IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 73/15

In the matter between:

BIDSERV INDUSTRIAL PRODUCTS (PTY) LTD	**Appellant**
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER L. DLAMINI N.O.	**Second Respondent**
SACTWU	**Third Respondent**
SIMON RAMAPUPUTLA	**Fourth Respondent**

Heard: **25 August 2016**

Delivered: **10 January 2017**

Summary: The fourth respondent employee had been dismissed from the services of the appellant company pursuant to a disciplinary hearing at which he was found to have been dishonest in that he had submitted a false statement of costs (a quotation) from his child's school in order for the appellant to pay more than it should. He referred an unfair dismissal dispute to the CCMA, where a commissioner found that there was an element of collusion between the fourth respondent and his witness with regard to the procurement

of the quotation and that *prima facie* the fourth respondent could be said to be guilty of dishonesty. The commissioner further determined that the appellant had been inconsistent in the application of discipline and that the fourth respondent's length of service militated against his dismissal. He ordered the appellant to reinstate the fourth respondent with limited back-pay. The award was upheld on review by the Labour Court.

On appeal the Labour Appeal Court found that the commissioner glossed over and did not determine the primary question whether the fourth respondent was dishonest which determination was central to the question whether the reason given for the fourth respondent's dismissal had been fair;

***Held*, that the probabilities weigh heavily against the fourth respondent showing that he knowingly submitted a false quotation in the hope of claiming more for his child's uniform from the appellant;**

***Held*, that the commissioner ought not to have embarked on the question of inconsistency in the application of discipline without having first determined the underlying reason for the dismissal and that he did not provide any basis for his finding that the other two employees of the appellant had been dishonest;**

***Held*, that it was incomprehensible that the commissioner concluded that the substratum of the employment relationship had not been destroyed when he had not determined whether the fourth respondent committed a dishonest act and its impact on the relationship of trust;**

***Held*, that the misconduct committed by the fourth respondent was of a serious nature and that his length of service foundered in the face of the weight of authority by the Courts.**

The appeal was therefore upheld with costs.

Coram: Landman JA, Savage AJA, and Phatshoane AJA

JUDGMENT

PHATSHOANE AJA

[1] This is an appeal against the judgment and order of the Labour Court (per Matyolo AJ) dated 16 July 2015 dismissing the application for the review and setting aside of the arbitration award issued under Case No: GAJB 27478-12 by the second respondent, the commissioner, under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA), the first respondent. The appeal comes before us with the leave of that Court.

[2] Bidserv Industrial Products (Pty) Ltd t/a G Fox & Co (Bidserv), the appellant, operates a bursary scheme in terms of which its employees would apply for payment of their children's school fees and related expenses, such as the school uniforms and stationery. The Skills Equity Committee (SEC) of Bidserv decided who of the employees would be eligible for this form of funding and the amount to be paid. Mr Simon Ramapuputla, the fourth respondent, who had been in the services of Bidserv since 1997, served in this committee in his capacity as a shop steward. He was dismissed by Bidserv on 20 September 2012 pursuant to a disciplinary enquiry which found him guilty of dishonesty in that he "procured a false statement of costs from his child's school in order for the company to pay more than it should."

[3] Regrettably, the transcribed record of the arbitration proceedings is difficult to follow. It is convoluted; has several interventions and indistinct parts. It is a tedious exercise to sort the chaff from the corn. Nevertheless, the following factual background can be distilled therefrom. Mr Amon Mohamme, called by Bidserv, testified that during 2012 the SEC received several bursary applications. At the meeting held on 14 February 2012 this committee questioned two of the bursary applications received from two employees for uniforms as being excessive. One application had been filed by Ramapuputla. He claimed R3 500.00 for the school uniform. The other applicant was

Ms Lorraine Marokwane. She claimed R3 115.45 and R3 365.45, respectively, for her two children's uniforms. Mohamme says that during this meeting Ramapuputla intimated that he had confronted the principal of Mmutle Combined School (the school) about the excessive amount of the quotation in respect of the uniform.

[4] Mohamme went on to say that at the subsequent committee meeting held on 13 March 2012 Ramapuputla denied having previously said that he confronted the school principal about the quotation. I must immediately point out that during the presentation of his case Ramapuputla confirmed that, at the internal enquiry that was held against him, Bidserv called at least five witnesses who confirmed Ramapuputla's initial statement.

[5] Mr Norman Hilton Smookler, the Human Resource Manager of Bidserv, was mandated by the SEC to conduct an investigation into the authenticity of the quotations of R3 500.00 received from Ramapuputla and of R3 115.45 and R3 365.45 in respect of Marokwane. The minutes of the SEC' meeting held on 13 March 2012 reflect that Smookler reported that the principal informed him that the quotation submitted by Ramapuputla was "wrong" and issued without his permission.

[6] Smookler requested Mohamme to conduct some investigations at the school. Mohamme says he attended at the school posing as a parent of a prospective learner and enquired about the fees and uniform costs. Mmutle is a no-fee public school.[1] Mohamme intimates that the principal gave him a list of the uniform required at the school and informed him of a retail store, Capital Fashions, which was the stockist for the school uniform. Mohamme went to Capital Fashions where he was provided with a quotation totalling a puzzling R627.00 only in respect of the uniform, far below the R3 500.00 quotation submitted by Ramapuputla.

[7] Mohamme intimates that at the meeting of the SEC held on 27 March 2012 Ramapuputla claimed that the quotation was sourced by his wife from the school. He was requested to bring a new quotation which he did on 10 April

[1] It is a school subsidised by the Department of Education and does not charge school fees.

2012. The minutes of 10 April 2012 reflects that the total of this quote was an amount of R1 447.00. Ramapuputla showed this to the committee but refused to submit it for record purposes.

[8] Under cross-examination Mohamme was confronted with a quotation from another employee, one Khahlamba, referred to on occasion as Miyambo. The quotation is reflected in a letter from E.P.P Mhinga Secondary School. The amount claimed for the sports uniform was deleted and the amount quoted reduced by the SEC. He was asked why the committee did not similarly alter Ramapuputla's quotation. He did not know what transpired in that case because the committee received many applications. Mohamme intimated that he also conducted an investigation in respect of Ms Marokwane's quotation and found nothing wrong with it. She claimed for her two children. The shop's prices corresponded with the amounts quoted. The SEC was of the view that some of the items could be shared by the two children. Mohamme says that Marokwane's quotation was reduced and approved after the investigation.

[9] Smookler's evidence largely corroborated that of Mohamme. He added that the questionable quotation submitted by Ramapuputla was faxed to Bidserv marked for Ramapuputla's attention. According to him Ramapuputla would have noted that the quotation was inflated. The shop stewards received the bursary applications from the employees of Bidserv; checked them to ensure their correctness before submitting them to the committee for approval. Ramapuputla was a senior shop steward at Bidserv. He collected the bursary applications from other employees and was familiar with the procedures and internal workings.

[10] Ramapuputla challenged the fairness of his dismissal based on the following. He spoke to a school teacher named Chris, his relative, to fax the quotation to him at work. The quotation came directly from the school but was late. He enquired from Smookler whether he could still submit it. Smookler's response was affirmative. Ramapuputla submitted it to Bidserv's payroll administrator. He never spoke to the principal at the time of procuring the quotation but only did so after Bidserv served him with a charge-sheet concerning an act of misconduct. He requested Mr Lota Mahlabane, the deputy principal of the

school, to forward a confirmatory note/letter showing that the quotation came from the school. This was provided. The School collected money and bought the uniforms and not the parents. He did not submit this confirmatory note at the initial enquiry which was held against him on the same offence because that enquiry was aborted due to lack of evidence. The same charge of misconduct was revived. He was called to attend the second disciplinary enquiry. He submitted the confirmatory note at the latter enquiry. Pursuant to the enquiry he was requested to submit his evidence in mitigation of the sanction in writing. He was not afforded the opportunity to argue in mitigation of the sanction.

[11] Under cross-examination Ramapuputla intimated that he never claimed for his child's school tours. This is absurd because the quotation he submitted to Bidserv reflects the costs in respect of entertainment excursions and/or tours. He could not explain whether his child went on tours as reflected in the impugned quotation. He intimated that the child resided with its mother in Limpopo whereas he was based in Gauteng.

[12] Ramapuputla called Mr Lota Mahlabane, the deputy principal, to testify in his case. He confirmed that Mmutle is a no fee school. Mahlabane says that Ramapuputla called the principal asking for a quotation urgently. It is to be recalled that Ramapuputla testified that he never spoke to the principal at the time of procuring the quotation. He intimated that Ramapuputla's wife collected the quotation from the school. This contradicts the evidence presented so far by Ramapuputla and Bidserv to the effect that the quotation was directly faxed from the school to Bidserv.

[13] Belatedly in the course of the arbitration Mahlabane was shown a letter he authored dated 18 February 2013 from the school which was never put to any of Bidserv's witnesses. It reads:

> 'We appreciate that G. Fox [Bidserv] provides scholarships for employees so that their children can attend school, etc, and/or the total amount available is capped and in some years, claims are reduced pro rata.

SR [Simon Ramapuputla] submitted a claim from the school with uniform amounting to R3 500.00. Maybe we need to clear this up! The amount stands as it was decided in a parent meeting and adopted, through the SGB it becomes a legit amount. However, G Fox [Bidserv], if it has a problem, would just pay what they can afford.

In part (2), I wanted to see the authenticity of the letter and why it is causing problems, that's why I wanted to see the copy.

Mr Ramapuputla never came to our school for anything, except phoning to request a "quote."

The headmaster never met any stranger on 23/03/2012, as our daily or log book reflects. All these in para 4-6 are just allegations based on building a constructive dismissal case.

The school especially the headmaster does not align itself/himself with this paragraph (7) and it is very incriminating and demeaning. Please supply the school with the said quote which was signed by Chris urgently as proof.

Lastly, in this school there are many educators who are related to the learners and the teaching and learning is very harmonious and we give this "quoted" relationship the benefit of a doubt, which is also harmonious.

However, and succinctly the school has the right to charge school fees even though it is declared a no-fee school, by the powers vested in the SGB- through parents of learners- as a juristic person.

Hoping this will serve as evidence towards what is happening and be given the benefit of a doubt.'

[14] The commissioner described Mahlabane's conduct as "shoddy". Without more, he determined that:

'(W)hat is clear from the evidence of the applicant (Ramapuputla) and his witness is that there was an element of collusion with respect to the procurement of the quotation. On the face of it, the applicant could be said to be guilty of dishonesty.'

[15] The commissioner then dealt with the question of consistency in the application of discipline as follows:

> 'However, the **main question** that arises here is whether this was the only situation where a quotation was found to be containing things that were beyond what was normally expected. It is common cause here that during the submission of quotations, there were two applications that were deemed to be higher than normal. Both were investigated and confirmed that they were requiring payments for extra things. In the case of the other employee (Lorraine Marokwane), the respondent pointed out that her quotation had the correct pricing but that she wanted to buy two items as opposed to one. Invariably, all they did was to alter the quotation and pay for one item each. There is also the story of Miyambo P, who wanted sports uniform (R800.00) which the respondent deleted on the list and adjusted the payment. In both cases, there is clear case of dishonesty to be made. The decision by the respondent to charge the applicant for misconduct and not the other two employees is arbitrary, to say the least.' (My emphasis)

[16] The commissioner found that there was no evidence to support the differential treatment between Ramapuputla and the other two employees. He then turned his attention to the appropriateness of the sanction meted out. He found that Ramapuputla was not afforded an opportunity to present evidence in mitigation of the sanction during his internal enquiry. He was of the view that Ramapuputla's 15 years of service and his clean disciplinary record militated against his dismissal. He held that no evidence was led to prove that the employment relationship had been irreparably damaged by the submission of the impugned quotation. All that Bidserv had to do, he stated, was to reduce the amount payable in respect of the quotation as it did with other employees.

[17] At the denouement of his award the commissioner remarked that Ramapuputla did not approach the CCMA with clean hands. He ordered that he be reinstated into the service of Bidserv but limited his retrospective pay to three months' salary to mark his displeasure at the conduct he "deemed inappropriate with respect to the whole saga of procuring the quotation."

[18] On review, the South African Clothing and Textile Workers Union (SACTWU), the third respondent, on behalf of Ramapuputla, argued at great length that he was subjected to double jeopardy[2]. Although this argument was raised during the arbitration proceedings apparent from the award is that it was not dealt with by the commissioner. In the absence of a cross-review by SACTWU and Ramapuputla the Court *a quo*, quite rightly, declined to entertain the issue. Having made reference to several decisions of the Courts on the review test[3] the Court *a quo* concluded that:

> '[12] In the circumstances of this case, the commissioner applied his mind to the evidence and even though he expressed suspicion of possible collusion in misconduct by the fourth respondent about which he commented that "on the face of it, the applicant could be said to be guilty of dishonesty". I do not find such a statement as constituting a finding of dishonesty against the fourth respondent.
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> [13] Though the commissioner took a dim view of the evidence of the fourth respondent's witness comparing it to a movie script going horribly wrong he did not make a definite finding of dishonesty that had the effect of breaking the relationship of trust. Secondly, and looking at all the circumstances, he found that reinstatement with some partial back-pay would be the appropriate sanction. I am of the view that the commissioner was entitled to do this and is enjoined to do so by s 138 of the LRA [Labour Relations Act, 66 of 1995].
>
> [14] In the circumstances, I am satisfied that the commissioner's award passes the test as set out above in that it falls within the band of reasonable decisions that could be reached in the circumstances of this case. I am also satisfied that the commissioner committed no material irregularities and/or acts of misconduct the result of which were to render his overall outcome unreasonable.'

[2] Being disciplined twice for the same offence whilst he had already been acquitted of that offence.
[3] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC); *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 *ILJ* 2795 (SCA) at 2806 para 25; *Shoprite Checkers (Pty) Ltd v Ramdaw No and Others* (2001) 22 ILJ 1603 (LAC) at 1636 para 101; *Palaborwa Mining Co Ltd v Cheetham and Others* (2008) 29 ILJ 306 (LAC) at 317 para 13.

[19] There are three key issues emerging for consideration in this appeal. Firstly, whether the employee's conduct amounts to an act of dishonesty; secondly, whether the commissioner's finding on the question of consistency in the application of discipline was reasonable; and thirdly, whether the award survives scrutiny under the review test. I deal with the three questions contemporaneously.

Consideration of the question whether Ramapaputla committed an act of dishonesty

[20] Mr G A Fourie, for Bidserv, contended that the Court *a quo* erred in finding that the commissioner did not make a determination on whether Ramapuputla acted dishonestly. Although the arbitration award is not a model of clarity, read in context, the flow of reasoning and the analysis to which the purported comparative cases were subjected to, it was contended, it can reasonably be inferred that the commissioner made a finding that Ramapuputla and his cohorts colluded and therefore he was guilty of dishonesty by submitting an inflated quotation. In the alternative, Mr Fourie argued that if this Court agrees that the commissioner did not make a finding that Ramapuputla was dishonest, as found by the Court *a quo*, the award ought to be reviewed and set aside as he failed to address the primary issue and deprived the parties of a fair trial.

[21] During the course of the arbitration the commissioner summarised the key issue in dispute as being "whether or not Ramapuputla submitted a fraudulent (inflated) quotation to his employer". On this issue, Bidserv and Ramapuputla's version were diametrically opposed. The approach to resolving mutually destructive versions was aptly summarised as follows.[4] To come to a conclusion on the disputed issues a court must make some findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. The latter involves an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. The Court will as a final step, determine whether the party burdened

[4] *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at 14-15 para 5.

with the *onus* of proof has succeeded in discharging it. I am referring to this synopsis bearing in mind that s 138 of the Labour Relations Act, 66 of 1995 (LRA), enjoins the commissioners to conduct the arbitration in a manner that they consider appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities. To this end, they have the discretion as regards the appropriate form of the proceedings.

[22] Save to strongly criticise the evidence presented by Mahlabane, the commissioner did not make any credibility findings on the other witnesses. He also did not effectually deal with the probabilities in respect of the disparate versions apart from perfunctorily stating that on the basis of the material before him the decision to dismiss Ramapuputla was not justifiable. Without substantiation he was also of the view that Bidserv's case was improbable. An assessment of the evidence on the basis of demeanour without regard for the wider probabilities constitutes a misdirection. Without a careful evaluation of the evidence that was given against the underlying probabilities, little weight can be attached to the credibility findings of the presiding officer.[5]

[23] The fact that the commissioner glossed over and did not determine the primary question whether Ramapuputla was dishonest, as correctly found by the Court *a quo*, is problematic. That determination was central to the question whether the reason given for Ramapuputla's dismissal was fair. In *County Fair Foods (Pty) Ltd v CCMA,*[6] this Court sounded a warning that failure to deal with an important facet may, depending on the circumstances of the case, provide evidence that the commissioner did not apply his/her mind to that facet.

[24] This Court gave the following seminal exposition of the review test in the *Head of Department of Education v Mofokeng and Others*[7]

[5] See *Medscheme Holdings (Pty) Ltd and Another v Bhamjee* 2005 (5) SA 339 (SCA) at 345A-C para 14.
[6] [1999] 11 BLLR 1117 (LAC).
[7] (2015) 36 ILJ 2802 (LAC).

'[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. **In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA**. **Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination**.'[8] (footnotes omitted) (My emphasis)

[25] On the view I take of this matter, quite apart from unsubstantiated conclusions he made, the commissioner misconceived the nature of the enquiry he was called upon to determine. Where this Court is in as good a position as the commissioner to decide the matter, regard being had to the considerable lapse of time since the dismissal took effect, it ought to do so and not to remit it to the CCMA, by parity of reasoning to the Bargaining Council, for a fresh arbitration.[9] Remitting this matter would merely serve to postpone the

[8] At para 33.
[9] *Department of Justice v Commission for Conciliation, Mediation & Arbitration and Others* (2004) 25 ILJ 248 (LAC) at 304 para 48.

inevitable. This brings me to the question whether Ramapuputla knowingly submitted a false or inflated quotation.

[26] The evidence presented by Bidserv is credible and there is no satisfactory counter to it whereas the contradictions and obfuscations apparent in Ramapuputla and Mahlabane's evidence are significant. For instance, Mahlabane was asked to name the outfitter where the school purchased its uniforms. He responded that the parents bought uniforms anywhere they liked. To this extent, his evidence contradicted that of Ramapuputla who said the school purchased the school uniforms. Mahlabane went on to say that there was no particular stockist from which the school purchased uniforms. However, he later changed and said that he knew that Capital Fashions was the stockist of the school uniforms. He was asked why the quotation contained a charge for the school uniform if the parents purchased the uniforms. He painted himself into a corner by giving various contradictory and illogical responses. He, *inter alia*, said:

> 'This is for say you have a company if we put the money inside the school then the school can take the money to the relevant parent and the books have been audited for that matter."

[27] Mahlabane tried hard to justify the R3 500.00 quotation submitted by Ramapuputla. He suggested that the amount quoted would be for a period of three years yet the quotation is silent on a three-year period. He also intimated that not every parent paid the R3 500.00 for the uniform. This begs the question why the quotation was issued. He then insinuated that when a child was sponsored a quotation will be issued whereas in other instances "ordinary parents can buy anywhere they liked".

When pressed on whether the quotation was solely issued because Ramapuputla was sponsored he gave a further startling response as follows:

> 'No you see a quotation is a quotation if the position is like this and say you must pay you are then asked and as the principal has said in that letter we can reduce it as you like, you can pay any amount that you like because the provision (indistinct) and it is not there and there is not this thing must..'

[28] Mahlabane's logic or lack thereof in explaining why the school issued a quotation to Ramapuputla is telling. His evidence was correctly rejected by the commissioner as resembling "a bad story line in a movie". The probabilities are overwhelming against Ramapuputla that he knowingly, in collaboration with his cohorts at the school, submitted a false quotation in the hope of claiming more than he was entitled to receive from Bidserv for his child's uniform. He was therefore dishonest as charged.

The finding on inconsistency in the application of discipline

[29] Having found that *prima facie* Ramapuputla could be said to be guilty of dishonesty, the commissioner considered whether Bidserv had been consistent in the application of disciplinary measures. This latter aspect was decisive to his finding and conclusion that the dismissal was unfair. It is important to bear in mind that the only concern raised by Ramapuputla with regard to the alleged inconsistent application of discipline is that Bidserv ought to have reduced his claim for the school uniform as it did in the case of Marokwane and Khahlamba/Miyambo. In my view, the commissioner ought not to have embarked on the question of inconsistency in the application of discipline without having first determined the underlying reason for the dismissal. In other words, whether the dishonest act was in fact perpetrated.

[30] The commissioner does not provide any basis for his finding that the other two employees (Marokwane and Khahlamba/Miyambo) had been dishonest. During the course of the arbitration, he correctly summarised the evidence as follows:

> 'Commissioner:….the point I am asking you is the Lorraine's issue has been (discussed) in the (context) of saying there were two problems right, when it was discovered the verifications (indistinct) was done both ultimately one was reduced…. *the price was correct but there were more items as to suppose to the(sic)*, the price was reduced and I think…..that that is the relevance of Lorraine's involvement in this comparison…'

[31] This Court sounded a warning on approaching the question of inconsistency in the application of discipline willy-nilly without any measure of caution.[10] Inconsistency is a factor to be taken into account in the determination of the fairness of the dismissal but by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss.[11] A generalised allegation of inconsistency is not sufficient. A concrete allegation identifying who the persons are who were treated differently and the basis upon which they ought not to have been treated differently or that no distinction should have been made must be set out clearly.[12]

[32] The evidence was that the prices reflected in the quotation submitted by Marokwane corresponded with the retail store's prices. There was no suggestion that Marokwane acted dishonestly or misrepresented the price of the school uniform. It was also never put to any of Bidserv's witnesses that there was impropriety involved in the procurement of her quotation. In the case of Khahlamba amongst the items claimed by him was the sports uniform to the value of R800.00. This item was deleted by the SEC from his claim and the balance was paid. Again, no evidence of improper conduct or misrepresentation was adduced or produced by SACTWU and Ramapuputla with regard to Khahlamba's case. Resultantly, there is some disconnect between the decision the commissioner ultimately reached and the evidence presented. This is untenable because the materiality of the error had a decisive impact on the outcome of the arbitration.

Consideration of the sanction imposed

[33] As already alluded to, the commissioner held that no evidence was led to prove that the employment relationship had been irreparably damaged by the submission of the impugned quotation. He was of the view that Ramapuputla's 15 years of service and his clean disciplinary record militated

[10] *Absa Bank Ltd v Naidu and Others* (2015) 36 *ILJ* 602 (LAC) at 616 para 36.
[11] *Absa Bank Ltd v Naidu and Others* (2015) 36 *ILJ* 602 (LAC) at para 42.
[12] *National Union of Mineworkers on behalf of Botsane v Anglo Platinum Mine (Rustenburg Section)* (2014) 35 *ILJ* 2406 (LAC) at 2417 para 39

against his dismissal. In *Toyota SA Motors (Pty) Ltd v Radebe and Others*[13], this Court pronounced:

> '[15].....Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty. It appears to me that the commissioner did not appreciate this fundamental point.
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> [16] I hold that the first respondent's length of service in the circumstances of this case was of no relevance and could not provide, and should not have provided, any mitigation for misconduct of such a serious nature as gross dishonesty. I am not saying that there can be no sufficient mitigating factors in cases of dishonesty nor am I saying dismissal is always an appropriate sanction for misconduct involving dishonesty. In my judgment the moment dishonesty is accepted in a particular case as being of such a serious degree as to be described as gross, then dismissal is an appropriate and fair sanction.'[14]

[34] Recently in *Woolworths (Pty) Ltd v Mabija and Others,*[15] this Court held:

> '[21] The fact that the employer did not lead evidence as to the breakdown of the trust relationship does not necessarily mean that the conduct of the employee, regardless of its obvious gross seriousness or dishonesty, cannot be visited with a dismissal without any evidence as to the impact of the misconduct. In some cases, the more outstandingly bad conduct of an employee would warrant an inference that trust relationship has been destroyed. It is, however, always better if such evidence is led by people who are in a position to testify to such break down. Even if the relationship of trust is breached, it would be but one of the factors that should be weighed with others in order to determine whether the sanction of dismissal was fair..'[16]

[13] (2000) 21 *ILJ* 340 (LAC).
[14] At paras 15-16.
[15] [2016] 5 BLLR 454 (LAC).
[16] At 458 para 21.

[35] Regard being had to the analysis set out above it is incomprehensible that the commissioner could conclude that the substratum of the employment relationship had not been destroyed when he had not determined whether Ramapuputla committed a dishonest act and its impact on the trust relationship. There is no question that the misconduct committed by Mr Ramapuputla is of a very serious nature. His length of service founders in the face of the weight of authority and facts referred to in the preceding paragraphs. The fact that he was a shop steward who had to be exemplary to other employees aggravates his misconduct. He also did not show any contrition. On this conspectus, his dismissal was justified.

[36] A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator.[17] I am satisfied that the Court *a quo* was wrong in concluding that the commissioner's award fell within the band of reasonable decision-makers. To my mind, the decision by the commissioner is unsustainable on the facts. This gross irregularity vitiates the award which stands to be reviewed and set aside.

[37] On the question of costs. SACTWU, the third respondent, stood by Ramapuputla throughout this litigation up to the appeal stage. In my view, it will be in accordance with the dictates of fairness for costs to follow the result of this appeal including those of the proceedings before the Labour Court.

Order

[38] In the result, I make the following order:

1. The appeal is upheld with costs;

2. The order of the Court *a quo* is set aside and substituted with the following:

> *'(a) The application to review and set aside the arbitration award issued by the Commission for Conciliation, Mediation and Arbitration (CCMA) under Case No: GAJB 27478-12 is granted;*

[17] *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 *ILJ* 2795 (SCA) at 2806 para 25.

(b) The arbitration award issued by the CCMA under Case No: GAJB 27478-12 is reviewed and set aside;

(c) Mr Simon Ramapuputla's (the fourth respondent's) unfair dismissal claim is dismissed;

(c) The South African Clothing and Textile Workers Union (SACTWU), the third respondent, and Mr Simon Ramapuputla are to pay the costs of the application jointly and severally, the one paying the other to be absolved.'

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MV Phatshoane

Acting Judge of the Labour Appeal Court

Landman JA and Savage AJA concur in the judgment of Phatshoane AJA.

APPEARANCES

FOR THE APPELLANT:	Adv G.A. Fourie Instructed by Brian Bleazard Attorneys
FOR THE THIRD AND FOURTH RESPONDENTS:	Adv F.J. Nalane Instructed by: Cheadle Thompson