IN LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JA 33/09

In the matter between:

RALPH DENNIS DELL	**APPELLANT**
and	
SETON SOUTH AFRICA (PTY) LTD	**First Respondent**
COMMISSIONER FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
SHEEN N.O	**Third Respondent**

Coram: Jappie JA, Tlaletsi JA; and Hendricks AJA

Judgment

Tlaletsi JA

Introduction

[1] The appellant was employed by the first respondent, Seton South Africa (Pty) Ltd, as a managing director in South Africa hereinafter the respondent. He was dismissed on 6 May 2005 pursuant to a disciplinary enquiry on allegations of misconduct. He referred a dispute of unfair dismissal to the second respondent, the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). The dispute could not be resolved through mediation and was subsequently referred for arbitration. The third respondent, a commissioner appointed under the auspices of the CCMA arbitrated the dispute.

The commissioner issued an award on 29 November 2005 in which he found, *inter alia*, that the appellant's dismissal was both procedurally and substantively fair.

[2] Aggrieved by the decision of the commissioner, the appellant instituted review proceedings in the Labour Court in terms of section 145 of the ***Labour Relations Act*** *66 of 1995* ("the Act") seeking an order, inter *alia,* reviewing and setting aside the award of the commissioner. On 23 July 2008 the Labour Court, per Molahlehi J, dismissed the appellant's review application and made no order as to costs. The appellant is now appealing against the judgment and order of the Labour Court having been granted leave by that court.

Factual background

[3] On 15 May 1996 the appellant was appointed Financial Director of a company called Hanni Leathers. During 1998 Seton purchased 75% of the shares of Hanni Leathers. The appellant was re-appointed as Financial Director of the respondent. He was subsequently appointed Managing Director of the respondent's operations situated in South Africa. The other directors, namely Messrs De Majistre, Traychek and Winkler were based in the United States of America and Germany.

[4] During the course of the year 2004, De Majistre who is the president of the respondent, expressed concerns to other directors about the appellant's remuneration as Managing Director. He then tasked Winkler to investigate why the appellant's remuneration had gone to what he believed to be too high. De Majistre further tasked Evans, the then chief financial officer to obtain information on the market rate of remuneration of Managing Directors in South Africa. Evans was also instructed to compare the appellant's rate of remuneration with the information provided by the appellant about his remuneration. There was also an annual internal audit that was being

undertaken at that time. De Majistre instructed that the internal audit should have a special focus on the appellant's remuneration from the year 2001 until the commencement of the enquiry. According to Evans the internal auditor reported, during March 2005 that the appellant was receiving remuneration in excess of what the appellant disclosed to Henry. The internal auditor also found that there was a second incentive compensation plan in favour of the appellant in addition to the one that he had disclosed. As a result of these findings, Evans was instructed to conduct an investigation on appellant's remuneration.

[5] On 28 March 2005 the appellant was placed on suspension with full remuneration. The purpose of the suspension according to the respondent was to allow a smooth process of investigation and to protect the integrity of the appellant. A firm of accountants, Ernst & Young was appointed to conduct an investigation on the circumstances surrounding the remuneration of the appellant. Ernst & Young submitted a report on its findings on completion of the investigations. Their report formed the basis for the subsequent charges for misconduct preferred against the appellant. De Majistre was supposed to chair the disciplinary enquiry in accordance with the respondent's policy on disciplinary enquiries. However, in view of the fact that all directors were involved in the investigations and others would be witnesses, the serious nature with which the respondent viewed the allegations of misconduct, it was decided that the disciplinary enquiry be presided by Prof. Harvey Wainer ("the Chairperson") who was an outside independent *"forensic specialist with experience in disciplinary hearings"*. The enquiry was held on 26 to 28 April 2005.

[6] At the disciplinary enquiry the appellant declined the offer of representation by a fellow employee or legal representative. The

respondent also abandoned the decision to have legal representation. The appellant was found guilty of five of the seven charges of misconduct against him and the chairperson recommended dismissal as an appropriate sanction. The respondent accepted the recommendation and dismissed the appellant. The appellant communicated his intention to appeal against his dismissal. He was denied the right to appeal by the respondent on the basis that there was no one in the structure of the respondent who could hear the appeal. The respondent was also not prepared to appoint another independent person to hear the appeal and instead, advised the appellant to refer a dispute to the CCMA.

[7] The appellant then referred his dispute with the respondent to the CCMA. At the arbitration, the respondent led evidence only on the four charges of misconduct on which the appellant was found guilty and abandoned those on which he was acquitted by the chairperson. It is apposite to deal with these relevant charges individually stating the respective versions of the parties where necessary.

The first charge

[8] This charge related to increases in remuneration without the authority of the respondent, alternately of its management and without the knowledge of all the directors of the respondent.

[9] The respondent's version on this charge was that the appellant during the period December 2001 to March 2005 granted himself increases in his remuneration without the authority or knowledge of the respondent, alternatively its management. It was common cause that at the end of November 2001 the appellant was earning a monthly salary of R68 500-00.

[10] During December 2001 Winkler, the then vice-president of Global Operations sent a memorandum to Henry, the human resources manager and appellant's subordinate, setting out an increase to appellant' s remuneration. The increase was from US$ 8 245.00 to US$ 10 000.00. The exchange rate used to convert from a rand value of R68 500-00 to US dollar value of US$ 8 245.00 was R3.31 to the dollar. This was the exchange rate the appellant had used during August 2001 when he provided Winkler with a list of respondent's members of management in South Africa and their respective remuneration.

[11] Winkler testified that he used the US dollar figure only to determine the increase so that he could compare the remuneration paid to the appellant against the remuneration paid to other employees within the first respondent. He did not use the US dollar conversion to make the appellant's salary dollar denominated. In order to achieve the 21% increase to appellant's remuneration the figure of US $ 10 000.00 had to be converted into Rands at the same exchange rate that had been used to convert the figure of R68 500.00 into dollars. According to the respondent's version the appellant's new monthly salary was supposed to be R83 100.00.

[12] It is common cause that after Henry had received the memorandum from Winkler relating to the appellant's salary increase, the appellant provided Henry with a *website* where he could determine the correct exchange rate for calculating the appellant's monthly remuneration. Having done so, Henry determined the appellant's monthly remuneration to be R97 600.00 at the current rate in December 2001. This meant that the appellant's increase was not the 21% that was envisaged by Winkler.

[13] During January 2002 the appellant informed Henry by letter that his remuneration was now US dollar denominated and that he would suffer from the exchange rate fluctuations if not fixed at a particular rate. Henry wrote to the appellant stating that his remuneration would be adjusted once per year on 1 January. The appellant's remuneration then increased to R121 500.00 per month from January 2002 based on the dollar/rand exchange rate applicable at the time. This meant that the appellant received an increase in his remuneration over a period of two months from R68 500.00 to R121 500.00, contrary to what Winkler intended.

[14] The appellant testified that during 1998 the Board of Directors of the respondent gave him full authority on all staff matters of the first respondent. He contended that the increase of December 2001 was authorised by Winkler. He referred to a document dated 14/15 November 2002 signed by Winkler in which, *inter alia*, the appellant's remuneration was reflected. He further referred to documents for 2002, and 2003 and contended that by implication Winkler was aware of his salary increase and how it had been implemented. Therefore, he testified, he did not give himself an increase in remuneration without the knowledge of the respondent or its management. The appellant testified further that for Winkler to sign the schedules for 2002, 2003, 2004 and 2005 he *"authorised the status quo"* of his salary and the implementation of his salary increase was *"driven"* by Henry.

[15] It is common cause that during January 2004 the appellant increased his remuneration to R140 000.00. He continued to receive this amount until March 2005. The appellant did not have any authorisation from other directors of the respondent for the increase. The appellant referred to a salary review sheet (spreadsheet) dated 20 November 2003 which reflected his salary on the second page

thereof. According to the appellant, Winkler's conduct in signing Review Sheet (spreadsheet) dated 20 November 2003 on the second page meant that he approved his salary increase from R121 500.00 to R140 000.00. However, Winkler denied agreeing to an increase for the appellant. He testified that there were some discussions about the appellant's remuneration increase and he made it very clear to him that there was nothing he could do as it was De Majistre who had to give approval for his salary increase. He could also not remember signing the spreadsheets relied upon by the appellant but acknowledged that the signature on the second page of the document was his.

The second charge

[16] On this charge the respondent's version was that during 1999 the appellant approached De Majistre and recommended that an incentive bonus be put in place for all staff. At the time of this recommendation De Majistre was not aware that certain of the senior managers including the appellant were already earning an incentive bonus of 25% of their remuneration as per their employment contracts. The appellant did not disclose this fact to De Majistre at the time of the recommendation. The recommendation made by the appellant was accepted and a resolution to that effect was passed.

[17] The implementation of the resolution resulted in the appellant receiving two incentive bonuses of approximately 50% of his annual remuneration for the period 2000 to 20005. De Majistre testified that had he been aware that appellant was already receiving an incentive bonus he would not have agreed to the recommendation made by the appellant. He mentioned that it was never his intention to have the appellant receiving two bonuses.

[18] The appellant's version in this regard was that the incentive bonus paid as per the resolution was over and above the remuneration per their employment contract. Although it is true that De Majistre was not presented with his employment contract at the time he made the recommendation, he (De Majistre) ought to have known the contents of his employment contract as he was the one who made the offer to him when he was employed as Managing Director. He mentioned further that other employees who received the incentive bonus as per their employment contract like himself had not been charged or subjected to disciplinary proceedings.

The third charge

[19] It is common cause that the appellant from January until June 2004 received monthly payments of R83 870.00. The total amount he received out of these unauthorised payments was R503 220.00. At no stage during this period did the appellant enquire or stop these payments. In an attempt to repay the said amount to the respondent, the appellant sold 55 leave days to the respondent. The majority of these leave days had not yet accrued to him at the time. The actual charge was therefore that in addressing the overpayment error, the appellant instead of actually repaying the amount, he devised a scheme to sell his leave days to the respondent some of which had not yet accrued to him, thereby breaching the policy of the respondent and acting without the knowledge or authority of the respondent or its Board of Directors.

[20] The appellant's contention on this charge was that he was merely correcting a clerical error made, not by himself, but by somebody else. He had to create negative leave, for instance leave owing to the company, which was not uncommon. He mentioned that in many instances employees were forced to take leave during low production periods which often occurred during December month's "shut-down"

or closure of the plant. He testified that there was no policy on how an error that occurred to his salary overpayment could be corrected. He contended that no company could have policy not to correct errors and that the management of the respondent must have "obviously" been aware of the error.

The fourth charge

[21] The misconduct complained of in this charge is that the appellant on various occasions misrepresented to various directors of the respondent the exact details of what he had earned from the respondent in remuneration bonuses. The first allegation was that he failed to disclose the fact that he was receiving two incentive bonuses referred to in charge two, the enormous salary increase from R68 500.00 to R121 500.00 or the salary increase from R121 900.00 to R140 000.00 to his fellow directors. He was also accused of providing incorrect information to Henry for onward transmission to Winkler on his remuneration when De Majistre became suspicious about his earnings during 2004 and 2005.

[22] The appellant's response to this charge was that there was no misrepresentation that he had made or that he was aware of. He testified that any information that was requested was supplied in the format as requested and the fact that Henry supplied the information on the documents to Winkler without his knowledge should not be used to blame him. He mentioned that full details of remuneration for all employees was reflected in the company documents which were available to all directors at all times as well as in the annual financial statements signed by the directors of the respondent.

The arbitration award

[23] The commissioner found that the appellant was indeed dismissed[1]. He further made the following findings on procedural challenge to the dismissal:

23.1 Although the appellant correctly submitted that the misconduct complained of went back some years, he was satisfied that the employer *"acted within a reasonable time from the time the (concerns) of the allegations being raised and investigated to the time the employee was disciplined"*

23.2 The fact that the appellant was denied an appeal hearing which was provided for in the disciplinary code did not make the procedure defective *"as it is not a must that an appeal hearing must be heard"*.

23.3 The fact that the suspension letter only mentioned *"alleged irregularities"* did not make the dismissal unfair *"as the employer was still proceeding with the investigation and as such could not be expected to lay the specific charges when the employee was suspended."*

23.4 The instances of the deviation from the disciplinary code were not prejudicial to the extent of making his dismissal unfair.

23.5 The presence of De Majistre throughout the disciplinary hearing was not prejudicial to render the dismissal unfair more so that his presence was justified by the fact that he was the President and Chief Operations Officer of the respondent.

[1] The appellant had contended that he was not dismissed because the respondent failed to provide him with a notice of cancellation or termination of his employment and that until such time that there had been compliance he had not been dismissed.

23.6 The fact that the respondent had obtained legal advice and opinion was within its rights, and no legal representatives participated in the merits of the disciplinary enquiry.

23.7 On the complaint that the respondent withheld documentation which prejudiced the appellant, the commissioner held that he could not find that the respondent acted wilfully because the appellant made a blanket request without specifics on certain documentation and further that the documentation would not have made any material difference to either the disciplinary enquiry or arbitration proceedings.

[24] As regard substantive fairness the commissioner made the following findings:

24.1 The appellant wilfully and knowingly attempted to manipulate the increase that he received in 2001. He *"took deliberate advantage of the fact that the Rand was at a weak state in January 2002 in the attempt to ensure a substantial increase of close on 100%."*

24.2 The appellant knew that he had not been authorized an increase as confirmation was still required in 2004. He nevertheless implemented an increase from R121 900.00 to R140 000.00 despite being made aware by Henry. The respondent had therefore succeeded in proving the guilt of the appellant on the misconduct relating to salary increases.

24.3 The status and position held by the appellant required of him to disclose that he was already earning an incentive bonus and that it is reasonable to interpret his actions in this regard as of

a person who had the intent to benefit twice. He also showed dishonesty on his part to financially enrich himself.

24.4 In creating negative leave the appellant acted contrary to the *"company policy authorised by him".*

24.5 The appellant deliberately provided incorrect information with the intention to cover up his actions in respect to his bonus scheme and 2004 salary increase.

24.6 He clearly abused the position of trust that was placed in him by the respondent.

24.7 He acted in direct contravention of his fiduciary duties as a member of staff and senior management.

24.8 The dismissal was an appropriate sanction based on the gravity of the conduct of the appellant.

Proceedings in the Labour Court

[25] In the Labour Court, the appellant appeared in person and contended both in his Heads of Argument and at the hearing that he sought to review the award on the basis that the Commissioner committed gross misconduct, gross irregularity, exceeded his powers, showed bias and made a decision that was neither reasonable nor justifiable in terms of the evidence that was properly before him, *"by not addressing or considering the pre-determined course of action of the respondent,"* which was to terminate the employment relationship at all costs. He contended that the commissioner committed misconduct by not addressing the unfair labour practice dispute; committed gross irregularity by allowing the respondent to have legal

representation, showed bias partying favour of the first respondent at arbitration.

[26] With regard to the substantive fairness of the dismissal, the appellant's main contention was that the commissioner was wrong in finding that the respondent had proved the misconduct instances justifying his conviction, and that the findings ought to have been in his favour. The appellant further contended that he should not have been found to have breached a fiduciary duty to the respondent as it was not one of the "charges" preferred against him. No reference to the prescribed grounds of review has been made by the appellant in his founding and Second "Founding affidavits' for the review application.

[27] With regard to the procedural challenge, the appellant contended that, contrary to the provisions of the respondent's own disciplinary code, he was denied the right to appeal against the decision of the chairperson of the disciplinary enquiry; that De Majistre was present throughout both the disciplinary and arbitration hearing; that Winkler was allowed to tender his evidence through "video conference"; and that the respondent was allowed to have legal representation.

[28] The Labour Court after considering the appellant's contentions held as follows:

28.1 That the commissioner applied his mind to the issue of denial of internal appeal and accepted as common cause that the appellant was denied an appeal hearing. It was held that in his evaluation and assessment of the circumstances of this case, the commissioner correctly came to the conclusion that the fact

that the appeal was not held did not make the procedure defective;

28.2 There is no evidence to substantiate the contention that De Majistre' s presence during both proceedings prejudiced the appellant in any way or manner;

28.3 The respondent was not represented by a legal practitioner at the arbitration;

28.4 That the commissioner's award is in line with the required standard of reasonableness and committed no gross irregularity or misconduct.

28.5 That the commissioner correctly found that dismissal was the appropriate sanction taking into account the evidence and the circumstances of the case.

The application for review was consequently dismissed with no order as to costs.

The Appeal

[29] In this Court the appellant's grounds of appeal against the judgment and order of the labour court are summarised hereunder: That the labour court erred:

29.1 in failing to find that the determinations of the commissioner was unreasonable;

29.2 that the sanction of dismissal was appropriate in the circumstances of this case;

29.3 in failing to find that the commissioner had failed to take into account all the relevant evidence;

29.4 in finding against the appellant on the procedural and substantive challenges of his dismissal.

[30] The issue that the labour court had to deal with was to determine whether the commissioner had committed misconduct in relation to his duties as an arbitrator; whether the commissioner committed gross irregularity in the conduct of the arbitration proceedings; whether the Commissioner had exceeded his powers; or that the award had been improperly obtained.[2] Furthermore, in order to comply with the constitutional imperative, the Labour Court had to determine whether the award is reasonable.[3] The appellant bears the onus to demonstrate to the labour court that the award of the commissioner was reviewable on these grounds and or that the decision reached by the commissioner is the one that a reasonable decision maker could not reach.

[31] It is important to note that the labour court was not sitting on appeal against the award of the commissioner. It is imperative that the distinction should always be observed. I mention this fact at this stage because the appellant contends that the labour court erred in coming to or erred in failing to come to a number of factual conclusions. Put differently, the appellant's main contention is that the commissioner made several incorrect factual findings in finding him guilty of the misconduct charges levelled against him.

[2] Section 145 of the Labour Relations Act 66 of 1995
[3] Sedumo v Rustenburg Platinum Mines Limited (2007) 28 ILJ 2405 (CC). Fidelity Cash Management Service v CCMA & Others [2008] 3 BLLR 197 (LAC)

[32] In this Court the appellant carried the onus to demonstrate that the labour court erred in finding that the award of the commissioner could not be reviewed and set aside on the grounds set out above. This Court therefore is required to apply the same test that the labour court had applied and if satisfied that the award falls to be reviewed, it has to substitute the order of the labour court and make an appropriate order.

[33] Mr Nolan who appeared on behalf of the appellant in this Court submitted that the respondent had not drawn any distinction between the appellant's roles as an employee and as a director, and further that the parameters of the appellant's fiduciary duties had not been established. He referred us to the decision in *Wolfowitz and others v Stein and others .*[4] He further contended that at no stage did the appellant unilaterally award himself any increase or remuneration but had always negotiated same "honestly" and "openly" with the respondent through the offices of a fellow Director. That in so far as his fiduciary duties towards the respondent in his capacity as Managing Director, all dealings with the respondent were done through fellow Directors in particular Winkler and the information was disclosed in the books of account; the minutes books of the Board of Directors; and correspondence between appellant and Directors of the respondent.

[34] It apposite to consider the facts considered by the commissioner in finding that the appellant's dismissal was procedurally and substantively fair, starting with the procedural complaints raised by

[4] 1909 TH 120 at 125. This case concerned an application by some of the shareholders of a company for an interdict to restrain the directors from acting on a resolution of theirs voting themselves and others in the employ of the company an increase of salary on the ground that the said resolution *was ultra vires* the company and illegal, and praying for a refund of all moneys paid in excess of the salaries as fixed by the company. The Witwatersrand High Court held that their actions were not ultra vires as they were neither inconsistent with the Articles nor with their Agreement.

the appellant. The commissioner accepted that the allegations of misconduct occurred over a period of years and action was only taken when the charges were preferred against the appellant. The commissioner then held that the respondent acted within a reasonable time from time the officials became concerned about the appellant's remuneration and instituting an investigation to the ultimate disciplinary hearing. There is no evidence to suggest that the respondent could have done otherwise. The finding of the commissioner in this regard is in my view reasonable.

[35] With regard to the matter relating to the denial of the internal appeal process, the finding by the commissioner and the labour court that failure to allow the appellant an internal appeal process did not make the procedure followed defective is in my view reasonable. It has to be accepted that all senior personnel of the respondent were involved either as witnesses or as investigators. It would also have been unreasonable to expect the respondent, having appointed an external person to chair the enquiry, to then appoint another person(s) as an appeal tribunal. It was in fact to the advantage of the appellant to proceed to the arbitration of the dispute in the CCMA where the matter is heard *de novo*. It proved to be time saving in the end. There were therefore in my view, reasonable reasons to deviate from the disciplinary procedure. The appellant has not shown any prejudice but merely demanded the internal appeal process only because it was provided for in the respondent's code. I do not think that the appellant, being a most senior employee of the respondent in South Africa should have had a difficulty in comprehending reasons provided by the respondent for not instituting an internal appeal hearing.

[36] The finding that the appellant had failed to show that the presence of De Majistre, in both the internal disciplinary enquiry and the

arbitration proceedings, prejudiced him is in my view not unreasonable. It happens in our courts almost daily that the defendant or a respondent be present in court when other witnesses testify and to thereafter tender his or her evidence after the plaintiff's case. His/her evidence is to be assessed on the basis that he or she was present during the proceedings when other witnesses testified. In this case De Majistre was both the President and Chief Operating Officer of the respondent and had to represent the respondent at both these proceedings.

[37] The complaint regarding legal representation is without merit and goes to show the attitude adopted by the appellant throughout the process. The appellant as a Managing Director ought to know that any party has a right to have a legal advisor in any matter as he or she wants. The appellant refused an offer of having legal representation during the proceedings and because of his choice the respondent abandoned its initial decision of having legal representation during the actual disciplinary proceedings. The respondent's legal representative was only present to argue and advise the respondent on the proceedings on the interlocutory issues relating to the proceedings. In this case the appellant has not shown that he was prejudiced by the respondent having legal advice or legal representative to argue the preliminary issues at the beginning of the arbitration proceedings only. The findings of the commissioner with regard to the appellant's dismissal are only based on the evidence that was presented on the charges of misconduct.

[38] It is clear from the record that the commissioner considered the various complaints and allegations raised by the appellant regarding the procedural fairness of his dismissal and found no basis for finding that the dismissal of the respondent was procedurally unfair. This

conclusion is not the one that a reasonable decision make could not reach.

[39] With regard to the substantive fairness of the dispute, I am of the view that most of the evidence presented by the parties is common cause. What is mainly in dispute is the interpretation or conclusions to be drawn from the conduct of the appellant. The issue therefore is whether the conclusion reached by the commissioner is the one that a reasonable decision maker could not reach. One must also bear in mind that the appellant has not relied on any of the specific grounds for review but on the commissioner's factual findings.

[40] The first issue that he commissioner had to decide was whether the appellant's salary was dollar denominated. The respondent contended that it was not dollar denominated and presented the evidence of Winkler who testified that he converted all salaries into dollars so that he could understand what he was paying as he was not used to working in South African Rand. The appellant is the one who converted his salary into dollar denomination for that purpose. Winkler testified that he never intended to make the appellant's salary dollar denominated and expected him to convert it back to the rand value using the same rate he used for the purpose of the exercise.

[41] The appellant on the other hand could not produce any document or evidence to prove that there was a decision to convert his salary into dollar denomination. He merely decided on his own that his salary was now to be dollar denominated and agreed with his junior, the financial manager to pay him the rand value of the dollar at the time. During January 2002 he then allow himself to be paid at a new rand dollar exchange rate resulting in him receiving a further increase and considered the version of the parties on this aspect and preferred the

respondent's thereafter caused his salary to be fixed at that higher rate.

[42] The commissioner considered the version of the parties on this aspect and preferred the respondent's version as being more probable and reasonable. By this finding the commissioner did not misdirect himself or commit any irregularity. His finding is not a decision that a reasonable decision make could not reach.

[43] The next issue that the commissioner had to determine was whether the appellant was given an increase from R121 900.00 to R140 000.00 salary per month. In an e-mail dated 18 December 2003 from Winkler to Evans, which was copied to De Majistre and sent to the appellant, it was stated that:

> *"I did review the plan with Ralph and signed them off. I did not do anything with Ralph or Herbert and it was my intention to go through the list during Bob's visit in Germany on the 3rd or 4th of December. Unfortunate this never took place but it is still my intention of reviewing this Bob in person. Hermaan (sic)".*

It is clear from the above e-mail that Winkler states categorically that he has done nothing with the appellant's salary increase at that stage and would be reviewed by "Bob".

[44] However, the appellant relied on a schedule headed Salary Review Effective for January 2004 wherein his name appears on line 24 reflecting his salary as R140 000.00. To this document Winkler testified that he could not remember seeing a document reflecting that salary for the appellant and further denied giving him a salary increase. He made it clear that the appellant's salary had to be authorised by De Majistre. The latter corroborated Winkler's version

in this regard. There is also a similar schedule that did not contain the appellant's name but of the rest of the employees and their salaries issued during that period.

[45] Again on this aspect the commissioner preferred the version of the respondent over that of the appellant. This finding is in my view not unreasonable more so that on the appellant's own version he never received any authorisation of the increase from De Majistre. He was not supposed to allow the increase on his salary to continue until such that he had De Majistre's authority. It cannot expected of him as the Managing Director to rely on an *"administrative error"* when he fully knew that he had not been authorised an increase. He was also not supposed to give himself an increase in anticipation of approval.

[46] On the issue of the bonus it is correct as the appellant asserts that it was authorised by a resolution of the respondent's Board of Directors. However, the respondent's concern with the bonus is that the appellant, when he proposed the introduction of the bonus, did not make it clear that he was already receiving a 25% incentive bonus as per his employment contract. He then drafted the resolution in such a way that his incentive bonus was protected from any challenge by stating that the new incentive bonus would be over and in addition to any remuneration in terms of the employment contract. The appellant on the other had agreed that he did not disclosed the existence of his contractual incentive bonus to De Majistre and reasoned that he had no duty to do so as De Majistre ought to have known as he was the one who offered him the employment contract.

[47] On this aspect the commissioner held that the status and position of Managing Director held by the appellant at the time required that he

make the *"information apparent. A reasonable person would make the interpretation that the employee did not inform the President of the initial scheme with the intent of benefiting him twice, which was my interpretation of the actions of the employee"*. This conclusion by the commissioner is not farfetched. The appellant must have considered the possibility of De Majistre excluding him from the scheme because of the incentive he was already receiving. If there was nothing to hide, the appellant should have made it known or reminded De Majistre of the incentive bonus and not to adopt a technical approach to defend his actions.

[48] It is not disputed that the appellant offered to repay the money in excess of the salary he was lawfully entitled to. However, in doing so he used the bonus scheme to do so. By such action, he continued to receive the salary of R140 000.00 and caused himself to be overpaid in his bonus by the amount of R217 200.00 which was the amount he was supposed to repay. On this aspect the commissioner held that:

> *"It was also clearly apparent that the employee manipulated the bonus scheme so that he would be paid an amount roughly equal to an overpayment made by the company, which the employee had to pay back. This act clearly showed the dishonesty of the employee in his attempt to financially enrich himself."*

The appellant has not demonstrated that the finding of the commissioner in this regard is unreasonable or unjustifiable. He may not agree with the conclusion of the commissioner but the conclusion is based on material that was placed before the commissioner.

[49] On the instance of misrepresentation the commissioner found that the respondent showed on a balance of probabilities that the

appellant deliberately provided incorrect information with the intent of covering up his actions with regard to his initial bonus scheme and salary increase. His argument that it was Henry who provided the information to the head office was in my view correctly rejected by the commissioner because the appellant was the origin of the information. It is not disputed that the document incorrectly reflected the appellant as earning R121 900.00 per month when he was at that stage receiving a salary of R140 000.00. It also reflected the appellant as receiving one bonus when in fact he was receiving two bonuses. It cannot be a defence for a person in the position of the appellant to contend that the charge technically stated that he misrepresented to other "Directors of the respondent" and not to Henry. It means that the information meant for Henry would be factually different from that intended for his co-directors with regard to his remuneration. There is no explanation why he gave Henry the wrong information when it was required by the directors.

[50] It was contended on behalf of the appellant that he never faced a specific charge of *"breach of fiduciary duties"* and as such he should not have been found guilty of breach of fiduciary duty or breach of trust. I am not persuaded by this argument. The breach of trust in this matter is implicit in the conduct of the appellant on the specific charges. His overall conduct leads to a conclusion that he breached the trust that the employer placed on him.

[51] What the evidence show in this case is that the appellant at all times placed his interests above those of his employer in the institution he headed as the most senior employee. It is in my view far more than merely negotiating the best salary for himself. In his dealing with other directors on matters relating to his employment contract, he owed a duty to the respondent to disclose fully why he declared his salary to be dollar denominated, what would the effect of the bonus

scheme be on him and the employer. He owed a duty to stop payment of an unauthorised salary to him and to refund forthwith what he unduly received.

[52] It is not necessary, in my view, as it was argued for the respondent, to establish the parameters of the appellant's fiduciary duties as a director and as an employee. It should be implied in a contract of employment that an employee in the position of the respondent owes to his employer a fiduciary duty to at all times work in the interests of the employer and not against the employer's interests. The appellant in this case by virtue of his employment relationship was an agent of the respondent and must act in the interest of his principal. I am mindful of the fact that breach of the fiduciary duty would depend on the facts of a particular case.[5] However, in this case I am satisfied that the appellant breached his fiduciary duty to the respondent as his employer.

[53] In conclusion, I am of the view that the appellant has not succeeded in showing any misdirection on the part of the Labour Court and the appeal falls to be dismissed with costs.

Order

The appeal is dismissed with costs.

Tlaletsi J A

I agree.

[5] See: Phillips v Fieldstone Africa (Pty) Ltd and another [2004]1 All SA 150 (SCA) at paras[33]

_____

Jappie J A

I agree.

_____

Hendricks AJA

Appearances:

For the Appellant:	**Mr D Nolan**
	Malherbe Rigg & Ranwell Incorporated
For the Respondent:	**Mr D Masher**
	Bell Dewar & Hall Incorporated