment of wrongdoing as would be required to enable the applicant to apply progressive discipline and bring the third respondent back into the fold of the employment relationship. The situation is further exacerbated by the act of dishonesty of the third respondent in persisting with a false defense and denial of any wrongdoing even to the stage of the conclusion of the arbitration. In my view, a reasonable and proper determination and evaluation of these crucial considerations by the second respondent could only have led him to him concluding that dismissal of the third

respondent was appropriate, and his failure to do so constituted a reviewable irregularity. As the Court in *Trident SA (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others*[55] said (being in mind that in the current matter the third respondent did not even acknowledge guilt):

> 'Moreover, to interpret a plea of guilty as remorse in circumstances where it is apparent from the employee's evidence that she felt none, in my view reflects a failure to have regard to the totality of the evidence and to weigh all the relevant considerations.
>
> The commissioner failed to apply his mind to the totality of the issues and evidence before him in reaching his conclusions.'

[62] I will next deal with the issue of the trust relationship per se. As stated, the second respondent never dealt with the issue of the trust relationship. In this regard, and in fact, the evidence was that even in the disciplinary hearing, it was clear a further working or trust relationship between the third respondent and the applicant was unsustainable and impossible.[56] The chairperson in the disciplinary proceedings specifically dealt with the issue of the trust relationship. The chairperson in this context also considered the nature of the offence, and comes to a motivated decision that the trust relationship has been broken. The trust relationship having been broken, I again refer to *Theewaterskloof Municipality*[57] where it was held as follows:

> 'The general principle that conduct on the part of an employee which is incompatible with the trust and confidence necessary for the continuation of an employee relationship will entitle the employer to bring it to an end is a long-established one. ….'

[55] (2012) 33 ILJ 494 (LC) para 16 – 17
[56] See Documents page 36
[57] Id at para 23

[63] In the light of the above, I am also compelled to conclude that the only reasonable conclusion that the second respondent could have come to was that the trust relationship has been destroyed. The second respondent's failure to do so is similarly a reviewable irregularity.

[64] This then leaves the nature of the misconduct to be considered. The fact is that the third respondent embarked upon unprotected strike action, which is in itself misconduct that could competently lead to dismissal. Whilst the second respondent is correct in his award where he says that not all cases of participation in unprotected strike action would automatically lead to dismissal, the difficulty is that the second respondent ignores a number crucial considerations in coming to the conclusion that in this case this misconduct is not dismissable. In *Nkutha and Others v Fuel Gas Installations (Pty) Ltd*[58], it was held as follows: ' …. an unprotected or unlawful strike (such as the strike in casu) is misconduct. However, such misconduct does not always deserve or justify the dismissal of the strikers concerned. The substantive fairness of such dismissal is to be determined in the light of the facts of the case, including factors such as the seriousness of the contravention of the Act, attempts made to comply with the Act and whether or not the strike was in response to unjustified conduct by the employer.' Also in *National Union of Metalworkers of SA and Others v Atlantis Forge (Pty) Ltd*[59] the Court held as follows: 'The determination of whether participation in unprotected strike action constitutes a fair reason for dismissal requires a weighing of all the facts with particular regard to the cause, nature, extent and objectives of the strike; its timing and duration; the conduct of the employees; and the consequences of the strike.'

[65] In *SA Clothing and Textile Workers Union and Others v Mediterranean Textile*

[58] (2000) 21 ILJ 218 (LC) para 94
[59] (2005) 26 ILJ 1984 (LC) para 79

Mills (Pty) Ltd[60] the Court said: 'It is trite that participation in a strike that does not comply with the provisions of chapter 4 may constitute a fair reason for dismissal in determining whether or not a dismissal is fair, see the Code of Good Practice: Dismissal (the code) in schedule 8. Item 6 of the code provides that the fairness of any dismissal pursuant to unprotected strike action must be determined in the light of the facts of each case, including whether or not the strike was in response to unjustified conduct by the employer.' This adds the dimension to the enquiry whether or not the employer did something wrong to provoke what happened.

[66] In the light of the above principles, I wish to refer to the judgment in *Masilela and Others v Reinhardt Transport (Pty) Ltd and Others*[61] which in my view can be directly applied to the current matter, and where it was held:

> 'Although it was common cause that the conduct of the strikers was not violent or aggressive, it cannot in the same vein be said that they embarked on the strike in respect of a legitimate concern, or that the conduct was justified by intransigence on the part of the employer. Nor can it be contended that they acted in the reasonable but erroneous belief that their conduct was legal. At all times the applicants' witnesses denied that they had been on strike notwithstanding the protracted period of their refusal to work in support of their list of demands as well as the demand for a meeting with the MD. The strike was therefore protracted and in no respect could it be said to have been functional to collective bargaining….'

[67] Further, and as to comparative cases in this respect, I refer to *National Union of Metalworkers of SA and Others v SA Truck Bodies (Pty) Ltd*[62] ; *National Union of Mineworkers and Others v Billard Contractors CC and Another*[63] ; *Steel Mining and Commercial Workers Union and Others v Brano Industries (Pty) Ltd &*

[60] (2010) 31 ILJ 2694 (LC) para 48
[61] (2010) 31 ILJ 2942 (LC) para 52
[62] (2008) 29 ILJ 1944 (LC) para 35
[63] (2006) 27 ILJ 1686 (LC)

Others[64].

[68] In my view, and in the light of the above authorities, the second respondent failed to have regard to the following crucial considerations:

(a) The issue in dispute giving rise to the unprotected strike had nothing to do with the applicant, its business or its management, and there was simply nothing at all the applicant could do about the matter. The issue existed between the applicant's customer and one of the other service providers to it;

(b) There was no cause or reason for the third respondent to even have become involved in the dispute. In the end, the dispute was resolved between the parties actually party to the dispute without any assistance or contribution from the third respondent;

(c) The third respondent took it upon his self to pursue the matter. From the evidence on record, he decided to "investigate" the incident and engage the store management. It was the third respondent who briefed the other merchandisers about what he perceived to be the store management's intransigence, and the merchandisers (including the third respondent) then 'decided to stop working'.[65] Whilst it may be so that the third respondent did not per se instigate the strike, his influence and central role was undeniable;

(d) On the evidence, the third respondent was actually singled out by the store management and instructed to return to work, which he

[64] (2000) 21 ILJ 666 (LC)
[65] See Record page 56 line 1 – 57 line 6

refused to do;[66]

(e) The third respondent never even reported the events to the applicant's management;

(f) There was no justification for the third respondent's behaviour;

(g) The applicant had dismissed employees in the past for similar misconduct (as recognized by the second respondent in his award).

[69] All the second respondent considered when it came to the nature of the misconduct is the short duration of the strike, the fact that no ultimatums were given, and that the merchandisers behaved themselves during the strike. These are indeed relevant considerations, but are clearly not the sum total of the considerations. In fact, and in my view, the second respondent's reliance on only these considerations is symptomatic of his approach in failing to apply a balanced value judgment taking into account the interests of both the applicant and the third respondent, as once again these factors referred to by the second respondent are only a consideration of only the interests of the third respondent.

[70] Considering the totality of factors relating to the nature of the misconduct, as set out above, it is my view that the factors relied on by the second respondent, if reasonably and properly considered together with all the other factors referred to, were wholly insufficient to mitigate against dismissal for participation in unprotected strike action by the third respondent. If this nature of the misconduct is then considered together with the lack of remorse and acknowledgement of wrongdoing by the third respondent (discussed above), this has to put the issue beyond doubt that dismissal was indeed a reasonable and fair sanction in this instance and the second respondent's interference with the same was a gross and reviewable irregularity.

66 See Record page 72

[71] I am fortified in my conclusions as set out above by the fact that the issue of the fairness or not of the sanction of dismissal was never actually placed in issue or in dispute at the arbitration. At the commencement of the arbitration it was recorded that the third respondent considered his dismissal to be substantively unfair because he did not commit the misconduct, and not because dismissal was too harsh. In fact, no mention was even made of the issue of the fairness of the sanction. The third respondent in giving his evidence in the arbitration made out no case about the sanction of dismissal being inappropriate and no such case was put to Madolo who testified on behalf of the applicant in cross examination. Significantly also, and in the closing argument by both parties and in particular that of the third respondent himself, no mention was made about the sanction being inappropriate or too harsh. As I read the record, as a whole, the arbitration was focussed on the issue whether the misconduct existed or not, and it seemed to be understood between the parties that if it existed, dismissal was appropriate. I am not saying the second respondent was not entitled to enquire into the issue of the fairness of the sanction, but what I am saying is that, considering the approach by the parties as set out above in the conduct of the matter, if the second respondent considered this to be an issue he wanted to look into and determine, he should have warned the parties that this was indeed what he wanted to do, and he should have called on the parties to present evidence or submissions to him in this respect. This is especially so considering that in the arbitration proceedings in the CCMA, no pleadings are required. In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[67] it was held that the opening address before the arbitrator by the employee party which is then not contradicted and/or accepted the employer party constitutes the issue the commissioner is required to determine and that it 'would be completely unfair to allow the appellant now to say that that understanding of

[67] Id at para 20 – 23

its case by the third respondent's attorney was wrong and it should be allowed to deal with the matter on the basis that the charge of gross negligence existed separately on its own and did not relate to the conduct covered by the second charge'. This *dictum* is of course in the context of an issue which the commissioner had to determine with regard to the existence of the misconduct itself, but there is no reason why the same consideration should not apply where it comes to the distinct and separate enquiry as to the issue of the fairness of the sanction. In *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd and Another*[68] it was held as follows, but in that case referring to a pre-trial agreement, but which *ratio* in my view can equally applied in the current instance:

> 'It is true, of course, that a pretrial agreement is a consensual document which binds the parties thereto and obliges the court (in the same way as the parties' pleadings do) to decide only the issue set out therein. In particular, a party who agrees to claim only limited relief would be bound by his agreement (*Shoredits Construction (Pty) Ltd v Pienaar NO and Others* (1995) 16 ILJ 390 (LAC); [1995] 4 BLLR 32 (LAC) at 34C-F). The agreement in *Reunert Industries (Pty) Ltd t/a Reutech Defence Industries v Naicker and Others* (1997) 18 ILJ 1393 (LC); [1997] 12 BLLR 1632 (LC) was not a pretrial agreement which served to further define issues in a set of pleadings; it was an agreement that the fairness of the sanction imposed on an employee would not be challenged before a CCMA commissioner. It was, quite correctly, held that the commissioner exceeded her powers in then redetermining the sanction. It was an agreement limiting the issues which is usually binding (*Filta-Matrix (Pty) Ltd v Freudenberg and Other*s 1998 (1) SA 606 (SCA) at 614B-D).'

[68] (2000) 21 ILJ 142 (LAC). See also *SA Commercial Catering and Allied Workers Union and Others v Sun International SA Ltd (A Division of Kersaf Investments Ltd)* (2003) 24 ILJ 594 (LC) para 80 – 81 ; *Minister for Safety and Security and Others v Jansen No and Others* (2004) 25 ILJ 708 (LC); *Minister of Safety and Security v Mashego and Others* (2003) 24 ILJ 1690 (LC); *Fuel Retailers Association of SA v Motor Industry Bargaining Council* (2001) 22 ILJ 1164 (LC); *GE Security (Africa) v Airey and Others* (2011) 32 ILJ 2078 (LAC) para 20

[72] It is my view that a consideration of the record as a whole reveals that the parties did not really require the determination of the fairness of the sanction as an issue before the second respondent. If the second respondent however, in terms of his duties and powers in determining the substantive fairness of the dismissal of the third respondent still wanted this to be determined, he needed to alert the parties to this and call upon them to each present a case. In my view, the second respondent's failure to do this contributes to my conclusion that his award cannot be sustained, and is reviewable.

General observations

[73] What is clear from all of the above is that the second respondent, as a matter of general principle, excluded or ignored pertinent evidence, and did not consider all the principles and factors he was required to consider. In *Network Field Marketing (Pty) Ltd v Mngezana No and Others*[69] the Court said:

> ' …. By excluding the applicant's evidence from serious consideration on this unwarranted basis, the arbitrator effectively denied the applicant a fair hearing which amounts to misconduct by the arbitrator in relation to his duties'"

[74] In *Pam Golding Properties (Pty) Ltd v Erasmus and Others*[70] the Court said:

> 'In his judgment in *Sidumo*, Ngcobo J reaffirmed the role of reasonableness in relation to conduct in these terms:
> "It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing ... the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the

[69] (2011) 32 ILJ 1705 (LC) para 23
[70] (2010) 31 ILJ 1460 (LC) para 6

> arbitration proceedings as contemplated in s 145(2)*(a)*(ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.'"

[75] I wish to make final reference to *Gaga v Anglo Platinum Ltd and Others*[71] where it was held as follows:

> 'Where a commissioner fails properly to apply his mind to material facts and unduly narrows the enquiry by incorrectly construing the scope of an applicable rule, he will not fully and fairly determine the case before him. The ensuing decision inevitably will be tainted by dialectical unreasonableness (process related unreasonableness), characteristically resulting in a lack of rational connection between the decision and the evidence and most likely an unreasonable outcome (substantive unreasonableness). There will often be an overlap between the ground of review based on a failure to take into consideration a relevant factor and one based on the unreasonableness of a decision. If a commissioner does not take into account a factor that he is bound to take into account, his or her decision invariably will be unreasonable. The flaw in process alone will usually be sufficient to set aside the award on the grounds of its being a latent gross irregularity, permitting a review in terms of s 145(1) read with A s 145(2)*(a)*(ii) of the LRA.'

[76] What is clear from the observations that I have made above is that in terms of the accepted review test, the failure to consider material facts and evidence, and the failure to apply critical legal provisions, constitutes a reviewable irregularity. This is unfortunately what the second respondent did in this instance.

Conclusion

[71] (2012) 33 ILJ 329 (LAC) at para 44

[77] Based on has been set out above, I conclude that the second respondent's award simply cannot be sustained. The second respondent did not consider a totality of circumstances as he was required to do, and did not exercise a value judgment which was fair to both parties. The second respondent failed to consider and apply all the *Sidumo* factors, especially the considerations of the trust relationship, the issue of remorse and the employer's interests. The second respondent failed to consider material evidence. All of this compels me to review and set aside the award of the second respondent as an award a reasonable decision maker could not come to in the circumstances. I accordingly so determine.

[78] Having reviewed and set aside the award of the second respondent, I see no reason to remit this matter back to the first respondent again. All the required evidence has been led and is on record. Also, and in essence, the second respondent's finding was principally based on the issue of sanction, which I, having the complete record of the totality of circumstances properly before the second respondent, am readily able to finally determine. I therefore intend to substitute the arbitration award of the second respondent with an award that the third respondent's dismissal was substantively fair.

[79] It is thus my conclusion that the applicant was entitled to dismiss the third respondent, and such dismissal was substantively fair.

[80] Neither the applicant nor the third respondent 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 where 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.

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

81.1 The arbitration award of the second respondent, being commissioner M Van Aarde dated 1 October 2010 in the arbitration proceedings between the applicant and the third respondent, under case number FS 3869 – 10, is reviewed and set aside.

81.2 The arbitration award of the second respondent, being commissioner M Van Aarde dated 1 October 2010 in the arbitration proceedings between the applicant and the third respondent, under case number FS 3869 – 10, is substituted and replaced with an award that the dismissal of the third respondent by the applicant was substantively fair.

81.3 There is no order as to costs.

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Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

APPLICANT: Mr B Bleazard of Brian Bleazard Attorneys

THIRD RESPONDENT: Mr M J Ponoane of Ponoane Attorneys