IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA45/14

In the matter between:

TEBOGO BRIAN MONARE **Appellant**

and

SOUTH AFRICAN TOURISM **First Respondent**

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **Second Respondent**

FAIZEL MOOI N.O. **Third Respondent**

Heard: **25 August 2015**

Delivered: **11 November 2015**

Summary: Territorial jurisdiction of the CCMA – employee employed overseas dismissed for misconduct – employee referring unfair dismissal to CCMA – commissioner finding employee dismissal substantively unfair – Labour Court *mero motu* raising lack of jurisdiction of the CCMA and reviewing and setting aside award on that ground. Appeal – principle enunciated in *Astral* and *Genrec Mei* to the effect that the undertaking where employee employed extraterritorially has to be separated and divorced from the other company in the Republic restated. – Employer a creature of statute mandated to perform functions within or outside the boundaries of the Republic – Overseas office not separated and divorced from South African operation. LRA applicable – CCMA having jurisdiction – Labour Court judgment set aside.

Review of arbitration award – Employee charged with misconduct relating to dishonesty and fraud in respect of subsistence and travel claims and the use of an access code without permission. Commissioner finding that fraud and dishonesty not supported by the evidential material and that employee not benefiting from his conduct – evidence showing that employee failing to follow company procedures – decision failing within the band of reasonableness – Labour Court's judgment set aside – Appeal upheld with costs.

Coram: Musi JA, Coppin JA *et* Makgoka AJA

JUDGMENT

COPPIN JA

[1] The Labour Court (Van Niekerk J) reviewed and set aside an award made by the third respondent, a commissioner, acting under the auspices of the Commission for Conciliation, Mediation and Arbitration ("*CCMA*"), in favour of the appellant and against the first respondent, reinstating the appellant in his employment with the first respondent, on the ground that the CCMA did not have jurisdiction in the matter. This is an appeal against the Labour Court's order with the necessary leave.

[2] In brief, the appellant was employed as Finance and Administration Manager in the London office of the first respondent in terms of a fixed term contract for three years, with effect from 1 February 2010 to 31 January 2013. He was charged with misconduct, details of which I will relate later in this judgment and he was dismissed. The appellant then referred the dispute about his dismissal to the CCMA, which in terms of the Labour Relations Act ("*LRA*"),[1] has no extraterritorial jurisdiction. The parties did not raise an issue concerning the jurisdiction of the CCMA and it only became an issue after argument in the Labour Court in respect of the review of the CCMA award, when the court *a quo* raised it *mero motu*.

[1] The Labour Relations Act No 66 of 1995.

[3] Having raised the issue, the court *a quo* requested the parties to file supplementary heads of argument dealing with it. The court a quo applied to the facts on record the test for jurisdiction assumed by this Court in *Astral Operations Ltd v Parry* (*Astral),*[2] which this Court largely derived from the test in *Genrec Mei (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering and Metallurgical Industry and Others* (*Genrec Mei),*[3] and which was also applied, *inter alia*, in the unreported Labour Court decision of *MECS Africa (Pty) Ltd v CCMA,*[4]and held, in effect, that the London office was an independent undertaking of the first respondent; that the appellant was employed by the undertaking in London; that he performed his duties only in the United Kingdom; that his disciplinary hearing was held there and he was given notice of dismissal there. In view of all the circumstances (including the factual findings which it made), the court *a quo* concluded that the LRA did not apply; that the appellant had no right to refer the dispute to the CCMA, because that body had no "*right*" to entertain it. The court *a quo* on that basis reviewed the CCMA award and set it aside. No costs order was made. Since the jurisdictional issue was decisive, the court *a quo* did not go on to consider the other grounds of review relied on by the first respondent in its application to that court.

[4] Accordingly, the main issue on appeal is the issue of jurisdiction of the CCMA and the applicability of the LRA to the dispute arising from the appellant's dismissal by the first respondent. The parties were in agreement that should that issue be decided in favour of the appellant, this Court should deal with and decide the other grounds of review, even though they were not considered by the court *a quo*. This Court has the power to do so.[5]

[5] Before dealing with the issues, it is necessary to deal briefly with an application brought by the applicant to lead further evidence in this Court. The further evidence relates to the jurisdiction point. The application was opposed by the first respondent, disputing the veracity of aspects of that evidence. In

[2] (2008) 29 ILJ 2668 (LAC).
[3] (1995) 16 ILJ 51 A; [1995] 4 BLLR 1 (AD).
[4] Unreported JR455/12 delivered on 16 August 2013.
[5] See *NUMSA obo Sinuko v Powertech Transformers (PPM) and Others* [2014] BLLR 133 (LAC).

light of the view I take in respect of the jurisdiction issue, it is not necessary for that application to be decided.

[6] I shall now first sketch a more detailed background using the common cause facts and then proceed to deal with the issue of jurisdiction and in light of the conclusion on that point, I will proceed to deal with the other grounds of review raised by the first respondent.

Background

[7] On 10 November 2009, the appellant was appointed as Finance and Administration Manager – UK for a period of three years with effect from 1 February 2010. He was previously employed in the first respondent's Amsterdam office. He commenced work in his office in Wimbledon London. The first respondent charged him with misconduct relating to dishonesty and fraud pertaining to subsistence and travel claims which he made in 2010 and the use of an access code to the first respondent's computer system. A disciplinary hearing was held in London during September 2010.

[8] Following the disciplinary hearing, the appellant was dismissed from the first respondent's employment on 30 September 2010. He lodged an internal appeal which was unsuccessful. On 17 November 2010, he referred an unfair dismissal dispute to the CCMA. Conciliation was unsuccessful and the matter proceeded to arbitration in Johannesburg before the third respondent ("*the Commissioner*"). The appellant contended, at the arbitration, that his dismissal was both procedurally and substantively unfair and he claimed reinstatement.

[9] The Commissioner found that the appellant's dismissal by the first respondent was procedurally fair, but substantively unfair and ordered the appellant's reinstatement "*with no loss of salary in the sum of £37 509,50 from 23 February 2011*". The Commissioner directed that the amount be paid to the appellant within 30 days from the date of the award, but no later than 23 September 2011 and that his reinstatement be effected by the first respondent by no later than 13 September 2011.

[10] The first respondent brought an application in the Labour Court to review and set aside the award of the Commissioner, largely on the basis that no reasonable decision-maker could have come to the same conclusion as the Commissioner on the available evidential material.

[11] When the matter came before the court *a quo,* it directed the parties to file supplementary heads of argument dealing the issue of jurisdiction which, as I have stated, was raised *mero motu*.

[12] The court *a quo* in its judgment had regard, *inter alia,* to the CCMA award in *Serfontein v Balmoral Central Contracts SA (Pty) Ltd;*[6] the judgment of the Labour Court in *Kleinhans v Parmalat SA (Pty) Ltd*[7] and the judgment of this Court in *Astral* where reference was made in particular to the judgment in *CWIU v Sopelog CC*[8] and *Genrec Mei*.

[13] In *Astral*, this Court had come to the conclusion that the territorial application of the LRA, to the dispute in question there, had to be determined according to the locality of the undertaking carried out by the company in which the employee was employed.

[14] In that case, the employee had been employed by the company until he was retrenched. He then agreed to be employed by a subsidiary of the company and relocated to Malawi. The subsidiary was also a company incorporated there. After a period, the company decided to end its operation in Malawi and the employee returned to South Africa where he continued to wind up the Malawi operation. His employment was terminated. A dispute was declared. When the matter reached the Labour Court, the company raised a point that the Labour Court lacked jurisdiction to entertain the employee's claims for contractual damages, unfair retrenchment and the non- or underpayment of various statutory amounts.

[15] On appeal, this Court applying the *Genrec Mei* criterion held:

[6] (2000) 21 ILJ 1019 (CCMA).
[7] [2002] 9 BLLR 879 (LC).
[8] (1993) 14 ILJ 144 (LAC).

> '*When all the facts of this matter are considered and the question is asked as to where the undertaking was carried on in which the respondent worked, the answer would be an easy one, namely Malawi!*'[9]

Accordingly, this Court concluded that the LRA did not apply to the company's operation in Malawi and the Labour Court had no jurisdiction to entertain the employee's claim. It also held that the Basic Conditions of Employment Act ("*BCEA*")[10] did not apply.

[16] Applying the same criterion as this Court applied in *Astral*, the court *a quo* in the present case reasoned and concluded as follows:

> '*… In the present instance, there is no such residual nexus with the South African office. The first respondent may be South African and they may have worked for an entity whose head office is located in South Africa but he was recruited overseas, his employment contract was concluded overseas, he was obliged to work overseas for an agreed fixed term with no right to return to South Africa and continue employment there on conclusion of that fixed term and he performed services only in the United Kingdom. He committed the acts of misconduct that resulted in his dismissal in the United Kingdom, his disciplinary hearing was held there, and he was given notice of dismissal there. In my view, in these circumstances the LRA has no territorial application. It follows that the first respondent had no right to refer his dispute to the CCMA and the CCMA had no right to entertain it.'*

[17] The court *a quo* accordingly reviewed and set aside the arbitration award of the third respondent.

[18] In the appeal before us, it was submitted for the appellant that the court *a quo* had erred in a number of respects. Firstly, in finding that certain facts pertaining to the appellant's employment and the London office of the first respondent were common cause, whereas they were not. These findings were, *inter alia,* that the appellant's contract of employment was concluded outside the Republic of South Africa; that Ms Mokhesi, the Country Manager in the first respondent's London office, had overall managerial control of the

[9] At para 20.
[10] Act No 75 of 1997.

first respondent's London office; that the London office had its own information technology system and its own controls; that the London office had its own established operational site in London; that that office was subject to a separate audit; that the appellant was recruited overseas and only performed services in the United Kingdom and was paid in pounds sterling in the United Kingdom.

[19] The appellant as a result brought an application to produce further evidence before this Court, to rebut some of the above findings, as I mentioned earlier.

[20] The appellant submitted further that the court *a quo* also erred by "*not taking into account*" the fact that the first respondent was a statutory body established in terms of the Tourism Act;[11] by "*over-emphasising the fact that the appellant rendered his service outside the RSA*"; by failing to find that the first respondent's undertaking was based in South Africa and that the London office was not a separate undertaking, but merely an extension of the South African undertaking. Further, that the court *a quo* erred in finding that the appellant had no right to refer the matter to the CCMA and that the CCMA had no power to entertain the dispute; by failing to properly take into account that the appellant, as a South African citizen, was entitled to protection against unfair dismissal by his employer, the first respondent (a South African undertaking financed by the South African taxpayers' funds); by not developing the test in *Astral* to accommodate the appellant's constitutional right to fair labour practices, including the right to have his dispute resolved by the application of law at a public hearing before an independent and impartial forum; alternatively, by failing to sufficiently take into account the appellant's constitutional rights to that effect.

[21] On behalf of the first respondent, it was submitted that the court *a quo* had not erred in its finding on jurisdiction. The first respondent also opposed the

[11] Act No 72 of 1993. This is the Act that applied at the time. It has since been repealed and replaced with the Tourism Act No. 3 of 2014 which came into operation on 16 June 2014. In terms of Section 6 of Schedule 1 of that Act: "*Any disciplinary measure instituted in terms of section 21F of the repealed Act, any appeal or review lodged in terms of section 21G of that Act and any criminal proceedings instituted in terms of section 28 of that Act, but not yet finalised when this Act takes effect, must be dealt with and concluded in terms of the repealed Act as if that Act had not been repealed."*

application to lead further evidence and submitted that the issue of jurisdiction could be determined on the common cause facts that were already on record.

[22] I shall now consider the arguments.

[23] In my view, two aspects in relation to the issue of jurisdiction need to be discussed. Firstly, the jurisdiction of the CCMA was not an issue on the "pleadings". The appellant had alleged that the first respondent was his employer and, in effect, that the locality of its undertaking (in which he was employed) was within the jurisdiction or territory of the CCMA. Arguably that was sufficient to clothe the CCMA with jurisdiction as I will explain below. Secondly, even if it were to be found that the court *a quo* had properly raised the issue of jurisdiction, it erred in its conclusion that the UK office of the first respondent, where the appellant was employed, was a separate and independent undertaking from its South African undertaking and, accordingly, that the locality of the undertaking of the employer (i.e. the first respondent) in which the appellant was employed was in London and therefore outside the territorial jurisdiction of the CCMA and the Labour Court.

[24] The court *a quo* seemingly did not in the context of the facts before it consider the principle that a claimant may formulate his or her claim in a way that enables him or her to bring it before a forum of his or her choice. If a claim as formulated is enforceable in that forum then the claimant is entitled to bring it in that forum. The fact that the claim is bad is another matter[12] and that jurisdiction is to be assessed on the pleadings properly construed and not on the substantive merits of the case.[13]

[25] While the principle has been articulated principally in relation to court pleadings there is in my view no reason why it should not be applicable to the CCMA and the documents in that forum that served to introduce the claim and define the issues between the parties, but I will revert on this aspect.

[12] See *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) at 72 para 34.
[13] *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 (CC) at paras 75 at 263.

[26] While the CCMA has many functions, its main function is the resolution of disputes. Although it is not a court of law, the CCMA does perform functions of a judicial nature.[14]

[27] In *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board,*[15] the Appellate Division defined the term "*jurisdiction*" in relation to courts as "*the power or competence of a court to hear and determine an issue between the parties*".[16] The definition was accepted and applied by the Constitutional Court in *Gcaba v Minister of Safety and Security*.[17]

[28] There is no reason why that term in relation to the CCMA should not have a similar meaning. Section 114 of the LRA provides that the CCMA has jurisdiction in all the provinces of the Republic. The term "*jurisdiction*" in that context, in my view, includes "*the power of the CCMA to hear and determine an issue between the parties*".

[29] Applying the *Astral* criterion (or test), it is appropriate to state that in terms of our law, the CCMA, *inter alia*, has the power to hear and determine a dispute (of the kind the LRA permits it to deal with) between an employer and an employee where the undertaking of the employer, in which the employee is employed, is located within any of the provinces of the Republic. Now applying the principle that jurisdiction is determined by the "*pleadings*", it would be appropriate to say that if the claimant has alleged facts that satisfy the jurisdictional test and the other party has not taken issue with those facts, the CCMA, may, arguably, have jurisdiction in the matter.

[30] As for the "*pleadings*" in the CCMA, that forum has elaborate rules which *inter alia* state how a dispute is to be referred to it and what notices ought to be given. It has also elaborate rules (CCMA Rules) on how to request an arbitration (after conciliation has failed) (Rule 18); for the nature and times for the filing of statements (Rule 19); for when parties must hold a pre-arbitration conference (Rule 20) and other procedures to facilitate the arbitration.

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[14] *Compare Carephone (Pty) Ltd v Marcus NO and Others* 1999 (3) SA 304 (LAC) at 311 para 15, 312F para 18; *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) at 53 para 82 (*Sidumo)*.
[15] 1950 (2) SA 420 (A).
[16] At 424.
[17] See *supra* at 263 at para 74.

[31] What is apparent from the facts of this case is that there was no jurisdictional dispute before the CCMA at any stage, or in any form. A perusal of the record of the proceedings in the CCMA shows, *inter alia,* the following: that in his referral to the CCMA for conciliation, the appellant *inter alia* stated that the other party to the dispute was the first respondent, which was located in Johannesburg; that the dispute related to an unfair dismissal and that the dispute arose on 18 October 2010 in Pretoria; that he sought compensation and that there was an objection to a con-arbitration process. It was certified that conciliation was unsuccessful and that the dispute remained unresolved. Furthermore, it appears from the record that the appellant had requested arbitration. In the relevant form he specifically confirms his details as an employee and that of the first respondent as an employer. Several documents were filed.

[32] Although, it does not appear as if formal "*pleadings*", namely, a statement of claim and response, were required to be filed and were filed, the parties made elaborate opening statements defining the issues and seemed to have held a pre-arbitration conference. It also appears from the common cause facts on record that there was nothing to suggest that the London office of the first respondent was an independent undertaking of the first respondent and therefore that the CCMA did not have jurisdiction. In terms of the case as defined before the CCMA, *prima facie*, it had jurisdiction.

[33] On assumption that the issue of jurisdiction should have been raised and dealt with by the CCMA specifically (because of the facts before it, which is clearly the more advisable approach and is also consistent with CCMA Rule 22[18]), I am of the view that it was not established on the facts that the London office was an independent undertaking of the respondent.

[34] What is clear from both *Astral* and *Genrec Mei* is that the undertaking where the employee was employed (i.e. and which was situated beyond the territorial jurisdiction of the respective *fora* in each of those cases), has to be separate

[18] The Rule provides:"*If during the arbitration proceedings it appears that a jurisdictional issue has not been determined, the commissioner must require the referring party to prove that the Commission has jurisdiction to arbitrate the dispute*."

and divorced from the employer's undertaking which is located within the jurisdictional territory of the relevant forum.

[35] In *Astral*, the employer's Malawian subsidiary, where the employee worked, was separate and divorced from the employer's South African undertaking. The Malawian undertaking was an incorporated concern with a separate personality. It was an independent company. In *Genrec Mei*, the court also emphasised the separateness and independence of the employer's undertaking in Durban, from its undertaking on the oil rig, where the employee was employed.

[36] The nub of the issue in this case, is not about where appellant was employed, because it is common cause that he was employed in the first respondent's London office, but whether the London office was an undertaking of the first respondent, which was separate and divorced from its undertaking in the Republic of South Africa. In my view it certainly was not.

[37] The first respondent, the South African Tourism Board, is the employer. It is a creature of statute, established as a juristic person in terms of the Tourism Act.[19]

[38] In terms of section 3 of the Tourism Act, the first respondent's objectives are, *inter alia,* to promote tourism by encouraging persons to undertake travels to and in the Republic and to that end, it is empowered to take measures to ensure that services and facilities provided to tourists comply with the highest attainable standards; to manage and conduct research relating to tourism and to advise the Minister on tourism policy, either of its own volition, or when requested to do so by the Minister.

[39] The other powers of the first respondent are provided for in section 13 of the Tourism Act. It may open and conduct offices in the Republic, or elsewhere, which may be necessary or advisable for the effective and proper exercise of its powers, the performance of its functions and the carrying out of its duties.

[19] See section 2 of the Tourism Act No 72 of 1993.

[40] In section 13(m), the first respondent is empowered to employ persons who are necessary for the exercise by the first respondent of its powers, the performance of its functions and the carrying out of its duties. It is also *inter alia* empowered to make provision for the payment in respect of its employees, former employees and dependants of such employees, pecuniary benefits in the case of death or injury of such employees in the course of their employment with the first respondent. Section 12 of the Tourism Act empowers the first respondent to pay its employees such remuneration, allowances, bonuses, subsidies, pensions and other benefits as it may determine, but with the approval of the Minister responsible for tourism in concurrence with the Minister of Finance.

[41] The office in London, where the appellant was employed, is an office as those contemplated in section 13(d). Its opening and conduct was probably necessary, or considered advisable, by the first respondent for the effective and proper exercise of its functions and the carrying out of its duties. The office does not have a separate corporate personality. It is part and parcel of the first respondent, which is one undertaking. The fact that the office was in London does not make it a different undertaking. It is most clearly not "*divorced or separated*" from the first respondent South African national undertaking, but it is inextricably linked to it. The first respondent's main objective is a singular objective, to promote tourism to the Republic and it has chosen to do so, *inter alia,* through the establishment of an office such as the London office.

[42] The Tourism Act contains provisions relating to its funds (section 16) and the submission of its statement of accounts to the Minister (section 17). The provisions of that Act apply to the first respondent; inclusive of its offices, wherever they may be situated. The Tourism Act does not empower the first respondent from conducting the London office as a separate undertaking. The facts confirm that the office was not organised and administered as a separate undertaking divorced from the first respondent's undertaking in the Republic.

[43] In the circumstances, I am of the view that the court *a quo* erred in reviewing and setting aside the CCMA award on the ground that the CCMA lacked

jurisdiction. In light of that conclusion that it is not necessary to deal with the application for leave to lead further evidence before this Court, but I shall deal with the issue of the costs of that application later in this judgment.

[44] On the basis of the conclusion reached, the time factor, that the parties had agreed and we were addressed on the other grounds upon which the review was brought by the first respondent, it is in the interest of justice to deal with them now, even though the court *a quo* did not do so.

The other grounds of the review

[45] The appellant was charged with and found guilty of the following two counts of misconduct: Firstly, with "*alleged dishonesty and/or fraud that on 01 April 2010, you made an S & T payment to yourself pertaining to your relocation to the United Kingdom to the value of £2 400,48 (pounds and pence) whilst only £2 000 (two thousand pounds) had been approved by the Acting CFO on 15th March 2010. This alleged dishonesty is in direct contravention of our value of integrity*". He was also charged and convicted of "*alleged dishonesty and/or fraud in that, after the Country Manager gave you permission to use her oracle password on 28 May 2010, having knowledge of the password, you continued to use it fraudulently until 6 August 2010, when she discovered this and brought it to your attention [that] this alleged dishonesty and/or fraud is in direct contravention of our value of integrity*".

[46] The appellant was found guilty of both charges of misconduct, following a disciplinary hearing held by the first respondent according to its disciplinary code. In respect of the first charge, the appellant was convicted, because he admitted to paying himself an amount of £400.48 with "*inadequate documentation"* and in respect of and the second charge, because he admitted using the Oracle password of the Country Manager without her knowledge even though it was for the business of the first respondent. The sanction in respect of either charge was dismissal.

[47] The appellant appealed internally against the findings on the following grounds: in respect of charge 1, that the Chairman's findings indicated that no supporting documentation was submitted to support appellant's entitlement to

the amount of £400.48, although the supporting documents had been submitted to the Chairman. Further, that it was indicated at the hearing that the amount of £2000 which was paid to him as authorised by the Chief Financial Officer was for his relocation to London and that the amount of £400.48 pertained to payments he had to make for lunches when hosting auditors in March 2010 as well as payments for taxis. Further, that the requisition and payment of the amount to him (i.e. the appellant) was signed by himself and Mr Armstrong, who had the authority to authorise the claim. Further that the claim for the £2000 and the £400.48 were "*valid business claims*".

[48] In respect of the second charge, the appellant contended in his appeal that he never used the password fraudulently. He only used it once to approve three purchase orders after receiving an e-mail from Mr Mogale to receive those orders on the oracle system in order to run the management report for July 2010. The Country Manager was on leave at the time and the POs were however not sent out until the Country Manager's return to the office on 6 August 2010 when she approved all of them, but for the three which he had approved on the system. The appellant apologised to the Country Manager for his wrong action but contended that his intention was not to cause harm or to defraud the first respondent.

[49] The internal appeal was dismissed regarding the first count on the basis that the appellant had produced the receipts for the expenses incurred, but was "*unable to produce authorisation for the claims as required in our policy. Without such authorisation, there is no proof that they were indeed valid claims*". In respect of the second charge, the appeal was dismissed despite the situation the appellant found himself in, which necessitated using the password to meet a deadline, because the "*sharing of oracle passwords is a huge risk to the organisation and should not be allowed as a Finance Manager* [the appellant] *should have been aware of this risk and should have dealt with it with integrity*". The appellant's services were terminated with effect from 30 September 2010 or 30 October 2010. There are two letters of termination on record that create an ambiguity about the date. They are both

dated 30 September 2010, one is by the Human Resources Manager and the other by the General Manager: Human Resources.

[51] As pointed out earlier, the appellant referred the dispute about his dismissal to the CCMA. After conciliation failed, the matter was referred to arbitration.

[52] The issues for determination before the Commissioner (the third respondent) were the procedural and substantive fairness of the appellant's dismissal. In respect of the former, the appellant contended at the CCMA that the chairperson of the disciplinary hearing did not give him sufficient time to access his office. Having considered that evidence, the Commissioner rejected the contention and found that the matter was procedurally fair for another reason. In respect of the substantive fairness, the Commissioner found that the appellant was not guilty of the charges for a number of reasons.

[53] In respect of the first charge, the Commissioner found that dishonesty and fraud had not been proved and that, at best, the probabilities had indicated that the appellant was guilty of breaching company policy. Unlawful misrepresentation, which is an essential element of fraud, was not proved. To establish fraud there must be proof of unlawful misrepresentation causing prejudice to another which was made with the intention to deceive. The Commissioner found that there was no unlawful misrepresentation, for a number of reasons. He stated:

> '*62. There was no unlawful misrepresentation for the following reasons: (a)The applicant indicated that the four hundred pounds was to reimburse him for taxi fares to the airport and to see Ms Mokhesi at home on business when she was off ill as well as meals around the auditors' trip. It is common cause that the auditors attended the London office and that Mr Van der Walt indicated that applicant should attend to their meals. It was also not disputed that the applicant had used taxis for business purposes.*
>
> *63. (b)The applicant produced rather faint and in other cases illegible photocopies of taxi and food invoices. Although the respondent argued that the receipts did not conclusively prove the applicant's claim that he incurred legitimate expenses I am prepared to accept*

that he did incur the said expenses as (i) it is common cause that the applicant handed in receipts at the hearing; (ii) Ms Chauke confirmed that the chairman handed the receipts back to the applicant as they considered the issue to be about authorisation and not the receipts and (iii) while Ms Holmes could not remember much about the business related to the receipts she could confirm that the applicant made arrangements for the auditors' meals with his credit card and that he paid for the auditors' taxi to the airport. Prima facie the applicant did incur certain meal and travel expenses for which, if he followed the correct procedure, he was entitled to be reimbursed.

64. *(c) The following calculations are in pounds and pence. The probabilities favour that the applicant did incur four hundred pound's expenses despite the fact that the receipts are not legible as (i) If one adds up the legible receipts of Marks and Spenser 44,08; taxi receipt dated 6/3/10 22,80; Tops Express Pizza 52,87; Abcus Car 40,00; Addison Lee receipt for pickup dated 17/2/10 for 55,90; Addison Lee receipts dated 13/2/10 and 4/2/10 for 50,00 and 30,00 respectively and undated Addison Lee receipt for 30,00 you get a total of 325,65. (ii) It is probable that the two illegible receipts were also in relation to work-related meals as one clearly has the name Nando's on it and as the outstanding sum of 74,83 is easily accommodated by two fast food meals.*

65. *As the receipts, although not all legible point closely to the sum of 400,48 pounds claimed by the applicant the probabilities favour that he did incur the expenses for work-related issues. There was therefore no misrepresentation regarding incurring the said expenses. There may well have been a claim against company procedure as the applicant may not have gotten pre-authority to incur the expenses. However not getting authorisation is a breach of procedure and does not establish a misrepresentation in regard to fraud nor does it establish dishonesty. The element of misrepresentation has not been proved.*"

[54] The Commissioner also found that prejudice had not been proved because it is probable, on the evidence, that the appellant had incurred the expenses in

respect of his work and if he had followed the correct procedure, the first respondent would have been obliged to reimburse him for those expenses.

[55] The Commissioner went on to find that for that same reason no intention to defraud had been proved. Furthermore, he found in respect of that charge that no intention to defraud had been proved because on the evidence of Mr Armstrong, who, was shown to have had delegated authority to sign the cheque requisition form, had testified that he would not have signed it if supporting documents for the £400 odd had not been attached to the form. The fact that the appellant did not comply with the accounting procedure did not make him guilty of fraud or dishonesty.

[56] In respect of the second charge, the Commissioner similarly found that no dishonesty or fraud had been established. The appellant had been given the oracle password for one transaction and did not obtain it fraudulently. The Commissioner also found that it had not been established that the appellant made any misrepresentation to anyone when he used the password for the three other legitimate business transactions. The appellant's contention that the transactions were legitimate and that the use of the password was necessary in respect of those transactions, as they were required for the Manager's report, were not refuted. There was furthermore no evidence that the appellant changed or attempted to change the password. He did not try to conceal what he had done with the password and had no intention to deceive the Country Manager, Ms Mokhesi concerning the use of the password.

[57] In those circumstances, the Commissioner had found that the appellant's dismissal had been substantively unfair. He ordered that the appellant be reinstated from 23 February 2011 and not from the date of his dismissal, because the appellant was guilty of breaching company procedures. The Commissioner awarded the appellant a loss of salary for a period of six months and two weeks and the award was made in pounds as agreed to between the parties.

<u>The review</u>

[58] In its application for review and in argument before us, the first respondent contended that the Commissioner's findings in respect of the first and second charges were "*grossly irregular and/or unreasonable*". The first respondent in effect submitted that the Commissioner erred in respect of certain findings, failed to take into account material evidence and arrived at a decision that a reasonable decision-maker would not have made. The first respondent also attacked the sanction which was imposed by the Commissioner, arguing, in effect, in that regard that the appellant was dishonest and fraudulent and that this had resulted in a breakdown of the trust relationship between the parties. In those circumstances, so it was argued, the Commissioner ought not to have ordered the reinstatement of the appellant and that the Commissioner's decision in that regard was one which a reasonable decision-maker would not have made.

[59] The test for the review of CCMA arbitration awards is now trite. It has been authoritatively stated in *Sidumo*[20] and further explained in *Herholdt v Nedbank Ltd*[21] and by this Court in, *inter alia, Fidelity Cash Management Service v CCMA and Others,*[22] *Bestel v Astral Operations Limited and Others*[23] and recently in *Gold Fields Mining South Africa (Pty) Limited (Kloof Gold Mine) v CCMA and Others.*[24] The test in brief is whether "*the decision reached by the Commissioner is one that a reasonable decision-maker could not reach*?"

[60] I shall first deal with the detail of the first respondent's attacks on the Commissioner's findings in respect of the charges and then I will deal with the attack on the sanction.

[61] In respect to charge 1, the first respondent's argument proceeded as follows: the appellant was in breach of the first respondent's policies when he "*committed the organisation to £400.48*". The e-mail from the Chief Financial Officer requesting the appellant to make arrangements for lunches for auditors who were coming to the UK was not pre-authorisation or pre-approval; The

[20] *Supra* at para 119.
[21] [2013] 11 BLLR 1074 (SCA).
[22] [2008] 3 BLLR 1997 (LAC).
[23] [2011] 2 BLLR 129 (LAC).
[24] [2014] 1 BLLR 20 (LAC) at paras 14 -16 (inclusive) and at paras 20 -1 (inclusive).

appellant was unable to produce "*any kind of voucher or legitimate business claim*" in respect of the expenses incurred; Reliance on illegible invoices which he only produced five to six months after the charges were laid did not assist him; The appellant gave contradictory evidence. At first he averred that the expenses were incurred during the period the auditors were in the United Kingdom, but it was clear from two of those invoices that they were not for that period. In the appellant's supplementary affidavit, he admitted that he was not able to recall the dates.

[62] The first respondent argued further concerning charge 1 as follows. The appellant produced inadequate proof of the expenses he had incurred and of the fact that they related to the first respondent. If the appellant had followed the correct policies and procedures from the outset he would not have struggled to justify the expenses and that this shows his dishonesty in the matter. Furthermore, that the Commissioner "*incorrectly calculated the illegible photocopies of the invoices that had been submitted by the appellant and arrived at an unsubstantiated conclusion that the total amount came close to £400.48*".

[63] The first respondent submitted further regarding charge 1, that the appellant's reliance on Mr Armstrong's evidence was futile, because Mr Armstrong testified that he signed the cheque requisition form on the basis of trust. According to the first respondent, this amounted to an illegitimate claim of expenses and the appellant "*clearly enriched himself by pre-approving his expenses to pay himself*".

[64] The first respondent submitted further that the Commissioner had "*failed to take into account that the mere production of the receipts and slips was not prima facie proof that the expenses incurred were for a legitimate company expense*". The first respondent argued that the appellant clearly misrepresented the facts to both, Mr Armstrong and the first respondent, by obtaining approval of a cheque requisition form without the S & T form having been approved by the Country Manager and that that in itself showed that the appellant was dishonest and that his actions amounted to fraud.

[65] The first respondent submitted further that the "*manner in which the Commissioner stepped into the shoes of the employer by stating what the charges should have been instead of what they were, amounted to a gross irregularity*". The Commissioner was also criticised for relying on the "*criminal law definition of fraud*". According to the first respondent, such reliance "*enforces the unreasonableness of the award because it is trite that the inquiry is not akin to a criminal trial*". The first respondent also submitted that the Commissioner "*failed to take into account that dishonesty in the employment context does not mean refraining from criminal acts: it embraces any conduct which involves deceit*".

[66] I need not say much about the above arguments raised by the first respondent in support of its attack on the Commissioner's findings in respect of count 1. The arguments lack merit and are devoid of a sound basis. In a number of instances they are circuitous and tautologous, based on suspicion or bias and are not supported by the evidence. The same can be said of the first respondent's arguments raised in respect of the findings on count 2, which I will deal with later.

[67] It was not unreasonable for the Commissioner to rely on the so-called "*criminal law*" definition of fraud. Fraud has the same elements even in a civil law context.[25] The first respondent alleged that the appellant was fraudulent and dishonest and it bore the *onus* to establish those rather serious allegations "*clearly and distinctly",*[26] on a balance of probabilities. The fact that the appellant did not comply with the company procedures did not make him guilty of fraud or dishonesty, or even deceitful, as the Commissioner very reasonably found.

[68] Mr Armstrong's evidence in effect was that he would not have signed the cheque requisition form without supporting documentation, which implies that there was supporting documentation. Ms Holmes' provides further confirmation. There was no evidence at all that the £400.48 was not in respect

[25] See on the topic of fraud in civil litigation, for example, LTC Harms *Amler's Precedents of Pleadings* (Lexis Nexis Butterworths; 6th Ed 2009) pp183-184.
[26] Ibid.

of a legitimate expense incurred by the appellant in the interest of the company. On the contrary, there was direct evidence of the appellant to that effect, corroborated by the receipts (insofar as they were legible) and the evidence of Mr Armstrong and Ms Holmes.

[69] In my view, one can definitely not conclude that the Commissioner arrived at the decision in respect of count 1 which a reasonable decision-maker could not have come to on the available evidential material.

[70] With regard to charge 2, the first respondent's arguments were in a similar vain to those made in support of its attack on the Commissioner's findings in respect of charge 1. The argument, briefly, was as follows: the Commissioner's findings in respect of the second charge were "*unfounded*" and failed to take into account the following material evidence, namely, that between 28 May 2011 and 4 June 2011 the Country Manager, Ms Mokhesi, who was required to authorise purchase orders initiated by employees in the UK office, by use of the password in the Oracle system, was en-route to South Africa and she had given the appellant the password to authorise a purchase order for a transaction. Instead, the appellant released three further purchase orders by using the password without the Country Manager's permission to do so. According to the first respondent, the appellant had pleaded guilty to the second charge and had admitted wrongfully using the password. He also admitted to the Country Manager and had apologised to her. According to the first respondent – "*the most clearly visible irregularity is the fact that the Commissioner found the appellant not guilty of an offence to which he pleaded guilty at the disciplinary hearing*".

[71] Even though it is recorded in the disciplinary proceedings that the appellant pleaded "*guilty*" to charge 2, one needs to examine that record carefully in order to establish whether he indeed pleaded guilty as contemplated in law. In order for guilt to have been established, the appellant would have had to freely, voluntarily and unequivocally admit all the elements of the charge. That includes fraud and dishonesty. In his defence at the disciplinary hearing, the appellant explained that he had used the password mistakenly in a situation of need. He denied being fraudulent or dishonest. He admitted being "*wrong*" but

denied that his intentions in using the password were "*illegal*". Technically therefore, the appellant did not plead guilty to the second charge, because he did not admit all the elements of the charge and the crucial ones remained in issue. To find him guilty in those circumstances would in itself have been grossly unfair and irregular.

[72] In the area of criminal law and procedure, where courts are constantly confronted with guilty pleas to serious criminal charges, special safeguards are provided that ensure that an accused person's utterances of a plea of guilty is in fact a proper plea of guilty and an unequivocal admission of guilt. For example, in terms of section 112(1)(b) of the Criminal Procedure Act 51 of 1977, the presiding officer may have to question the accused person with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty. Furthermore, courts are required not only to be convinced that an accused admits an allegation in the charge, but that the accused appreciates what that admission entails.

[73] Even though the disciplinary inquiry is not a criminal trial, it has certain features akin to such a trial. In a disciplinary hearing, for example, there is (a) charge(s) of misconduct to which an employee may either plead guilty or not guilty, which is similar to a plea to a criminal charge. Fairness and logic dictates that the same safeguards that apply in a criminal trial with regard to a plea of guilty, should also apply in disciplinary hearings where the employee faces dismissal.

[74] It is abundantly clear from the record of the disciplinary hearing that what the appellant himself said at the time of his plea of guilty in respect of the second charge, did not amount to an admission to fraud or dishonesty in relation to the use of the password. In those circumstances, he cannot be found to have effectively pleaded guilty to the second charge. In the absence of clear and distinct evidence that the appellant acted fraudulently or dishonesty, he could not have been found guilty of that charge.

[75] At the arbitration, there was no evidence to prove that the appellant's use of the password was fraudulent or dishonest or that he intended to deceive anyone by using it and that it was not in the company's interest that he used it as and when he used it for the three purchase orders. Therefore, in respect of the Commissioner's findings in respect of charges 1 and 2, I am of the view, that it has not been shown that there are findings that a reasonable decision-maker could not have made.

Re: the sanction

[76] The first respondent submitted that the Commissioner's finding on the sanction was irrational and irregular and not based on the evidence. According to the first respondent, the Financial Manager gave evidence that the offence of not obtaining a pre-authorisation was viewed in a serious light by the organisation and that by doing what he did, the appellant had broken the trust relationship. The first respondent justified the sanction of dismissal on the basis that the appellant was "*placed in a position with a high duty of trust with regard to monetary issues*" and "*the first respondent as a public organisation has to take 100% responsibility of how taxpayer's money is spent*" and, because "*the trust relationship was broken and there was no desire for the appellant to continue in the services of the first respondent*".

[77] The first respondent also referred to the averments of the Country Manager, Ms Mokhesi, made in a supplementary affidavit, that she could not trust the appellant and that given the working circumstances, including the fact that the UK office was small, she would not be able to run the office. She averred, *inter alia*, that "*honesty was critical and that the appellant could have merely picked up the phone when he wanted to utilise a password and that he did not do so and as a result the trust relationship was broken*". Reference was also made to what the Chief Financial Officer said in a supplementary affidavit, namely that the offences were serious and the trust relationship had been broken.

[78] The essence of this attack on the sanction of the Commissioner was on the basis that "*the misconduct of the appellant was dishonest and fraudulent and*

resulted in a complete breakdown of the trust relationship between the parties", therefore the sanction was not one which a reasonable decision-maker would have imposed.

[79] Concerning the powers of a Commissioner pertaining to the sanction, it has been held in *Sidumo* that:

> '*The 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. In arriving at a decision, a Commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances*.'[27]

[80] Therefore, it is for the Commissioner, having considered all the relevant circumstances, to determine whether the dismissal by the employer is fair.

[81] The Commissioner in this instance, in my view, properly took into account all the relevant circumstances, including the fact that the fraud and dishonesty had not been proven and that, at best, a failure by the appellant to adhere to company procedures had been shown. In my view, there was nothing wrong in the Commissioner commenting on the fact that even though the appellant had not been shown to be fraudulent or dishonest it had been shown that he did not comply with company procedures.

[82] As I stated earlier, the Commissioner's findings regarding the charges specifically cannot be said to be unreasonable. Similarly, his finding, that in the absence of proof of fraud and dishonesty the sanction of dismissal was not fair, cannot be faulted. The misconduct for which the appellant could have been found guilty of, had he been charged with it, namely, not complying with company procedures, did not justify his dismissal. In my view, the reasoning and findings of the Commissioner regarding the sanction were reasonable.

[83] In the circumstances, the review application that was brought by the first respondent in the court *a quo* ought to have been dismissed.

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[27] At para 79.

[84] There is no reason in my view in fairness and in law why the first respondent should not bear the costs of the appeal and of the review. Appellant's counsel argued for the costs of two counsel. I am of the view that one counsel was adequate and, accordingly, that only the costs of one counsel ought to be allowed. In respect of the costs of the application to lead further evidence, I make no order of costs in respect of that application.

[85] In the result, the following order is made:

1. No order is made in respect of the application to lead new evidence.

2. The appeal is upheld with costs. The order of the court *a quo*, reviewing and setting the award of the third respondent, is set aside and is substituted with the following order:

"*The review application is dismissed with costs.*"

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P Coppin JA

Musi JA *et* Makgoka AJA concurred in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT:	Adv Hein Gerber with him Adv R Grundlingh Instructed by Bester & Rhoodie Attorneys
FOR THE FIRST RESPONDENT	Mr A Snider Instructed by Clifffe Dekker Hofmeyr Attorneys