REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA2/13

In the matter between:

THE MINISTER OF SAFETY AND SECURITY	**First Appellant**
THE NATIONAL COMMISSIONER OF POLICE	**Second Appellant**
and	
MTHOZAMI MADIKANE	**First Respondent**
THE SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL	**Second Respondent**
THUTHUZELA NDZOMBANE N.O. (ARBITRATOR)	**Third Respondent**

Heard: **25 February 2014**

Delivered: **23 October 2014**

Summary: Review of arbitration award- employee charged and found guilty of misconduct charges for not complying with standing order in handling blood sample and defeating the ends of justice and dismissed. Arbitrator finding on probabilities that dismissal substantively unfair and procedurally unfair because employee not fit to appear at the disciplinary hearing and ordered reinstatement - Labour Court partially setting aside arbitration award but upholding arbitrator's findings on the charge of defeating the ends of justice- On Appeal held arbitrator erred materially in his approach to the drawing of inference of employee's knowledge and participation in the destruction of the

blood sample – in not taking into account all the evidence and the probabilities- inference drawn that employee had knowledge and was accomplice in tampering with blood sample. Arbitrator's award unreasonable. Labour Court erred in upholding arbitration award. Procedural unfairness- Arbitrator failing to take into account employee's witness's evidence that employee was fit to appear in the disciplinary hearing if represented and employee's participation in other proceedings- Arbitrator's finding unreasonable. Cross-appeal on costs dismissed. Appeal upheld arbitrator's award set aside and substituted- dismissal confirmed.

CORAM: TLALETSI DJP, HLOPE *et* COPPIN AJJA

JUDGMENT

COPPIN AJA

[1] This is an appeal against part of the judgment and order of the Labour Court (Lagrange J) in terms of which an award of the third respondent, acting as arbitrator under the auspices of the second respondent and in which it was found that the dismissal of the first respondent ("*Mr Madikane*") was substantively and procedurally unfair and reinstating Mr Madikane to his employment, was reviewed and only partly set aside. Mr Madikane is also cross appealing against the costs order of the Labour Court.

Background facts

[2] It is common cause that early on the morning of 26 November 2007, members of the South African Police Services ("SAPS") arrested Mr Tony Yengeni for alleged drunken driving. A sample of his blood ("*the blood sample*") was taken and was to be sent by the investigating officer, once appointed, to the Laboratory for analysis and, more particularly, to establish whether the alcohol level in Mr Yengeni's blood at the relevant time exceeded the legal limit. Pending its submission to the Laboratory, the blood sample, which was duly sealed, was placed in a drop safe at the Goodwood Police Station in the care of a SAP13 clerk, a member of the SAPS stationed there.

[3] On the same day, (i.e. 26 November), Inspector Lock, who was stationed at the Goodwood Police Station, was appointed investigating officer in the matter after he had duly informed the Station Commander, Senior Superintendent Hewana ("*Mr Hewana*") of Mr Yengeni's arrest. Upon Inspector Lock's appointment as investigating officer in the matter, Mr Hewana attempted to enlist his cooperation to tamper with the blood sample on promises that it would be good for his career prospects.

[4] Inspector Lock informed his superior in the detective section who was also stationed at the Goodwood Police Station, Superintendent Izaks, of Mr Hewana's request and his fears and reservations of either cooperating or not cooperating with Mr Hewana concerning the blood sample. Inspector Lock did not want to continue being the investigating officer in the matter and suggested that Superintendent Izaks appoint another senior police officer to replace him.

[5] Mr Madikane, a senior police officer of many years' standing, with the rank of captain, had just been transferred to Goodwood Police Station and it was his first day on duty there on the 26 November 2007. Superintendent Izaks appointed him as investigating officer in the matter on that same day. She did not inform him of Mr Hewana's approach to Inspector Lock, but warned him to be careful.

[6] It is common cause that Mr Hewana, who was unaware that Inspector Lock had informed Superintendent Izaks of his request to tamper with and corrupt the blood sample and unaware that Inspector Lock was no longer the investigating officer in the matter, yet again approached Inspector Lock in order to secure his cooperation with the tampering. Inspector Lock had informed Mr Hewana that he was no longer the investigating officer and that Mr Madikane had been appointed in his stead.

[7] It is further common cause that later on that same day (i.e. on the 26 November), Mr Madikane collected the blood sample from the SAP13 clerk who retrieved it from the drop safe. Mr Madikane did not take the blood sample to the Laboratory but left it in a desk drawer in Mr Hewana's office

with Mr Hewana's knowledge and consent. It was also not disputed that after collecting the blood sample Mr Madikane had been informed by a Care Centre of his son's illness; and that after leaving the blood sample in Mr Hewana's office Mr Madikane had gone to fetch his son from the Centre and took him to a doctor in the afternoon of 26 November.

[8] It is further common cause that the next day, Mr Madikane got another policeman, Constable Gaya, to assist him with the completion of the necessary forms for the submission of the blood sample to the Laboratory and that after Mr Madikane had retrieved the blood sample from Mr Hewana's office, Constable Gaya took the blood sample to the Laboratory.

[9] It was common cause that the seal of the blood sample was not tampered with from the time it was sealed after it was taken from Mr Yengeni, until it was left by Mr Madikane in Mr Hewana's office.

[10] It was also not disputed that after receiving the blood sample from Constable Gaya the Laboratory established that the seal of the blood sample had been tampered with and that the blood sample had been diluted and rendered useless for the purpose for which it had been taken in the first place.

[11] It is further common cause that the original docket in the matter had been altered. In particular, the times of arrest had been changed on the instruction of Mr Hewana.

[12] Mr Hewana and Mr Madikane were charged, in separate hearings, with misconduct following the corruption of the blood sample. It is common cause that Mr Hewana was found guilty at his disciplinary hearing of tampering with the blood sample and that he was consequently dismissed. Mr Madikane had testified falsely at the disciplinary hearing of Mr Hewana and contrary to a written statement and evidence subsequently given by him at his own disciplinary enquiry, to the effect that Mr Hewana was not aware that he, (Mr Madikane) had placed the blood sample in the drawer of Mr Hewana's desk.

[13] Mr Madikane was charged at his disciplinary enquiry, firstly with a failure to comply with standing order 335.9, which relates to the safekeeping of exhibits,

in particular, the blood sample (as I will explain in more detail later) and, secondly, with defeating the ends of justice. The latter charge related to the tampering with the blood sample. At his disciplinary hearing, Mr Madikane was found guilty of both charges and was dismissed. An internal appeal to the Appeals Authority of the SAPS was also unsuccessful. Mr Madikane thereupon took the matter to the Bargaining Council, the second respondent, complaining that his dismissal was both substantively and procedurally unfair.

[14] The third respondent in his award found in favour of Mr Madikane. Several witnesses were called at the arbitration proceedings. Inspector Lock, Superintendent Izaks, Constable Gaya, Inspector Rhona Burger, Inspector Taljaard, Mr Fahim Charles, Director Brandt, Superintendent Khanyisa Mzimkulu (Chief Psychologist), Ms Buyile Mdluli and Ms Denise Beukes gave evidence on behalf of the appellant. Mr Madikane called a psychiatrist, Dr Christopher George, and also gave evidence himself. I will deal with some of the detail of the evidence presented in considering the grounds of appeal.

[15] Mr Madikane's defence at his disciplinary enquiry, and subsequently at the arbitration, was that he was not guilty of any of the charges. He testified that just after retrieving the blood sample from the SAP13 clerk, he received a telephone call from his child's Care Centre informing him that his child was ill. This necessitated fetching his child from the Centre and taking him to a doctor. As a result, he could not take the blood sample to the Laboratory. When he did not find Superintendent Izaks in her office, he sought Mr Hewana and left the blood sample in Mr Hewana's care. He put it in a drawer of Mr Hewana's desk, where it was covered with some papers. He denied knowing of Mr Hewana's intention to tamper with or corrupt the blood sample. He ascribed his testimony at Mr Hewana's hearing, i.e. to the effect that Mr Hewana was not aware of the blood sample being in his drawer, to an error, which he also ascribed to a psychological condition, namely, depression, which Dr George testified about.

[16] I have to point out at this stage that, having found that it was not disputed that Mr Madikane had received a call from the Care Centre saying that his child was ill; that he had taken his child to a doctor at Kuilsrivier and was there at

16h30 and that his version appeared to be probable in circumstances, the third respondent found that since standing order 335 provided that the Station Commander was primarily responsible for safeguarding of exhibits and that there was no evidence that Mr Madikane knew or was aware of Mr Hewana's intentions with the blood sample, Mr Madikane was not guilty of breaching the standing order or of defeating the ends of justice. The third respondent held that even if Mr Madikane "*was guilty of breaching the standing* order", he did not believe that it would have led to a dismissal because, at best, Mr Madikane would only have committed an act of negligence and that does not constitute a dismissible offence. The third respondent found in respect of that charge that, in any event, the mitigating factors raised by Mr Madikane were sufficient to exclude dismissal as a sanction.

[17] In respect of the second charge, namely that of defeating the ends of justice, the third respondent found that "*there [was] not clear evidence that* [Mr Madikane] *was aware that Mr Hewana intended to tamper with the blood sample and also no evidence to suggest that [Mr Madikane] had intentionally assisted Mr Hewana to accomplish his illicit conduct*". Concerning the appellants' reliance on circumstantial evidence to prove this charge, the third respondent, having referred to academic writing on the subject[1] stated "*[I have*] *already found that there is no evidence that shows that* [*Mr Madikane*] *was aware of Mr Hewana's illicit intention. I also found that* [the] *evidence of both Superintendent Izaks and that of Inspector Taljaard was contradictory and stands to be rejected. In the light of the above evidence there are no consistent facts proved by the respondent in this regard. The evidence of [Mr Madikane] which was left unchallenged was that he had the intention of dispatching the blood sample to* [the] *Laboratory but was unable due to sickness of his child which evidence appeared to* [be] *more probable in the circumstances.*"

[1] *Schwikkard and Van der Merwe 'Principles of Evidence'* 2nd edition (2002) at page 21 where the authors state: "Circumstantial evidence often forms an important component of the information furnished to court. In these instances the court is required to draw inferences, because the witnesses made no direct assertion with regard to the fact in issue. These inferences must comply with certain rules of logic."

[18] The third respondent found that, at best for the appellants, they had a strong suspicion "*that Mr Madikane might be involved in that act of misconduct, but that was not enough to find him guilty of the offence charged and that the appellant had to prove Mr Madikane's guilt on a balance of probabilities*".

[19] The third respondent also held that if his conclusion regarding the proof of Mr Madikane's guilt was wrong, then he would nevertheless conclude in effect that Mr Madikane was not guilty of the offence charged, or if he was guilty, should not have been dismissed, because of the appellants' inconsistent treatment of Mr Madikane and the other accomplices of Mr Hewana, namely, Constables Jeftha and Voskuil, who tampered with the docket, and of Superintendent Izaks, who knew of Mr Hewana's approach to Inspector Lock and had done nothing about it. The third respondent surmised that if Constables Jeftha and Voskuil had been charged with misconduct and found guilty, a sanction no greater than a final written warning would have been imposed upon them. Although the third respondent acknowledged that merely because those employees did not receive a sanction equal to their conduct would not exonerate Mr Madikane from wrongdoing if it was proved that he had done wrong.

[20] The third respondent, apparently accepting the evidence of Mr Madikane and Dr George, held that Mr Madikane had not been fit to participate in the disciplinary proceedings and his subjection to those proceedings despite his psychological problems as testified to by Dr George, namely, depression, rendered those proceedings procedurally unfair. The third respondent rejected Superintendent Mzimkhulu's opinion, formulated after the disciplinary enquiry and on the basis of an examination of a transcript of the disciplinary proceedings, to the effect that Mr Madikane was fit to participate in the disciplinary enquiry.

[21] Having found that Mr Madikane's dismissal was both procedurally and substantively unfair, the third respondent issued an award, *inter alia*, ordering the SAPS to re-instate Mr Madikane on the same conditions that applied prior to his dismissal. In terms of the award, Mr Madikane was to report for duty on 3 May 2010. The third respondent also ordered the SAPS to pay Mr Madikane

back pay in the amount of R244 333,11 by no later than 31July 2010. The third respondent made no order regarding the costs.

The proceedings in the Labour Court

[22] The appellants brought an application in the Labour Court in terms of section 145 of the Labour Relations Act No 66 of 1995 ("*the LRA*") to review and set aside the third respondent's award on certain specific grounds and on the general ground that it was not an award that a reasonable decision-maker would have made.

[23] In respect of the third respondent's finding of procedural fairness, it was specifically averred by the appellants that the third respondent had failed to apply his mind, or to properly consider the evidence of Superintendent Mzimkhulu and Ms Mdluli, who were present at the proceedings relating to the promotion dispute that Mr Madikane had with SAPS and where Mr Madikane testified. It was further contended that the third respondent had failed to properly consider that Mr Madikane had also testified at Mr Hewana's disciplinary enquiry despite his alleged suffering from a major depressive episode.

[24] It was further contended on behalf of the appellants in their application for review that the third respondent failed to properly consider Dr George's evidence that Mr Madikane would have been able to deal with facts that were of significance to him. It was submitted that the evidence pertaining to the tampering with the blood sample was of significance to Mr Madikane and that, therefore, he was in a position to deal with such evidence. It was also submitted that Mr Madikane contradicted himself concerning Mr Hewana's knowledge of the blood sample being put in his drawer and had deliberately set out to falsely testify at Mr Hewana's hearing that Mr Hewana did not know of it, in order to exonerate Mr Hewana; and that Mr Madikane subsequently testified at his own disciplinary enquiry that Mr Hewana knew that he had put the blood sample in the drawer in order to exonerate himself.

[25] As regards the substantive fairness, it was contended on behalf of the appellants regarding the first charge, that standing order 335.1 provided that

the Station Commander was responsible for the safe custody of all property handed in at the charge office and that such responsibility may be delegated to another member of the SAPS at a larger centre, but standing order 335.2 provided, *inter alia*, in respect of small items, such as blood samples, that they must be confined to a safe or a strong room for safekeeping if the police station has such facilities. It was further contended that order 335.9 provided that while in the police's custody the greatest care must be taken of exhibits and every precaution must be taken to prevent them from being tampered with. It was averred in the application for review that the third respondent had to determine whether the leaving of the blood sample in a drawer of Mr Hewana's desk was in compliance with the standing order. There was evidence by Inspector Burger, the SAP 13 clerk and Director Brandt, that the placing of a sample in a drawer, did not comply with the standing order and that had the third respondent taken their evidence into account, he could not have concluded that Mr Madikane had in fact complied with standing order 335.

[26] Regarding the second charge, namely, that of defeating the ends of justice, it was contended in the application of review on behalf of the appellants (i.e. the applicants in the court *a quo*), that even if there was no direct evidence that Mr Madikane knew that Mr Hewana intended to tamper with the blood sample and that Mr Madikane assisted Mr Hewana in that regard, those were the only reasonable inferences to be drawn and they were consistent with the proven facts. In that regard, it was contended in particular that: the blood sample had been tampered with between the time Mr Madikane collected it from the SAP 13 clerk (i.e. Inspector Burger) and when it was handed to Constable Gaya to take to the Laboratory; only Mr Madikane and Mr Hewana exercised control over the blood sample during the aforementioned period; Mr Hewana knew that Inspector Lock was no longer the investigating officer and that he had been replaced by Mr Madikane; Mr Hewana knew that it was Mr Madikane's duty, as investigating officer, to take the blood sample to the Laboratory; the original docket which had been handed to Mr Madikane had been altered and tampered with by the arresting officers on the instruction of Mr Hewana in that, they changed the time of Mr Yengeni's arrest; Mr Madikane, as

investigating officer, exercised control over the docket and it was Mr Madikane who put the docket that had been altered in Superintendent Izaks' safe. Superintendent Izaks only discovered that the docket in her safe was not the 'original' docket after she had been called to a meeting concerning the tampering with the blood sample; Mr Madikane deliberately testified falsely at Mr Hewana's hearing that Mr Hewana did not know of the blood sample that had been put in his drawer in order to exonerate Mr Hewana.

[27] Regarding the inconsistency point, it was contended on behalf of the appellants in the application for review that, in respect of Superintendent Izaks, the third respondent had failed to take into account that it was not the case of the police that Superintendent Izaks had failed to comply with the standing order, or that she had tampered with the blood sample. Furthermore, that Superintendent Izaks' conduct after she had been informed by Inspector Lock of Mr Hewana's intention was reasonable. She could not confront Mr Hewana lest Inspector Lock had misunderstood Mr Hewana and that the appointment of a senior officer to replace Inspector Lock was a reasonable measure taken by her to safeguard the integrity of the blood sample because Mr Hewana would have been less inclined to approach such an officer to tamper with the blood sample. It was submitted that the SAPS were consistent because Mr Hewana had been charged with misconduct arising from the tampering with the blood sample and had been dismissed.

[28] It was further submitted on behalf of the appellants that the third respondent erred in finding that Superintendent Izaks and Inspector Taljaard had contradicted each other in all material respects. On the contrary, so it was contended, Inspector Taljaard's evidence corroborated that of Superintendent Izaks in material respects. It was accordingly contended that the third respondent failed to properly consider all the evidence that had been presented at the arbitration and that he had made an unreasonable credibility finding in respect of Superintendent Izaks and Inspector Taljaard. It was further argued that the third respondent also, and accordingly, erred in the weighing- up of the probabilities and the inconsistencies in Mr Madikane's

evidence and came to a conclusion which a reasonable decision-maker would not have come to.

[29] Mr Madikane opposed the review application in the court *a quo* and contended, in essence, that the third respondent was correct in his finding and conclusions and that his award was indeed one that a reasonable decision-maker would have made in the light of the evidence and the circumstances. Mr Madikane, *inter alia*, contended that there was no direct evidence at the arbitration hearing that he knew that Mr Hewana intended to tamper with the blood sample, and that it had not been put to him that he was aware of that. He contended that the evidence of Superintendent Izaks and Inspector Taljaard was "*of [an] exceptionally poor quality*". He further contended in respect of the credibility findings by the third respondent, that those findings, typically, do not warrant interference on review because the arbitrator "*is steeped in the matter*" and "*enjoys the advantage of being face-to-face with the witnesses*". In any event, so he contended, the credibility findings were reasonable.

[30] The court *a quo* upheld the appellants' argument regarding the breach of standing order 335. The court *a quo* held that it was clear that the third respondent (i.e. the arbitrator) adopted Mr Madikane's broad interpretation of the standing order, namely, that since the Station Commander was responsible for the safekeeping of property and exhibits, there was sufficient compliance if Mr Madikane left the exhibit with the Station Commander, but then went on to hold that the third respondent did not act reasonably in concluding that Mr Madikane did not breach the standing order by leaving the blood sample in the care of the Station Commander. The court *a quo* reached this conclusion on the basis of the following: placing of the sample in a drawer (which was not proved to have been lockable), where it was merely covered with papers, was not reasonably reconcilable with Mr Madikane's duty to exercise the greatest care with the blood sample and to prevent it from being lost, damaged or tampered with; the designated storage facility at the Goodwood Police Station was a drop safe facility that was supervised by the SAP 13 clerk and it was not shown to have been impossible for Mr Madikane

to have returned it to that facility for safekeeping – particularly, because, as Mr Madikane himself conceded, it would not have taken three to five minutes for him to get there; the fact that Mr Madikane might have had a call to collect his child because of illness, did not justify his abandonment of his duty to take the greatest care of evidence that was in his custody. The court *a quo* accordingly set aside the third respondent's finding that Mr Madikane was not guilty of breaching the standing order and substituted it with the finding that Mr Madikane was indeed guilty of breaching it.

[31] With regard to the charge of defeating the ends of justice, the court *a quo* held, in effect, that the third respondent's finding on that charge could not be said to be so unreasonable that no reasonable arbitrator could have made it. In particular, it held that the finding. that Mr Madikane's evidence of his personal emergency relating to the illness of his child was uncontested and that his version of events was therefore plausible, was not a finding a reasonable arbitrator could not make. However, the court *a quo* stated parenthetically that if it was an appeal, it would have been inclined to hold that "*the arbitrator's conclusion on the probabilities was wrong when all the evidence is properly weighed*". Furthermore, the court *a quo* held that Mr Madikane's supposed complicity in the tampering with the docket was not an issue that was canvassed directly with him in cross-examination and that it was never put to him that it would be argued that he was not a credible witness, because he adapted his evidence according to the needs of the enquiry in which he was testifying. The court *a quo* held, therefore "*in fairness to the arbitrator*" if the appellants never "*put the propositions they now seek to advance to [Mr] Madikane during his testimony*" the arbitrator cannot "*be blamed for not considering the connection between that evidence and the likelihood of him acting as [Mr] Hewana's accomplice in tampering with the blood sample*". Accordingly, so the court *a quo* found, the arbitrator did not act "*wholly unreasonably in accepting the coincidental explanation of how the sample fell into Mr Hewana's hands*" or commit a reviewable error in not considering the contradictions between Mr Madikane's evidence in Mr Hewana's disciplinary enquiry and in his own arbitration, concerning Mr Hewana's knowledge of the sample having been placed in his drawer.

[32] In respect of the issue of the alleged inconsistency in the treatment of Mr Madikane, Superintendent Izaks and the two constables who altered the docket and changed their statements, the court *a quo* held that the arbitrator failed to appreciate the relevance of the evidence given by Ms Beukes that the constables were very new in the SAPS at that stage and had been instructed by a very senior officer namely, Mr Hewana, to tamper with the docket and alter their statements. The court *a quo* also held that the arbitrator did not give any real consideration to the difficult position Superintendent Izaks found herself in where she had no direct evidence of Mr Hewana's intentions with the blood sample and took steps, which she thought, would minimise the risk of him being able to make good his reported intentions. The court *a quo* also held that the arbitrator had also failed to consider Superintendent Izaks' evidence that she had repeatedly refused to take the docket back from Mr Madikane without the blood sample and assumed that Mr Madikane would retrieve the sample and put it, together with the docket, into the safe in her office.

[33] Having remarked that the arbitrator's acceptance of the possibility that after Mr Madikane had deposited the blood sample in the drawer of Mr Hewana's desk, Mr Hewana had tampered with the blood sample himself without Mr Madikane's knowledge, would have been unreasonable if only the undisputed facts were considered, the court *a quo* held further that it is difficult to avoid the conclusion that Mr Madikane had direct knowledge that the docket was tampered with since there was no evidence that he ever relinquished control of it between the time he removed it from Superintendent Izaks' safe to the time he replaced it there. The court *a quo* stated in that regard: "*If he allowed the docket to be tampered with at the time when it was under his control, then there is more reason to believe he would have assisted in the interference of the blood sample, even if it was only by way of making it available to Hewana. His change of testimony between Hewana's enquiry and his own is also cause for concern about his veracity which the arbitrator did not even consider*."

[34] The court *a quo* then went on to conclude on the issue of consistency, that the arbitrator had "*applied an unreasonably broad comparative approach*" and that he had failed "*to consider material evidence which might have justified not acting in the case of the individuals mentioned*". In respect of the issue of the procedural fairness of the disciplinary enquiry, the court *a quo* concluded, that even though some "*trenchant points*" were made why it was not unreasonable for the chairperson of the enquiry to have proceeded with the disciplinary enquiry, it could not find that the arbitrator's finding, that the enquiry ought not to have proceeded, was unreasonable.

[35] The court *a quo* held that even if Mr Madikane breached standing order 335, the sanction of dismissal for that transgression was too harsh and that an order of reinstatement with a final written warning was a more appropriate sanction. The court *a quo* accordingly ordered, *inter alia*, that the arbitrator's finding that Mr Madikane was not guilty of failing to comply with standing order 335.9 be set aside and substituted with a finding of guilt in respect of that charge; that the relief ordered by the arbitrator be set aside and replaced with an order that SAPS (i.e. the appellants) reinstate Mr Madikane "*with retrospective effect to 1 January 2010*" and pay to him arrear remuneration due to him within 30 days of him resuming his duties. Furthermore, that the appellants issue Mr Madikane with a final written warning for his non-compliance with standing orders. The parties were ordered to pay their own costs.

The appeal

[36] After having unsuccessfully applied to the court *a quo* for leave to appeal against part of its judgment and order, the appellants successfully petitioned this Court for leave to appeal accordingly. Mr Madikane only noted a cross-appeal against the court ***a quo's*** ruling on costs and sought to have that order substituted with an order that the appellants (i.e. the applicants in the court *a quo*) pay his costs jointly and severally, the one paying the other to be absolved. The appeal of the appellants is directed at what the court *a quo* held in respect of the second charge, namely, that of defeating the ends of justice, including the sanction and its conclusion that the arbitrator's finding

that the disciplinary proceedings were procedurally unfair, was not so unreasonable that a reasonable arbitrator would not have made such a finding.

[37] In respect of the second charge, the appellants' arguments, in essence, were that if all the evidence was properly evaluated, the only reasonable inference that could have been drawn was that Mr Madikane knowingly enabled Mr Hewana to tamper with the blood sample and so was an accomplice of Mr Hewana in defeating the ends of justice. It was pointed out, *inter alia*, that the court *a quo* was at pains to emphasise that if it had been considering an appeal, it would have been inclined to find that the arbitrator's conclusion on the probabilities was wrong, particularly, if all the evidence was properly assessed. On that aspect, it was submitted that the court *a quo* erred in nevertheless concluding, notwithstanding a failure by the arbitrator to properly assess all the relevant evidence and the probabilities, that the arbitrator's findings were reasonable. In essence, the submissions in this regard were that the arbitrator's failure to take into account relevant evidence could never be said to be reasonable and that had the arbitrator taken into account such evidence, he could never reasonably have made the findings that were being contested.

[38] It was submitted that, in addition to the evidence of Inspector Lock that Mr Hewana requested his assistance to tamper with the blood sample and Mr Hewana's knowledge that Mr Madikane replaced him (i.e. Inspector Lock) as investigating officer in the matter, there were other proven facts that pointed to collusion between Mr Madikane and Mr Hewana. Mr Madikane conceded that it would have taken no more than three minutes for him to return the blood sample to the SAP 13 clerk after he got a call from his child's school; it was not disputed that the original docket in the matter had been tampered with by the constables the night after the arrest; that the docket was at all times in Mr Madikane's control according to Superintendent Izaks; that Mr Madikane only brought the docket back in the afternoon of the 27th; that Superintendent Izaks gave Mr Madikane the keys to the safe and he put the docket in the safe and returned the keys to her; that Mr Madikane at no stage denied or placed in

issue that he was in control of the docket and Superintendent Izaks' evidence, of him collecting the docket from the safe and returning it, was not disputed; Mr Madikane gave evidence at Mr Hewana's disciplinary hearing, which was favourable to Mr Hewana and inconsistent with what he had said in his statement and what he testified to in his own disciplinary hearing, namely, to the effect that Mr Hewana was not aware of the blood sample in his drawer; Mr Madikane's explanation for giving such evidence was not credible; Mr Madikane knew what the charges against him were, namely, that he had been complicit with Mr Hewana in tampering with the blood sample; that the questioning of Mr Madikane and the witnesses was directed at establishing that he was complicit in tampering with the blood sample.

[39] It was also submitted on behalf of the appellants that the third respondent's decision was one which a reasonable decision-maker, having taken into account and having properly assessed all of the evidence, would not have arrived at. With regard to the sanction, it was submitted that the first charge was so serious that a sanction of dismissal in respect of that charge alone was justified, and that dismissal was clearly justified in respect of the conviction on the second charge.

[40] In respect of the procedural fairness issue, it was argued on behalf of the appellants that the court *a quo* erred in holding that the arbitrator's finding of procedural unfairness at the disciplinary enquiry was reasonable because the arbitrator had failed to apply his mind properly to the evidence adduced by Mr Madikane's own expert witness, the psychiatrist, Dr George. In particular, it was submitted that Dr George's evidence-in-chief, that Mr Madikane was able to be present at the enquiry if someone represented him, and Dr George's concessions under cross-examination that Mr Madikane would be able to participate in the hearing, understand what was going on and be able to appreciate what the reason for the hearing, was not taken into account. On that aspect, it was submitted that Mr Madikane was represented throughout the enquiry and had attended two other hearings before his own disciplinary hearing, one relating to a promotion dispute which he had with the employer,

which he had initiated and in which he was a party and the disciplinary enquiry of Mr Hewana where he testified as a witness.

[41] Relying on the decision in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[2] and the recent decisions in *Herholdt v Nedbank Ltd*[3] and *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others,*[4] it was submitted on behalf of Mr Madikane, basically, that the court *a quo* was correct in finding, in respect of the matters in issue, that the third respondent's findings and conclusions were not so unreasonable that a reasonable decision-maker would not have made them and that, therefore, the appeal should be dismissed with costs. In respect of the counter-appeal on the costs order made by the court *a quo,* it was submitted that the court *a quo* ought to have ordered the appellants (i.e. the applicants there) to pay Mr Madikane's costs for the review jointly and severally, because Mr Madikane was substantially successful in opposing the review application and that there was no basis in law or fairness why a costs order should not have been given in his favour against the appellants.

[42] Regarding the charge of not complying with standing order 335: the court *a quo's* finding that Mr Madikane did in fact breach the order and that he ought to have been convicted accordingly was not appealed against or challenged. In my view, those findings of the court *a quo* are, in any event, unassailable. Because of my conclusion on the second charge, namely, that of defeating the ends of justice, I shall first deal with the merits of that charge and then with the issue of the sanction and, lastly, with the issue of the procedural fairness of the disciplinary enquiry.

Defeating the ends of justice

[43] There was no direct evidence that Mr Hewana approached Mr Madikane to assist with the tampering of the blood sample, or that Mr Madikane knew that Mr Hewana intended to tamper with it. The employer sought to prove this by means of inference.

[2] [2007] 12 BLLR 1097 (CC).
[3] [2013] 11 BLLR 1074 (SCA).
[4] [2014] 1 BLLR 20 (LAC).

[44] The position regarding the process of inferential reasoning is trite. Citing *R v Blom*[5] and *Ocean Accident and Guarantee Corporation Ltd v Koch*[6] where the court referred to '*Wigmore on Evidence',*[7] Nugent JA, in *S A Post Office v Delacy and Another*[8] summarised the position as follows:

> '*The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be 'consistent with all the proved facts. If it is not, then the inference cannot be drawn' and it must be the 'more natural or plausible, conclusion from among several conceivable ones' when measured against the probabilities.*'

In *Ocean Accident*, Holmes JA explained that the word "*plausible*" was used in *Wigmore* in the sense of "*acceptable, credible, suitable*".

[45] It was clearly not reasonable for the third respondent to not take into account all the evidence in deciding whether the second charge of misconduct had been proven against Mr Madikane. The latter's evidence about the emergency that confronted him after being called by his child's school concerning his child's health and the fact that that evidence was not disputed is clearly not determinative of the inference to be drawn. The inference sought to be drawn could only be drawn in the light of all of the evidence. In my view, the court *a quo* erred in finding that despite the third respondent having ignored evidence material to the issue, his conclusion, concerning the inference to be drawn, was reasonable. The third respondent's conclusion on the inference to be drawn is based on a material misdirection.

[46] The court *a quo* was at pains to point out that if it had been dealing with an appeal it would have been more inclined to say that the arbitrator's conclusion on the probabilities was wrong "*when all the evidence is properly weighed*". The court *a quo* seemed thereby to suggest, or imply that, because of the test for reviews (which is different to that of appeals) a failure to weigh all the evidence and probabilities, in deciding whether to draw inferences, was reasonable. That approach cannot be correct. The failure to weigh all of the

[5] 1939 AD 188 at 2-203.
[6] 1963 (4) SA 147 (A) at 159B-D.
[7] 3rd Edition para 32.
[8] 2009 (5) SA 255 (SCA) at para 35.

relevant evidence and the probabilities to draw inferences and make findings cannot be said to be reasonable. It is not only wrong not to take into account all of the relevant evidence but is also unreasonable and clearly what a reasonable decision-maker would not do.[9]

[47] Most of the evidence was common cause, save for some aspects such as, for example, whether Mr Madikane knew of Mr Hewana's aims and intentions with the blood sample and whether Mr Madikane assisted Mr Hewana to achieve them, by making the blood sample available to Mr Hewana; whether Mr Madikane had removed the docket from Superintendent Izaks' office where it was kept in a safe and whether he had been in control of it throughout, i.e. from the time the matter was assigned to him, or from the time he took it from Superintendent Izaks' office, until a falsified docket had been deposited back into the safe in Superintendent Izaks' office; whether Mr Madikane had a longstanding, friendly relationship with Mr Hewana at the time of the incident, as opposed to a mere "*nodding acquaintance*"; and whether Mr Madikane knew how to deal with exhibits such as blood samples in "*drink and drive cases*". The last aspect does not require any specific further elaboration.

[48] At the outset, something needs to be said about Appellate and reviewing court's deference to factual findings of the trier of facts, in this instance, an arbitrator. The rule of practice that such courts will not readily interfere with such findings is not an inflexible one. The factual findings of an arbitrator are not cast in stone and may be interfered with if they are unreasonable or based on a misdirection and are material, in that they impact on the outcome of the matter.[10] The rule was never intended to 'tie the hands' of the appeal or reviewing court, but was intended to assist those courts to do justice. The Labour Court has the power, in terms of s 145(4), when setting aside an

[9] See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) at para [78] and *Cusa v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC) at para [66].
[10] Compare: *Bernert v ABSA Bank Ltd* 2011 (3) SA 92 (CC) at 120-122 paras 105 and 106 where the Constitutional Court had occasion to discuss the meaning and implications of the decision in *R v Dhlumayo and another* 1948 (2) SA 677 (A) concerning the appellate court's deference to factual findings of the trial court.

arbitrator's award, to determine the dispute in the manner it considers appropriate.

[49] In my view, the following could be readily found to have been proved on the evidence, *inter alia,* that:

49.1 the blood sample was properly extracted from Mr Yengeni and was properly sealed and not tampered with up to the time it was collected by Mr Madikane from the SAP 13 officer, Inspector Burger, at about 13h30 on Monday 26 November 2007;

49.2 Mr Hewana had approached Inspector Lock, the first investigating officer in the matter, to enlist his cooperation in order to gain access to and to tamper with the blood sample and had told Inspector Lock not to discuss that with anyone else;

49.3 Mr Hewana knew that Inspector Lock was no longer the investigating officer and that Mr Madikane had replaced Inspector Lock;

49.4 having taken the blood sample from the SAP 13 officer, Mr Madikane did not return it to the SAP 13 officer, or to the drop safe, or submit it to the Laboratory on 26 November, but went to place it in a desk drawer in Mr Hewana's office and that Mr Hewana knew that it was there;

49.5 Mr Madikane only collected the blood sample from Mr Hewana's office on Tuesday the 27 of November 2007 at about 13h00;

49.6 Constable Gaya took the blood sample from Mr Madikane on 27 November, after Mr Madikane had collected it from Mr Hewana's office, and at Mr Madikane's request, took it to the Laboratory where it was established that the seal of the blood sample and the blood sample itself had been tampered with and that the blood sample had been corrupted;

49.7 the original docket in the matter, which had been assigned to Mr Madikane, had been interfered with and the original time of arrest had been falsified and altered by the arresting officers, Constables Jeftha and Voskuil, on the instructions of Mr Hewana;

49.8 Mr Hewana had been charged at his disciplinary enquiry, *inter alia,* with tampering with the blood sample and had been found guilty on that charge and dismissed;

49.9 Mr Madikane had testified at Mr Hewana's disciplinary enquiry and, on his own admission, had given a false version exonerating Mr Hewana in that he had testified that when he put the blood sample in Mr Hewana's desk drawer, Mr Hewana was not aware of him doing so and was not aware of the blood sample being there;

49.10 It would have taken no more than three to five minutes from the time Mr Madikane got a call from his son's school, for Mr Madikane to have returned the blood sample to the drop safe at the Goodwood Police Station.

[50] Regarding the issues that appear to have been in contention. There was evidence about Mr Madikane's relationship with Mr Hewana. Superintendent Izaks testified on this aspect during her cross-examination at the arbitration to the effect that one of the reasons why she did not tell Mr Madikane, at the time of appointing him as investigating officer, about what transpired between Mr Hewana and Inspector Lock regarding the blood sample, was because she knew that Mr Madikane and Mr Hewana were good friends and out of fear of jeopardising their friendship. Mr Madikane's legal representative put to Superintendent Izaks that Mr Madikane's version of the relationship was that "*he knows Mr Hewana.* [H]*e does know him, but they're not good friends. He'd been transferred – he knows him from the past, but he had been transferred to that station on that day*". His legal representative demanded a response from Superintendent Izaks regarding that version. Superintendent Izaks' response was as follows:

> '*When Mr Madikane was introduced to me, and in the office of Superintendent Hewana, he said 'I know this man for a very long time where I know him [from] – we were in college together those years. He is also from the Eastern Cape, I know him very well. We are friends, we. And he did not say anything when Superintendent Hewana told that to me.*'

In his rejoinder to her response, Mr Madikane's legal representative said:

> '*Okay. Well, you've heard Mr Madikane's version. But let's explore that. If you know that they are very good friends; then it makes it worse for you. Because what you've done now is that you've assigned the case to a person who is very goods friends – on your version – with Hewana.*'

[51] Mr Madikane in his evidence-in-chief gave a different version to that which was put by his legal representative to Superintendent Izaks. He denied knowing Mr Hewana before 26 November. He testified that he only knew Mr Hewana "*physically*" and only knew the name "*Hewana*". Mr Madikane denied meeting Mr Hewana before 26 November and said that he only knew of him because he once featured in the media in the Eastern Cape. Mr Madikane then testified in response to a leading question put by his legal representative during his evidence-in-chief about how he approached Mr Hewana to leave the blood sample with him. The question and answer was as follows:

> '*Okay. So you had met Senior Superintendent Hewana in the morning before this incident, is that right?*'

Mr Madikane answered, emphatically: "*No, no, no*." He then testified that when he approached Mr Hewana in his office with the blood sample it was his first time to meet Mr Hewana. Mr Madikane testified that he once saw Mr Hewana when the latter was passing their office and a constable addressed Mr Hewana as "*Station Commissioner*". Mr Madikane testified that at the time Mr Hewana was wearing uniform and his badges and the constable told Mr Madikane that he was "Superintendent Hewana". Mr Madikane testified that the first time he spoke to Mr Hewana was when he went to leave the blood sample with him, but then in response to the following leading question by his legal representative, namely "*Okay, so you hadn't spoken to him, he hadn't introduced you to people at the morning parade?*", Mr Madikane changed his version and testified that Mr Hewana had introduced him at the morning parade and had said things about him there, that he was "*a good detective and so on and so and so*". Mr Madikane now admitted emphatically that he had met Mr Hewana earlier on that day, in other words on 26 November. Under cross-examination by the police's legal representative, Mr Madikane

testified that he met Mr Hewana on the morning of 26 November for the first time. Mr Hewana introduced him to all the staff of the police station in order for them to know him (i.e. Mr Madikane).

[52] Viewed in the light of all the evidence, Mr Madikane's version of his relationship with Mr Hewana was contradictory. He changed his version of their relationship as he was giving evidence. It is more probable that Mr Madikane knew Mr Hewana by the time he started to work at Goodwood Police Station on 26 November and a finding to that effect is not only reasonable, but also justified. The third respondent failed, *inter alia*, to consider the evidence of the relationship between Mr Hewana and Mr Madikane, even though that was very relevant in considering whether an inference could be drawn that Mr Madikane had been approached by Mr Hewana to provide him with the blood sample and whether Mr Madikane was aware of Mr Hewana's intentions with it.

[53] Regarding Mr Madikane's control of the docket in the matter: the third respondent also did not take this evidence into account. There was pertinent evidence on this issue. According to Superintendent Izaks, after Inspector Lock brought her the docket in the matter, she locked it in the safe in her office. When she appointed Mr Madikane as investigating officer, she discussed the docket with him and told him to be careful with the investigation; Mr Madikane took the docket from her and said "*Don't worry*" and left her office with it; After a brief period, he returned with the docket and told her to keep it in a safe; At about 12h30 on 26 November, Mr Madikane again asked her for the docket because he wanted to fetch the blood sample from the SAP 13 office and dispatch it to the Laboratory for analysis; She gave him the docket and he then left with it; At about 14h30, while she was in her office talking to Inspector Taljaard, Mr Madikane brought the docket back. She testified that she asked Mr Madikane how he had dispatched the blood sample. In reply he told her that he did not dispatch it and that she should not worry; that the blood sample was with Mr Hewana. She refused to take the docket from Mr Madikane in those circumstances and he left again. According to Superintendent Izaks, Mr Madikane returned to her the same day and had

the docket in his hand and said that he was going to Mr Hewana and she never saw him again for the rest of that day.

[54] According to Superintendent Izaks, on Tuesday 27 November, they had a meeting in Mr Hewana's office to discuss the annual awards and Mr Hewana asked about progress in the investigation of the Yengeni matter. He asked where the blood and the docket were and she told him that the docket was with Mr Madikane and that the blood was in his drawer and he pretended to be surprised. Later in the afternoon on 27 November, Mr Madikane returned the docket to her. She was busy at her desk and she handed him the key to the safe. Mr Madikane took the key, went to put the docket in the safe and returned the key to her. He told her that the blood sample had been dispatched. On about the Wednesday 28 November, he came back to her and requested the docket yet again, because he wanted to request the Laboratory to expedite the analysis of the blood sample. She again handed him the key to the safe and he retrieved the docket himself, found the requested address to the Laboratory and locked the docket in again.

[55] According to Superintendent Izaks, on 1 December, she was summoned to a meeting in Mr Hewana's office and told to bring the docket along because Commissioner Ndebela and Director Brandt were coming to peruse it. She opened the safe to get the docket and noticed that the docket that was there was not the same as the original docket which she received from Inspector Lock. It was different in certain respects and, more pertinently, the date and time of Mr Yengeni's arrest were now different. When she got to Mr Hewana's office where Director Brandt and Commissioner Ndebela were waiting, and Mr Madikane was also present, the docket was perused. After Commissioner Ndebela and Director Brandt had left the office, she wanted to discuss the docket with Mr Hewana. He and Mr Madikane spoke to each other in a language that she did not understand. Then Mr Hewana turned his back to her and he and Mr Madikane started to laugh. About an hour later, Mr Madikane telephoned her and told her that he did not want anything further to do with the investigation and the docket. Later that evening Director Brandt also telephoned her and she informed him, *inter alia,* that the docket she had

brought to them was not the same as the one she had received from Inspector Lock.

[56] Mr Madikane's version about his contact with and control of the docket differed in material respects from Superintendent Izaks' version. In his evidence-in-chief at the arbitration hearing, Mr Madikane testified that when Superintendent Izaks assigned the case to him there was no "*physical docket*". She merely instructed him orally. This despite Inspector Lock's unchallenged evidence that there was a "*physical*" docket that he had worked on and that he had handed to Superintendent Izaks upon telling her of the difficulty he had encountered with Mr Hewana. Mr Madikane did not say anything much about the docket in his evidence-in-chief. In response to a question put to him by his legal representative that it was Superintendent Izaks' evidence that he had returned the docket, he testified that he returned the docket to Superintendent Izaks on the Wednesday, that would have been on 28 November. He testified that he told her that he does not want to be involved in the investigation and that she should "*take the docket*". All of this implied that he, Mr Madikane, at some point had the docket with him and only returned it to Superintendent Izaks on 28 November.

[57] Under cross-examination, Mr Madikane conceded that the docket was first with Inspector Lock and that, after the matter was assigned to him, Superintendent Izaks gave him the docket and that he returned it to her again. He denied, however, that she gave him the docket on Monday 26 November and testified that he only got the docket on the morning of 27 November when he was dealing with dockets that had been brought forward. He testified that Superintendent Izaks was telling a lie when she said that she gave him the docket on 26 November. However, Superintendent Izaks' evidence in that regard was not challenged when she was cross-examined by Mr Madikane's legal representative.

[58] Mr Madikane testified that throughout the 26 November he never had the docket with him and that he only got it on the morning of 27 November, i.e on the Tuesday.

[59] On the probabilities, it is unlikely that Mr Madikane would have been assigned the matter without a docket. It was clearly in existence and had been handed by Inspector Lock to Superintendent Izaks. In any event, Inspector Lock's evidence to that effect was not challenged. A perusal of the docket would also have been crucial for Mr Madikane as investigating officer. He would have had to peruse it in order to see what had been done and what was still to be done in the investigation of the matter. Even if one does not take into account Superintendent Izaks' version of when she gave him the docket and when he returned the docket to the safe in her office (because of the contradictory evidence that Inspector Taljaard gave in that regard as well), on Mr Madikane's own version, he was in control of the docket from the morning of 27 November. And on his own version, he returned the docket on 28 November, after he had decided that he did not want to be involved in the matter any further. Constables Jeftha and Voskuil admitted to fraudulently altering the docket (i.e. and creating another docket) on the evening of 27 November. They *inter alia* changed the arrest time and inserted contents that were not there originally. The docket that Superintendent Izaks retrieved from her safe was the falsified one. There is no evidence at all that she was handed a second docket by Mr Madikane or that there were two dockets in the safe in her office pertaining to the same matter.

[60] While one does not have to make any finding regarding Mr Madikane's involvement in the altering of the docket, on the evidence, it can be found that he was in control of the docket in the matter of Mr Yengeni.

Mr Madikane's knowledge of an involvement in Mr Hewana's intention to destroy the blood sample

[61] The inference that Mr Madikane became aware of Mr Hewana's intention to tamper with the blood sample and that he actively and knowingly assisted Mr Hewana to achieve that objective, by making the blood sample available to him, is the most natural and plausible conclusion when measured against the

probabilities and upon a proper evaluation of all of the evidence and not merely selected parts. It is clearly consistent with the proved facts. But the other inference namely, that Mr Madikane left the blood sample with Mr Hewana coincidentally, which is the inference the third respondent (i.e. the arbitrator) seemingly, drew and which the court *a quo* seemed to have found to have been a reasonable and acceptable inference to draw, is clearly not natural or plausible when measured against the probabilities and upon a proper evaluation of all of the evidence. One does not even have to reject Mr Madikane's version that he received a call from his child's school and that he had to take his child to a doctor and that he did so. It might have been the case, but that does not exclude the fact that Mr Hewana wanted access to the blood sample; that he required the investigating officer's cooperation in tampering with it; an aim and objective that he made know to Inspector Lock; and that he got such access to the blood sample that very same day through Mr Madikane, who had replaced Inspector Lock as investigating officer. Mr Madikane's version that he was ignorant of Mr Hewana's intention, considered in the light of all of the evidence and the probabilities, cannot reasonably possibly be true. The court *a quo* erred in finding that the third respondent could reasonably have come to a different conclusion, as far as the drawing of inferences and Mr Madikane's actual defence (i.e. based on coincidence) is concerned.

Procedural fairness of the disciplinary enquiry

[61] The third respondent failed to take into account Dr George's evidence which was not that Mr Madikane was not fit to face the disciplinary enquiry, but was that, Mr Madikane was to be represented by someone – (and he was); and further that Mr Madikane would be able to follow the procedures, function well and be in a position to answer questions. Dr George also conceded that Mr Madikane was able to participate in the proceedings and that he knew exactly what was going on there, including what the reason for the enquiry was. In

ignoring that evidence of Dr George, the third respondent could not reasonably come to a conclusion that the disciplinary enquiry was not procedurally fair. The fact that Mr Madikane participated in other proceedings voluntarily and, apparently, from a perusal of the records in those proceedings, without difficulty, also militates against the reasonableness of the finding on procedural fairness. In my view, the court *a quo* erred in finding that the third respondent could have reasonably concluded in the circumstances that the disciplinary enquiry was not procedurally fair.

Consistency

[62] The court ***a quo's*** decision regarding the issue of consistency was not appealed against. In my view, it was correctly held by the court *a quo* that the third respondent did not reasonably assess the evidence and take into account relevant facts in making findings on this issue and had applied an unreasonably broad comparative approach. I accordingly need not say anything more on that aspect.

The sanction

[63] In my view, there is no question of the appropriateness of a sanction of dismissal where Mr Madikane's guilt in respect of the second charge has been established. The question whether a penalty of dismissal in respect of the charge of contravening standing order 335 is reasonable, becomes irrelevant in those circumstances. In my view, Mr Madikane's guilt has been established in respect of both those charges on a balance of probabilities. Since they are closely related, one sanction, namely dismissal, is appropriate and justified.

Cross-appeal re: costs

[64] In light of my view and conclusions regarding the appeal and in particular, the finding that the review should have succeeded, the cross-appeal, which is premised on Mr Madikane's success in the court *a quo*, stands to be dismissed.

[65] In light of the time period that has elapsed since the disciplinary enquiry, it would not be in the interests of justice to refer the parties back to the Labour Court. All the facts are on record and before us. This Court is empowered in the interests of justice to finally decide the matter.[11]

[66] In the result, the following is ordered:

1. The appeal is upheld.

2. The cross-appeal is dismissed.

3. The parties are to bear their own costs of appeal.

4. The order of the court *a quo* is set aside and is replaced with the following order:

'*1. The applicants' late filing of their founding and supplementary affidavits is condoned.*

2. The review succeeds, in particular:

2.1 The final award of the third respondent is set aside in its entirety and is substituted with the following:

Mr Madikane is guilty of both charges, namely, that of failing to comply with standing order 335-9 and of attempting to defeat the ends of justice by being an accomplice in the tampering with Mr Yengeni's blood sample;

2.2 The sanction of dismissal is confirmed.

3. The parties are to pay their own costs of the review.'

[11] See *NUMSA* on behalf of *Sinuko v Powertech (Pty) Ltd* [2014] 2 BLLR 133 (LAC).

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Coppin AJA

Tlaletsi DJP and Hlope AJA agreed.

FOR THE APPELLANTS:	MR E A De Villiers-Jansen Instructed by the state attorney Cape Town
FOR THE FIRST RESPONDENT:	MR G A Leslie Instructed by Godla and Partners Inc Cape Town