REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D 290/2012

In the matter between:

SURGICAL INNOVATIONS (PTY) LTD **Applicant**

and

THE COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

RICHARD LYSTER N.O. **Second Respondent**

JANET TORGIUS **Third Respondent**

Heard: **30 July 2013**

Delivered: **13 February 2014**

Summary: CCMA arbitration proceedings – Review of proceedings, decisions and awards of commissioners – Test for review – practical application of review test set out – determinations of commissioner compared with evidence on record – arbitrator's award regular and sustainable – award upheld

CCMA arbitration proceedings – Review of proceedings, decisions and awards of commissioners – assessment of evidence and legal principles by

commissioner – assessment and determination reasonable – award upheld

Compensation – determination of the quantum of compensation – principles applicable – exercise of a discretion not readily interfered with – factors considered – award of compensation upheld

Misconduct – charge of defamation – what constitutes defamation – such misconduct not proven

Misconduct – sanction of dismissal – principles applicable in deciding sanction – no basis to interfere with decision of commissioner that dismissal not appropriate – sanction determination of commissioner upheld

Disciplinary hearing – reasonable apprehension of bias of chairperson – principles stated – dismissal procedurally unfair

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerns an application by the applicant to review and set aside an arbitration award of the second respondent in his capacity as commissioner of the CCMA (the first respondent). This application has been brought in terms of Section 145 of the Labour Relations Act[1] ("the LRA").

[2] The third respondent was dismissed by the applicant on 20 December 2010 for misconduct based on charges relating to unauthorised removal of company property, failure to act in the best interest of the company, and defaming the company with a fellow company employee. The third respondent then pursued her dismissal as an unfair dismissal dispute to the CCMA and the matter came before the second respondent for arbitration in October and December 2011, and concluded in January 2012. Pursuant to these arbitration proceedings, the second respondent then determined that the dismissal of the third respondent by the applicant was substantively and

[1] Act No 66 of 1995.

procedurally unfair. The second respondent then awarded the third respondent maximum compensation in an amount equivalent to 12 (twelve) months' salary, amounting to R442 872.00. It is this determination by the second respondent that forms the subject matter of the review application brought by the applicant, which application was filed on 29 March 2012.

Background facts

[3] The applicant conducts business as the supplier of surgical and medical products to both government and private hospitals across the country, and also has operations across the country, including Durban and Cape Town.

[4] The third respondent was employed by the applicant as what is called a product specialist. This is in essence a sales position, with a strong emphasis on maintaining customer relationships and customer support. Considering the nature of the applicant's products, the third respondent was also required to work closely with all the medical professionals the applicant supplied products to, and in particular, to train these professions in the use of the products as and when required and to address and answer any queries about the products. Using the words of the applicant, the product specialists are the face of the business of the applicant. The third respondent was stationed at the applicant's Durban operations.

[5] In this matter, the evidence clearly showed that it was a Carte Blanche television program towards the end of 2010 about irregularities with the labelling of the applicant's products that was the catalyst for the third respondent's demise as employee of the applicant. This program was exhibited to the second respondent in the arbitration and watched by all the parties present, but was unfortunately not part of the record of the arbitration before this Court.

[6] The case at hand concerned two of the applicant's products, being the COQ09 and COQ94 products. As stated above, these are surgical products supplied to various hospitals, and as relevant to this case, hospitals in Kwa-Zulu Natal. These products are imported by the applicant from the United States and packed in specialised material ensuring sterility, and then labelled

after packaging, which label inter alia contains an expiry date. If the product had expired, it was not permitted to be used, unless the manufacturer in the United States after due process agreed to the extension of the expiry date.

[7] Similarly, none of these products were permitted to be re-labeled. The labels for the products came from the United States and served to ensure the integrity of the products. In particular, products were not allowed to be re-labeled by any staff members of the applicant or third party, and if an instance of re-labelling was found, it had to be investigated, a report prepared, and an actual report to made both the applicant's management and the hospital management, in terms of a prescribed process. In this matter, the issue was that two products concerned had been re-labeled, which, as far the applicant was concerned, was unacceptable. It was however never contended that the third respondent actually relabeled the products or was involved in such relabeling.

[8] From the evidence, it appeared that only the re-labeled COQ09 product was shown on the Carte Blanche program and not the COQ94 product. According to the case of the applicant, this product seen on Carte Blanche was provided to Carte Blanche by the third respondent. The applicant contended that the product was part of a consignment of 15 COQ09 items provided to St Anne's hospital, of which 11 were unused and later returned to the applicant and 4 products were unaccounted for. The applicant also contended that the lot number on the product featured on Carte Blanche was from the St Anne's hospital consignment.

[9] The third respondent on the other hand contended that all the St Anne's hospital COQ09 products were accounted for. The third respondent said she had dispatched 11 products back to the applicant. According to the third respondent, of the other 4 so called unaccounted products, the computer system at the hospital actually showed that 2 products were used by the hospital, and that 2 products had been written off. According to the third respondent, the product shown on Carte Blanche did not come from her. The third respondent also stated that all problems she experienced with labelling of products she would report to the applicant, and one of her reports earlier in

2010 actually included a report about a rumour she had heard about the then pending Carte Blanche program.

[10] A further issue raised by the applicant was that the third respondent had actually been aware of re-labeled products and being so aware, she had to report this in her weekly report called an FTR and did not. Instead, the third respondent telephoned two other Cape Town product representatives and discussed with them the fact that she knew of re-labelled products. The third respondent contended that the FTR was not to report re-labelling but was there to report damages, broken or incomplete products. The third respondent also stated that she did report a problem with re-labeling in June 2010 when the COQ09 consignment from St Anne's hospital was returned.

[11] As far as the COQ94 product is concerned, the applicant contended that the third respondent had been in possession of such a product at the time of the Carte Blanche episode, and that such product was still unaccounted for. The third respondent's answer was that the COQ94 product she had access to, had been used by Durdoc Medical Centre, but the applicant did not account for this on its system, because the documents sent to the applicant to confirm the order were not legible. The third respondent stated that she later went to obtain an order number for the product from Durdoc to resolve this. It was undisputed that the re-labeled COQ94 product was never featured on Carte Blanche, but was only depicted on photographs, the origin of which was uncertain.

[12] The third respondent was charged with misconduct on 3 December 2010. Based on the above background, the substance of the applicant's charges against the third respondent was that she had removed the COQ09 and COQ94 products without permission and gave it to Carte Blanche, that she did not act in the best interest of the applicant because she knew about re-labeled products but did not immediately disclose and report this to the applicant, and finally that she had defamed the applicant to a fellow employee by discussing the re-labeling issue with her. The third respondent was also charged with a fourth charge, being gross negligence, of which she was subsequently acquitted in disciplinary proceedings to follow, and I shall

accordingly devote no further attention to the substance of this charge in this summary of facts. The disciplinary hearing was convened for 8 December 2010.

[13] The applicant appointed an independent chairperson, Adv Wayne Hutchinson ("Hutchinson"), to preside over the disciplinary hearing. The disciplinary hearing was also conducted at the offices of the applicant's attorneys, Fluxmans Attorneys on 8 December 2010. Hutchinson found the third respondent guilty of the all the charges against her, save for the charge of gross negligence of which she was acquitted and recommended her dismissal, in a written finding dated 17 December 2010. The third respondent was then dismissed on 20 December 2010.

[14] The matter ultimately came before the second respondent for arbitration. The second respondent determined that the applicant's dismissal was both substantively and procedurally unfair, and awarded her compensation. Hence the current review application.

The relevant test for review

[15] The proper review test to be used comes from the judgment in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[2] where Navsa, AJ held that in light of the constitutional requirement (in s 33(1) of the Constitution) everyone has the right to administrative action that is lawful, reasonable and procedurally fair, and that 'the reasonableness standard should now suffuse s 145 of the LRA'. The majority of the Constitutional Court set the threshold test for the reasonableness of an award or ruling as the following: 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'[3] Following on, and in *CUSA v Tao Ying Metal Industries and Others,*[4] O'Regan J held:

> 'It is clear…. that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to

[2] (2007) 28 ILJ 2405 (CC).
[3] Id at para 110.
[4] (2008) 29 *ILJ* 2461 (CC) at para 134.

administrative justice.'

[16] What the Constitutional Court meant in *Sidumo* and *Tao Ying Metal Industries* was a review test based on a comparison by a review court of the totality of the evidence that was before the arbitrator as well as the issues that the arbitrator was required to determine, to the outcome the arbitrator arrived at, in order to ascertain if the outcome the arbitrator came to was reasonable.

[17] This review test was considered and applied in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others,*[5] where the Court said the following:

> 'The Constitutional Court has decided in *Sidumo* that the grounds of review set out in s 145 of the Act are suffused by reasonableness because a CCMA arbitration award, as an administrative action, is required by the Constitution to be lawful, reasonable and procedurally fair. The court further held that such an award must be reasonable and if it is not reasonable, it can be reviewed and set aside.'

As to what would be considered to be unreasonable, the Court in *Fidelity Cash Management Service* held as follows:[6]

> 'The Constitutional Court further held that to determine whether a CCMA commissioner's arbitration award is reasonable or unreasonable, the question that must be asked is whether or not the decision or finding reached by the commissioner 'is one that a reasonable decision maker could not reach' (para 110 of the *Sidumo* case). If it is an award or decision that a reasonable decision maker could not reach, then the decision or award of the CCMA is unreasonable, and, therefore, reviewable and could be set aside. If it is a decision that a reasonable decision maker could reach, the decision or award is reasonable and must stand. It is important to bear in mind that the question is not whether the arbitration award or decision of the commissioner is one that a reasonable decision maker *would* not reach but one that a reasonable decision maker *could* not reach….'

[5] (2008) 29 ILJ 964 (LAC) at para 96.
[6] Id at para 97.

The Court in *Fidelity Cash Management Service* then went further and formulated this outcome based review test which the Court considered the *Sidumo* review test envisaged, where the Court said:[7]

> 'It seems to me that, …. there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner's decision does not depend - at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.'

The Court in *Fidelity Cash Management Service* then concluded:[8]

> '…. Whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner and what the issues were that were before him or her. There is no reason why an arbitration award or a finding or decision that, viewed objectively, is reasonable should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that existed which could demonstrate the reasonableness of the decision or finding or arbitration award.'

[18] Following a number of different interpretations and applications of the *Sidumo* test after the judgment in *Fidelity Cash Management*, matters came full circle, so to speak, in the judgment of the SCA in *Herholdt v Nedbank Ltd and*

[7] Id at para 102.
[8] Id at para 103.

Another[9] where the Court again specifically considered the *Sidumo* test, and concluded as follows:[10]

> 'In summary the position regarding the review of CCMA award is this: A review of a CCMA award is permissible if the defect in the proceedings fall within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. 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. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

What this judgment means is simply that if the commissioner ignored material evidence, and the review court in considering this material evidence so ignored together with the case as a whole, believes that the arbitration award outcome cannot still be reasonably sustained on any basis, then the award would be reviewable.

[19] Following the judgment of the SCA in *Herholdt*, the Labour Appeal Court has most recently in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[11] again authoritatively interpreted and applied the *Sidumo* test and held as follows:[12]

> '*Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator… In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether

[9] 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA) per Cachalia and Wallis JJA.
[10] Id at para 25.
[11] (JA 2/2012) [2013] ZALAC 28 (4 November 2013) (4 November 2013) not yet reported, per Waglay JP.
[12] Id at para 14.

> the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material'

With respect, this clearly postulates that the *Sidumo* test is limited to an outcome based review test. The Court further said:[13]

> '…. What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by *Sidumo*. The gross irregularity is not a self-standing ground insulated from or standing independent of the *Sidumo* test.…'

And concluded:[14]

> 'In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her, evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decision he or she arrived at.'

[20] The first step in a review enquiry is thus to consider or determine if an irregularity indeed exists. A review court determines whether such an irregularity exists by considering the evidence before the arbitrator as a whole, as gathered from the review record and comparing this to the award and reasoning of the arbitrator as reflected in such award. The review court must also at this stage apply all the relevant principles of law in order to determine what indeed constituted the proper evidence that the arbitrator, as a whole, would have had to consider. Once an irregularity is identified, the materiality of the irregularity then becomes relevant and must be considered. This means that the irregularity committed by the arbitrator must be a material departure from the acceptable norm or a material deviation from the actual evidence before him or a material departure from the proper principles of law or a material failure to consider and determine the evidence or case, in order to constitute an irregularity of sufficient magnitude to satisfy this first step in the enquiry. If the review court in conducting this first step enquiry should find that no irregularity exists in the first instance, the matter is at an end, no further determinations need to be made, and the review must fail.

[13] Id at para 15.
[14] Id at para 16.

[21] Should the review court however conclude that a material irregularity indeed exists, then the second step in the review test follows, which is a determination as to whether if this irregularity did not exist, this could reasonably lead to a different outcome in the arbitration proceedings. Put differently, could another reasonable decision-maker, in conducting the arbitration and arriving at a determination, in the absence of the irregularity and considering the evidence and issues as a whole, still reasonably arrive at the same outcome? In conducting this second step of the review enquiry, the review court needs not concern itself with the reasons the arbitrator has given for the outcome he or she has arrived at, because the issue of the arbitrator's own reasoning was already considered in deciding whether an irregularity existed in the first part of the test. The review court, in essence, takes the proper evidence as a whole, as ascertained from the review record, considers the relevant legal principles and decides whether the outcome that the arbitrator arrived at could nonetheless be arrived at by another reasonable decision-maker, even if it is for different reasons. If, and pursuant to this second step in the review enquiry, the review court is satisfied that the same outcome could not reasonably follow even for any other reasons, then the review must succeed, because, simply put, the irregularity would have affected the outcome. The end result always has to be an unreasonable outcome flowing from an irregularity for a review to succeed.

[22] I will now proceed to determine the applicant's review application on the basis of the above principles and the two step enquiry in the application of the *Sidumo* test as I have set out above.

The reasoning of the commissioner

[23] From the outset, I am compelled to state that as far as arbitration awards go, I have found the award of the second respondent, in general, of a very high standard. The second respondent, in my view, comprehensively and effectively set out the relevant evidence before him concerning the actual issues he was called on to determine. Overall, the award is to the point, properly reasoned, and if only all awards were so written, the workload of the Labour Court would be much reduced.

[24] This then brings me to a consideration of the award itself. The second respondent firstly considered the issue of procedural fairness, and found the third respondent's dismissal to be procedurally unfair, for a number of reasons. The first reason was that the third respondent had not been provided with the necessary further particulars and documents she asked for prior to the disciplinary hearing, the second reason was that the refusal of her request for a postponement at the commencement of the disciplinary hearing to further prepare was unfair, and the third reason was that there existed a reasonable apprehension of bias on the part of the chairperson of the disciplinary hearing.

[25] On the issue of substantive fairness, the second respondent first restricted himself to the three charges the third respondent had been found guilty of, and declined to consider the gross negligence charge of which the third respondent had been acquitted in the disciplinary hearing.

[26] The second respondent first dealt with the first charge of unauthorized removal of company properly, for the purposes of providing them to Carte Blanche, and recorded that the charge specified that the COQ09 item was removed from St Anne's hospital. The second respondent accepted that only the COQ09 product was shown on Carte Blanche. The second respondent further found that the photographs sent to the supplier in the United States that showed the re-labeled COQ94 product, and the origin of these photographs were unknown.

[27] In considering the issue of the COQ09 product specifically, the second respondent found that there was no paper trial linking the product in possession of Carte Blanche to the third respondent. The second respondent further found that there was no lot number on the product in the Carte Blanche program, and thus it could have come from anywhere else in the applicant. The second respondent further concluded that the stock take records of the applicant were in any event not accurate and that lot numbers of a product could not be linked to any specific item in the country at any one time. The second respondent found that the charge in any event specified that

the item came from St Anne's hospital, and this could not be substantiated, as the St Anne's hospital stock was accounted for.

[28] The second respondent then dealt with the COQ94 product, found that it was only shown on photographs and not on the Carte Blanche program, and concluded that the applicant failed to even prove the origin of these photographs. The second respondent accepted that the only COQ94 product it could be shown the third respondent had access to, had been accounted for.

[29] The second respondent then concluded, as to the first charge, that there was insufficient evidence to show that the third respondent indeed removed the products without authorisation and gave them to Carte Blanche, and thus that she was not guilty of this charge.

[30] The second respondent also paid some attention to the evidence presented by a witness for the third respondent, being a Mr Fazal Nazam ("Nazam"). Nazam was a former senior employee of the applicant, and according to the second respondent Nazam testified that he was the one who gave the products to Carte Blanche, and that he, with other employees and the approval of the applicant, actively relabeled products. The second respondent accepted that all this evidence of Nazam was not put to the applicant's witnesses under cross examination, and based on this, the second respondent determined that he would not consider this evidence insofar as concerns the relabeling of products. The second respondent however did conclude that the evidence of Nazam concerning the fact that he was the one who gave the products to Carte Blanche was true, and accepted this evidence.

[31] As to the second charge, the second respondent accepted the third respondent's evidence that she actually did report suspicious looking products to the applicant's management, and that the stock was returned to and inspected by the applicant who then in essence did nothing about it. The second respondent did however find that the third respondent could have done more to report this. The second respondent accepted that the third

respondent was indeed guilty of this charge, but concluded that dismissal as a sanction was entirely inappropriate for this charge.

[32] The second respondent then dealt with the third charge of the third respondent defaming the applicant with a fellow employee. The second respondent accepted that the third respondent discussed the issue of the relabeled products with a Cape Town representative of the applicant. The second respondent, however, concluded that this conversation could not constitute defamation and thus the third respondent was not guilty of this charge.

[33] As a general proposition, the second respondent determined the credibility of the testimony presented by all the witnesses, and preferred the version of the third respondent. He found her to be a credible witness, and found the applicant's witnesses to be unreliable, and often self serving. The second respondent also considered and determined two pertinent probabilities, the first being that if it was the third respondent who sent the items to Carte Blanche, then why would she tell her employer about this, why would she send products back to her employer, why would she tell her employer about enquiries she received about the products and ask the applicant how to deal with this, and finally why discuss it with the Cape Town employees. The second probability considered by the second respondent was that it would simply not be in the interest of the third respondent to expose the applicant and there was no indication that she was an unhappy or disgruntled employee.

<u>The grounds of review of the applicant</u>

[34] In a nutshell, the applicant raised the following individual grounds of review in the founding affidavit: (1) The second respondent did not properly consider the evidence concerning the 6 month delay in bringing charges against the third respondent; (2) the second respondent acted in an illogical and irrational manner in his determination of the evidence of Rhona Lloyd who testified for the applicant; (3) the second respondent misconstrued the evidence by not finding that it was impossible to use one product without the exact

complimentary product; (4) The second respondent accepted the evidence of Nazam despite his evidence never being put to the applicant's witnesses and the second respondent contradicted himself in determining this evidence; (5) the second respondent failed to properly consider all of the evidence given by Nazam, and his conclusions about Nazam's evidence is unreasonable and unjustifiable; (6) the second respondent makes findings about the applicant being involved in the re-labelling of stock when he was not called upon to do so; (7) the second respondent disregarded all the evidence presented by the applicant with regard to the process of re-labelling stock; (8) the second respondent erred in finding that the charge of failing to act in the best interest of the applicant was not dismissable; (9) the second respondent did not properly consider the evidence of the two Cape Town representatives; (10) the third respondent should not have been afforded maximum compensation; (11) the second respondent misconstrued crucial evidence and committed material errors of fact; (12) the second respondent should not have accepted the version of the third respondent; and (13) the second respondent made material errors of law.

[35] In the supplementary affidavit, the applicant did nothing more than to again address the facts of the matter, now with specific reference to the transcribed record, but did not actually raise any further grounds of review not having already been set out and established in the founding affidavit.

[36] I will now determine the applicant's review application based on the above individual grounds of review actually raised. I will however not determine each and every ground of review on an individual basis, but on the basis of broader categories, as will appear hereunder.

Merits of the review: procedural unfairness

[37] I do not intend to deal in detail with all the grounds upon which the second respondent found the dismissal of the third respondent to be procedurally unfair. This issue can be simply and easily answered by having regard to the issue of bias of the chairperson.

[38] The disciplinary proceedings were presided over by Hutchinson, as stated

above. The difficulty is that Hutchinson had previously represented the applicant in a CCMA dispute, and according to the third respondent was associated with the applicant. This contention by the third respondent was never contradicted. The third respondent contended that because of this, Hutchinson could not be considered to be impartial and was in any event compelled to have disclosed, prior to the commencement of the disciplinary proceedings, this state of affairs to the third respondent so that the third respondent could make an informed decision so as to whether to proceed with the disciplinary enquiry before Hutchinson.

[39] Added to the above, the disciplinary proceedings against the applicant were facilitated by its attorneys, Fluxmans, and the disciplinary proceedings were arranged by them and conducted at their offices. Fluxmans conducts a reputable, seasoned and experienced employment law practice. Yet the above state of affairs was allowed to come to pass, without any attempt to call a witness to offer an explanation or answer the issues raised by the third respondent.

[40] What is clear is that there exists a commercial relationship between Fluxmans, Hutchinson and the applicant. The fact is that Hutchison had actually represented the applicant in an employment dispute. In my view, it was essential that the commercial relationship between Hutchinson, Fluxmans and the applicant be fully disclosed beforehand, to the third respondent, and the third respondent could then decide having been the recipient of such a disclosure whether or not she wanted to proceed with the disciplinary proceedings before Hutchinson. In *Ndimeni v Meeg Bank Ltd (Bank of Transkei)*[15] the Court set out the applicable principle as follows:

> 'In our law the ground for the disqualification of a judicial officer is the existence of a reasonable apprehension that he or she will not decide the case impartially or without prejudice, and not that he or she will decide the case adversely to one party. And the question is 'whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear

[15] 2011 (1) SA 560 (SCA) at para 12.

on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel'. In the same paragraph the Constitutional Court observed that 'it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial'.

[41] In an employment law context, the Court in *BTR Industries SA (Pty) Ltd and Others v Metal and Allied Workers Union and Another*[16] said:

> '…. It is a hallowed maxim that if a judicial officer has any interest in the outcome of the matter before him (save an interest so clearly trivial in nature as to be disregarded under the *de minimis* principle) he is disqualified, no matter how small the interest may be…. The law does not seek, in such a case, to measure the amount of his interest. I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a lay litigant. Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing Court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended, then that is an end to the matter.'

[42] A practical application of the above principles can be found in the judgment of *Bernert v ABSA Bank Ltd*[17] where the Court held as follows:

> 'The question which a judicial officer should subjectively ask himself or herself, therefore, is whether, having regard to his or her share ownership or other interest in one of the litigants in proceedings, he or she can bring the necessary judicial dispassion to the issues in the case. If the answer to this question is in the negative, the judicial officer must, of his or her own accord, recuse himself or herself. If, on the other hand, the answer to this question is in the affirmative, the second question to ask is whether there is any basis for a reasonable apprehension of bias on the part of the parties, whether on the basis of an interest in the outcome of the case, interest in one of the litigants (by shareholding, family relations or otherwise) or attachment to the case. If the answer to this question is in the affirmative, the judicial officer must

[16] (1992) 13 ILJ 803 (A) at 821J-822D.
[17] 2011 (3) SA 92 (CC) at para 63.

> disclose his or her interest in the case, no matter how small or trivial that interest may be. And, in the event of any doubt, a judicial officer should err in favour of disclosure.'

[43] I am of the view that the fact that Hutchinson had previously represented the applicant in CCMA dispute resolution proceedings constitutes an interest that required disclosure by Hutchison. No such disclosure was ever made. The situation is exacerbated by the failure of the applicant to call Hutchinson as a witness to dispel, in evidence, any apprehension of bias inferred in this failure to disclose. That being the case, what is then the consequences of such failure? In *Meeg Bank*[18] the Court dealt with an acting Judge having been instructed by a litigating party to execute mortgage bonds, and in a factual context very similar to the matter *in casu*, and said the following:

> '…. In my view it was open to the respondent and Zilwa AJ to rebut the prima facie evidence presented by the appellant, that Zilwa AJ executed the bonds on behalf of the respondent. They failed to do so. It would have been quite easy for the respondent to state that the bonds were not executed on its instructions and that it never remunerated Zilwa AJ's firm for them. It is true that in his affidavit, in support of the respondent's opposition to the appellant's application for leave to amend his grounds of appeal, Kalternbrünn stated that no work was ever done by Zilwa AJ's firm on behalf of the respondent. But after the appellant had produced copies of the bond documents one would have expected the respondent, or Zilwa AJ, to have stated pertinently that the bonds were not executed on behalf of the respondent, and that the latter never remunerated the firm for the services rendered.
>
> It must be remembered that the case before Zilwa AJ concerned the fairness or otherwise of the appellant's dismissal by the respondent. Two of the witnesses who testified at the trial on behalf of the respondent, namely Marais and Kalternbrünn, were senior members of the respondent's management stationed at head office. The appellant was their subordinate. Their evidence, particularly Marais', was to be weighed against his because he was placing the blame for the respondent's financial loss on Marais, while Marais was placing it on him. …. In my view, the appellant would be entitled to believe, reasonably so, that Zilwa AJ would have expected to receive more

[18] Id at para 22 – 23.

> instructions in the future from the respondent to prepare and execute bonds on its behalf. In these circumstances, I agree with the submission of counsel for the appellant that Zilwa AJ was obliged to disclose his relationship with the respondent, so that the appellant could decide whether to request him to recuse himself, or to waive his right to do so. In my view, the facts satisfy the requirements of the 'reasonable apprehension of bias' test.'

The Court in *Meeg Bank* concluded:[19]

> '…. There is no reason, in my view, why the appellant or litigants in labour disputes generally, should be denied their right to a fair trial, to which everyone else is entitled. In cases where the judicial officer refuses to recuse himself or herself when he or she should in fact have done so, what occurs thereafter, ie the continuation of the proceedings, is a nullity.'

[44] I therefore find that the failure to disclose the relationship between the applicant and Hutchison to the third respondent created a reasonable apprehension of bias, and in the absence of prior disclosure, as such deprived the third respondent of a fair hearing. Consequently, the dismissal of the third respondent was procedurally unfair, and the second respondent's conclusion that this was the case does not constitute an irregularity as contemplated by the review test as set out above, and must be sustained.

[45] For the sake of completeness, the second respondent also concluded that an analyses of the conduct of Hutchinson as reflected in the record of the disciplinary hearing showed that he must have predetermined the matter and exhibited bias, and the failure of the applicant to call him as a witness to rebut any such inference was significant. I agree with these conclusions. A study of the record of the disciplinary proceedings gave a strong indication that Hutchison had in some or other manner been pre-briefed in this matter and his manner of participation in the proceedings gave an uncomfortable sense of undue involvement. The refusal of the postponement request to just enable the third respondent to properly prepare in my view certainly added to this perception. The manner in which Hutchinson chose to intervene in and steer the disciplinary proceedings equally added to this perception of pre-

[19] Id at para 24.

determination. In *BTR Industries* the Court said:[20]

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

[46] Also, and in *SA Commercial Catering and Allied Workers Union and Others v President, Industrial Tribunal and Another,*[21] the SCA held as follows:

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

[47] The crisp question now is whether the above conduct of Hutchinson satisfies this test, namely does it create the existence of a reasonable apprehension of bias. In my view, it unfortunately does, especially in the absence of Hutchinson being called as a witness to rebut any such inference. The conclusions of the second respondent are thus fully supported by the facts, the law and does not constitute an irregularity. On this basis as well, the second respondent's conclusion of procedural unfairness must be sustained.

[48] I, therefore, uphold the second respondent's conclusion that the dismissal of the third respondent was procedurally unfair.

<u>The merits of the review: substantive fairness</u>

[49] I will first deal with the applicant's grounds of review under the broad description of the second respondent preferring the evidence of the third respondent and not accepting the evidence presented for the applicant, and the actual credibility findings made by the second respondent. The applicant

[20] Id at 822A-B.
[21] (2001) 22 ILJ 1311 (SCA) at para 10; See also *SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd (Seafoods Division Fish Processing)* (2000) 21 ILJ 1583 (CC) at para 16.

has contended that the second respondent has acted irregularly and unreasonably in his findings in this regard in a number of individual review grounds, already referred to above. The point of departure in determining this ground of review is to state that where the second respondent prefers the evidence of the third respondent over that of the applicant's witnesses, this is in essence a finding of credibility. As was said in *Sasol Mining (Pty) Ltd v Ngqeleni NO and Others:*[22] 'One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him.' In this regard, I also refer to *Standerton Mills (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[23] where the Court said:

> '…. Credibility issues are indeed difficult to determine in motion proceedings such as these. The commissioner is undoubtedly in a better position to make a finding on this issue. In *Moodley v Illovo Gledhow and Others* (2004) 25 *ILJ* 1462 (LC) at 1468C-D Ntsebeza AJ observed in this regard as follows:
>
> > 'Sitting as I do as a review judge, I fail to understand, in this case, how I could decide to set aside an award given by an arbitrator who sat at the hearing, observed the witnesses, their demeanour and the manner in which they came across. I cannot see that I can interfere merely on an assessment of whether she misdirected herself by reason of the fact that she considered whether the witnesses were credible before determining what the probabilities were in the light of their testimonies.... I should be extremely reluctant to upset the findings of the arbitrator unless I am persuaded that her approach to the evidence, and her assessment thereof, was so glaringly out of kilter with her functions as an arbitrator that her findings can only be considered to be so grossly irregular as to warrant interference from this court.'

[50] I have had the opportunity to consider the very issue of the challenge of credibility findings of arbitrators in review proceedings, in the matter of *National Union of Mineworkers and Another v Commission for Conciliation,*

[22] (2011) 32 ILJ 723 (LC) at para 9.
[23] (2012) 33 ILJ 485 (LC) at para 18.

Mediation and Arbitration and Others[24] and said:

> 'The issue of the importance of credibility findings made by the commissioner being accepted in this court on review was made by Mr *Snider*, who represented the third respondent. He submitted that it was the commissioner who sat in the arbitration proceedings, looked at the witnesses, listened to them, and assessed their credibility, and on review, this court should not readily interfere with this, as the commissioner was in the best position to make these findings. I agree with these submissions. This court should not readily interfere with credibility findings made by CCMA commissioners, and should do so only if the evidence on the record before the court shows that the credibility findings of the commissioner are entirely at odds with or completely out of kilter with the probabilities and all the evidence actually on the record and considered as a whole. Findings by a commissioner relating to demeanour and candour of witnesses, and how they came across when giving evidence, would normally be entirely unassailable, as this court is simply not in a position to contradict such findings. Even if I do look into the issue of the credibility findings of the second respondent in this case, I am of the view that the record of evidence in this case, if considered as a whole simply provides no basis for interfering with the credibility findings of the second respondent. There is simply nothing out of kilter between the evidence by the witnesses on record and the credibility findings the second respondent came to. The evidence on record in my view actually supports the second respondent's credibility findings. The credibility findings of the second respondent therefore must be sustained.'

The same reasoning equally applies to the current matter, and there is simply no basis to interfere with the second respondent having preferred any evidence by the third respondent over that of the applicant. I have equally perused the entire record of the evidence presented before the second respondent, and I am of the view that there is nothing apparent from the record to show that the credibility findings of the second respondent are completely out of kilter with the evidence as recorded in the transcript, as a whole, and therefore unsustainable. I conclude that the second respondent's credibility findings must be sustained.

[24] (2013) 34 ILJ 945 (LC) at para 31.

[51] There is one particular aspect of the evidence of Vizirgianakis and Basson, who testified for the applicant, that is concerning. Whenever confronted with a situation of providing particularity, Vizirgianakis would state that Basson would come and testify to provide the necessary details. In particular also, Vizirgianakis often had no personal knowledge of events, and would equally defer to Basson who would according to him come and testify to provide the necessary particulars. The difficulty however then was that Basson, when she came to testify, never testified about any of these issues. In particular, this related to evidence concerning stock takes, stock movement and stock control. It was also intimated that Basson would provide all the requisite documentary evidence to tie the product in possession of Carte Blanche to the third respondent, which Basson never brought forward. The second respondent was very much alive to this difficulty, and made specific reference to it in his award, and in my view, properly and justifiably so. It is certainly a reasonable conclusion that these difficulties would materially detract from the credibility of the case of the applicant against the third respondent. I may add that it was clear from the record of the evidence that there were also several contradictions between the evidence presented by Vizirgianakis, Basson and Lloyd, further detracting from the credibility of the applicant's case.

[52] However, a matter is not decided only on the basis of credibility. As was said in *SFW Group Ltd and Another v Martell et Cie and Others:*[25]

> 'The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.'

[53] The second respondent very much considered and determined probabilities. As to what the concept of "probabilities" entails, I refer to *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport,*[26] where it was held that the inference drawn from the evidence just has to be "the most natural or

[25] 2003 (1) SA 11 (SCA) at para 5.
[26] (2000) 21 ILJ 2585 (SCA) at para 9.

acceptable inference", and not the only inference.[27] In *Bates and Lloyd Aviation (Pty) Ltd v Aviation Insurance Co,*[28] it was held as follows:

> '…The process of reasoning by inference frequently includes consideration of various hypotheses which are open on the evidence and in civil cases the selection from them, by balancing probabilities, of that hypothesis which seems to be the most natural and plausible (in the sense of acceptable, credible or suitable).' (emphasis added)

[54] I am of the view that this entire matter was unnecessarily complicated before the second respondent, with much time being spent on what in the end was irrelevant considerations (I will address this further hereunder). A proper consideration of the probabilities establish quite a simple case for determination, being whether the third respondent gave Carte Blanche a product out of the St Anne's hospital stock, whether the third respondent should have done more to report re-labeled stock, and whether the third respondent defamed the applicant by saying to a fellow employee that she thought there was truth in it being said that the applicant may have re-labeled stock. I am satisfied that this is exactly what the second respondent appreciated, and in the end determined. In *Fidelity Cash Management*[29] the Court said:

> 'It is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal. The exception to this general rule is where at the time of the dismissal the employer gave a particular reason as the reason for dismissal in order to hide the true reason such as union membership. In such a case the court or tribunal dealing with the matter can decide the fairness or validity of the dismissal not on the basis of the reason that the employer gave for the dismissal but on the basis of the true reason for dismissal.' (emphasis added)

[27] See also *Govan v Skidmore* 1952 (1) SA 732 (N) at 734A-C; *Food and Allied Workers Union and Others v Amalgamated Beverage Industries Ltd* (1994) 15 ILJ 1057 (LAC) at 1064C-E.
[28] 1985 (3) SA 916 (A) at 939I-J.
[29] (*supra*) footnote 5 at para 32.

[55] The application of the above ratio in *Fidelity Cash Management* must immediately dispose of the charge of gross negligence against the third respondent, which the applicant in the arbitration still wanted to rely on. The evidence was that even in the disciplinary proceedings, the third respondent was acquitted of this charge. That means, simply put, that the gross negligence charge could not have been a reason for the dismissal of the third respondent by the applicant. It is, accordingly, not an issue that can be placed before the second respondent to determine. The second respondent in fact specifically dealt with this gross negligence charge on this basis, and this conclusion is in my view correct. The second respondent's approach and finding on the gross negligence charge is therefore simply not an irregularity, and must thus be sustained.

[56] Dealing then with the charge of unauthorised removal of company property, the second respondent found, as has been set out above, that there was insufficient evidence to substantiate this charge. It is this conclusion that constitutes the largest portion of the review challenge by the applicant, and most of the individual grounds of review of the applicant in essence take issue with the manner in which the second respondent considered and determined the evidence relating to this charge. In this regard, the first issue to be dealt with is the evidence presented by Nazam. From the outset, it was apparent to me that this witness was somewhat controversial and clearly had an axe to grind with the applicant, and was involved in litigation against the applicant. The applicant contended that the second respondent should not have had any regard to the evidence of Nazam, in particular the evidence of Nazam that product re-labeling was a regular occurrence with the knowledge of the applicant and that it was he (Nazam) that supplied the products to Carte Blanche. Now it is true that this evidence of Nazam was never put to the applicant's witnesses under cross examination. The second respondent actually recognised this to be the case in his award. The consequence of this failure to put this important evidence to the applicant's witnesses to deal with

is that the testimony should not be believed. In *ABSA Brokers (Pty) Ltd v G N Moshoana N.O. and Others,*[30] it was held as follows:

> 'It is an essential part of the administration of justice that a cross-examiner must put as much of his case to a witness as concerns that witness (see *van Tonder v Killian NO en Ander* 1992 (1) SA 67 (T) at 72I). He has not a right to cross-examination but, indeed, also a responsibility to cross examine a witness if it is intended to argue later that he evidence of the witness should be rejected. The witness' attention must first be drawn to a particular point on the basis of which it is alleged that he is not speaking the truth and thereafter be afforded an opportunity of providing an explanation (see *Zwart and Mansell v Snobberie (Cape) (Pty) Ltd* 1984 (1) PH F19(A)). A failure to cross-examine may, in general, imply an acceptance of the witness' testimony….'

[57] I am inclined to agree with the applicant that the manner in which the second respondent chose to deal with the evidence of Nazam is somewhat perplexing, and is certainly one instance where his award does attract justified criticism. On the one hand, the second respondent appears to reject one part of the testimony of Nazam concerning the re-labeling of stock with the knowledge of the applicant because it was not put to the applicant's witnesses under cross examination. On the other hand however, and because he finds that it does not "prejudice" the applicant, the second respondent accepts the evidence of Nazam about him having handed the products to Carte Blanche. This approach in my view is inconsistent and irregular. The test is not whether or not the applicant had been prejudiced by the failure of the third respondent to put the evidence of Nazam to its witnesses, as prejudice does not come into the equation. It is the actual failure to put material evidence per se to a witness that causes it to be disregarded. As I said in *Trio Glass t/a The Glass Group v Molapo NO and Others*:[31]

> 'The effect of the failure to put such an important issue to the third respondent under cross-examination must mean that this evidence must be disregarded. In fact and in *Southern Sun Hotel Interests (Pty) Ltd v Commission for*

[30] (2005) 26 ILJ 1652 (LAC) at para 39; See also *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 452 (LC) footnote 13; *Masilela v Leonard Dingler (Pty) Ltd* (2004) 25 ILJ 544 (LC).
[31] (2013) 34 ILJ 2662 (LC) at para 41.

> *Conciliation, Mediation and Arbitration and Others*, the court said: 'To rely on evidence in the absence of its having been put to the opposing party's witnesses under cross-examination constitutes a reviewable defect.''

The second respondent should have rejected the evidence of Nazam with regard to him having handed the products to Carte Blanche as well. In nonetheless considering this evidence and using it as part of his reasoning in finding in favour of the third respondent, the second respondent committed a material irregularity.

[58] In fact, and in my view, all the evidence presented by Nazam should have been disregarded save where the same was supported by other witnesses. Nazam, as the second respondent himself recorded in his award, had the propensity to "tailor the facts" to suit him, and in essence, in discharging his duty of assessing credibility, the second respondent accepted that Nazam was not a credible witness. What the second respondent was actually doing was a nice way of saying that Nazam manufactures evidence. Inexplicably, the second respondent however simply records that he does not have to object to everything Nazam said and then records that he "believes" Nazam when he said that he (Nazam) had handed the products to Carte Blanche. A proper consideration of the record shows Nazam to be entirely self serving, and unreliable. Any reliance on his evidence was a gross irregularity.

[59] However, and in terms of the review test, the fact that the second respondent committed a gross irregularity by relying on the evidence of Nazam is not the end of the enquiry. The next question is whether, despite the existence of this gross irregularity, the ultimate outcome arrived at the second respondent is still a reasonable outcome. In other words, and if the gross irregularity did not exist, would the determination of the second respondent that there was insufficient evidence to show that the third respondent was guilty of this charge of unauthorised removal of company properly to give to Carte Blanche, still be a reasonable outcome, considering the record of evidence as a whole. The answer to this question is in fact alluded to in the second respondent's own award, where he says that the finding he makes about the evidence of Nazam is not necessary to exonerate the third respondent. The

fact is that a proper consideration of the probabilities, as established by the evidence as a whole, leads me to conclude that the second respondent was entirely justified in coming to the conclusion that there was insufficient evidence against the third respondent in respect of this charge, even if the entire evidence of Nazam is completely disregarded.

[60] Differently and simply put, and even without the testimony of Nazam, the outcome arrived at the second respondent on this charge is still a reasonable outcome. I say this for the reasons to follow. As I have already touched on above, it must be considered what the third respondent was actually charged with in this regard. The charge, with regard to the COQ09 products, was quite specific, in that the product given to Carte Blanche came from the 15 items of this product at St Anne's hospital (in particular the 4 unaccounted ones). In my view, the evidence simply did not substantiate this, as: (1) It was undisputed that 11 of these items where returned to the applicant, leaving 4 items; (2) the acceptable evidence was that of these 4 items, two had been used and two had been discarded, thus leaving all 15 items accounted for; (3) the COQ09 item shown on Carte Blanche did not have a lot number actually tying it to St Anne's hospital, and could have come from anywhere in the applicant; (4) there was certainly no documentary evidence in fact tying the third respondent to possession of the actual product given to Carte Blanche; (5) clearly appreciating its difficulties, the applicant then in arbitration tried to prove an alternative case that the product in possession of Carte Blanche came from Westville hospital when this was never the case before; and (6) there was simply no reason or motive given as to why the third respondent would want to send the product to Carte Blanche, which would in any event be to her financial detriment. The second respondent himself also considered another critical probability in this regard, being that if the third respondent was the one that gave the product to Carte Blanche, then why would she actually send the products back to the applicant and inform the applicant of her conversation with Du Toit (a complaining customer) about the products and the Carte Blanche "rumour" at the time, and actually ask how she would have to answer questions about all of this. All of these probabilities, considered together, and as properly substantiated by acceptable evidence, substantiates

the conclusion of the second respondent on the first charge without any reference to the evidence of Nazam.

[61] The next product in terms of this first charge is the COQ94 product. I will again deal with this issue without any regard to any evidence by Nazam. This product, on the common cause evidence, did not feature on Carte Blanche. This product was only shown on photographs, but there was simply no direct or credible evidence as to where these photographs originated from. The product on the photographs could also not be tied to a specific location and certainly it was not linked to the third respondent in any way. It would seem to me that the accusation against the third respondent was based on one COQ94 product at the Durdoc Hospital that the applicant thought was unaccounted for but which was actually used at this hospital and which was not recorded on the system because the order sent through by the third respondent was initially illegible. The fact is that this one COQ94 product that could be tied to the third respondent was in the end properly accounted for. To add insult to injury, and as this product did not even feature on Carte Blanche, it is unclear as to how it can be said in the first place that this product was provided to Carte Blanche by the third respondent, this being the specific contention in the charge sheet. Again, all of these probabilities together, being properly substantiated by acceptable evidence, substantiates the conclusion of the second respondent without any reference to the evidence of Nazam.

[62] I have little hesitation in concluding, without any reference to any evidence presented by Nazam, that the third respondent was not responsible for providing Carte Blanche with the COQ09 product. I equally have little hesitation in concluding that there was no evidence that the COQ94 product had even been provided to Carte Blanche in the first place, let alone being provided by the third respondent. What is clear to me, from the evidence in this matter, is that the applicant sought a scape goat for being exposed on Carte Blanche and the third respondent was the unfortunate victim. The second respondent clearly contemplated this as well. Accordingly, the second respondent's conclusions relating to the charge of the unauthorized removal

of company property against the applicant for the most part does not constitute any kind of irregularity, and even the irregularity committed by the second respondent in considering the evidence of Nazam does not render the outcome arrived at the second respondent in respect of this charge to be unreasonable. The conclusion that the third respondent is not guilty of this charge must thus be sustained.

[63] The next issue to consider is the charge relating to defamation. This charge is based on a contention that the third respondent informed a fellow employee, being Miluzaan Schmidt ("Schmidt") that she (the third respondent) was of the view that the applicant was re-labelling stock. According to the applicant, this defamed the applicant with Schmidt. It is so that Schmidt testified that the third respondent telephoned her at about the time of the Carte Blanche program, and asked if she had seen the program, which Schmidt had not. According to Schmidt, the applicant then told her that that she had seen a product that had been re-labeled, and there was some truth in what appeared on Carte Blanche. The third respondent also told Schmidt that she was shocked having seen a re-labeled product because she had never seen such before. Schmidt then told the third respondent not to believe what she sees on Carte Blanche. Other issues were discussed, but these are simply not relevant for the purposes of the determination of this charge. The second respondent properly considered all the pertinent evidence in regard to this charge and concluded that he was not sure what to make of it. I am compelled to agree. The first question is surely what constitutes defamation, which is a question the second respondent asked. In answering this question, I firstly refer to *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)*[32] where Brand AJ, writing for the majority of Court, held as follows:[33]

> '…. In *Khumalo and Others v Holomisa* this court stated that the elements of defamation are '*(a)* the wrongful and *(b)* intentional *(c)* publication of *(d)* a defamatory statement *(e)* concerning the plaintiff'.

[32] 2011 (3) SA 274 (CC).
[33] Id at para 84 – 85.

> Yet the plaintiff does not have to establish every one of these elements in order to succeed. All the plaintiff has to prove at the outset is the publication of defamatory matter concerning himself or herself. Once the plaintiff has accomplished this, it is presumed that the statement was both wrongful and intentional. A defendant wishing to avoid liability for defamation must then raise a defence which excludes either wrongfulness or intent....'

As to the issue of "publication", the Court said:[34]

> 'Publication' means the communication or making known to at least one person other than the plaintiff. It may take many forms. Apart from the obvious forms of speech or print, the injurious information can also be published through photographs, sketches, cartoons or caricatures.
>
> Statements may have primary and secondary meanings. The primary meaning is the ordinary meaning given to the statement in its context by a reasonable person. The secondary meaning is a meaning other than the ordinary meaning, also referred to as an innuendo, derived from special circumstances which can be attributed to the statement only by someone having knowledge of the special circumstances. A plaintiff seeking to rely on an innuendo must plead the special circumstances from which the statement derives its secondary meaning. But an innuendo must not be confused with an implied meaning of the statement which is regarded as part of its primary or ordinary meaning….'

The Court also dealt with the situation where a plaintiff contends that the publication of the statement is defamatory per se and said:[35]

> 'Where the plaintiff is content to rely on the proposition that the published statement is defamatory per se, a two-stage enquiry is brought to bear. The first is to establish the ordinary meaning of the statement. The second is whether that meaning is defamatory. In establishing the ordinary meaning, the court is not concerned with the meaning which the maker of the statement

[34] Id at para 86 – 87.
[35] Id at para 89 and 91. The Court gave the following examples in subparagraph 91(c): 'Examples of defamatory statements that normally spring to mind are those attributing to the plaintiff that he or she has been guilty of dishonest, immoral or otherwise dishonourable conduct. But defamation is not limited to statements of this kind. It also includes statements which are likely to humiliate or belittle the plaintiff; which tend to make him or her look foolish, ridiculous or absurd; and which expose the plaintiff to contempt or ridicule that renders the plaintiff less worthy of respect by his or her peers.'

intended to convey. Nor is it concerned with the meaning given to it by the persons to whom it was published, whether or not they believed it to be true, or whether or not they then thought less of the plaintiff. The test to be applied is an objective one. In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test it is accepted that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated but also to what is implied….

At the second stage, that is whether the meaning thus established is defamatory, our courts accept that a statement is defamatory of a plaintiff if it is likely to injure the good esteem in which he or she is held by the reasonable or average person to whom it had been published….'

[64] In dealing with the concept of "reputation" the Court in *Mohamed and Another v Jassiem*[36] held:

'In his work on defamation Burchell *The Law of Defamation in South Africa*, remarks (at 99):

'Reputation is a "relational interest" - it is the opinion which others hold of a person. Even if this opinion is not diminished among persons generally but only among a portion of society, it seems right that the plaintiff should have his remedy... Melius de Villiers defines reputation as "that character for moral or social worth to which [a person] is entitled among his fellow men". In South Africa, with its diverse population with different ideologies and cultures, in many instances the concept of a person's fellow men inevitably assumes a sectional meaning and there is a distinct need for the recognition of the views of different groups.'

[65] Two further authorities need reference, especially in the context of the matter now before me. In *National Media Ltd and Others a Bogoshi,*[37] the Court said that: 'It is trite that the law of defamation requires a balance to be struck between the right to reputation, on the one hand, and the freedom of

[36] 1996 (1) SA 673 (A) at 708J – 709B.
[37] 1998 (4) SA 1196 (SCA) 1207C-D.

expression on the other'. And in *Johnson v Beckett and Another*[38] Corbett CJ held that '…. to answer the question whether the comment published in the *Frontline* article was fair, in the sense that objectively speaking it qualified as an honest, genuine (though possibly exaggerated or prejudiced) expression of opinion relevant to the facts upon which it was based, and not disclosing malice.'

[66] It is in the above legal context that the applicant's defamation complaint against the third respondent must fail. Firstly, there was no evidence of any wrongful and intentional conduct by the third respondent. Even if wrongfulness and intention is presumed, then in any event the statement made by the third respondent was not defamatory of the applicant. There was no evidence that the statement made by the third respondent was calculated to injure the good name and reputation of the applicant. In the ordinary sense, the statement that the applicant saw a re-labeled product and thought there may be truth in the Carte Blanche program cannot on face value be considered to be wrongful. Therefore, this statement can only be defamatory if in the particular circumstances of the applicant's business environment it may have another and secondary meaning. Considering it was a telephone discussion between two fellow employees in the context of in essence a work related issue resulting from a program aired on television, Schmidt as a reasonable recipient of the statement would not have considered it defamatory. Finally, the applicant led no evidence as to how its good name and reputation was in any way prejudiced by this telephone conversation between two employees. A balanced assessment also shows the absence of malice on the part of the third respondent. The second respondent came to a conclusion along the lines of what I have set out above. There is nothing irregular in this conclusion of the second respondent, being fully supported by the facts in this matter, and the relevant provisions of law. Therefore, the second respondent's conclusion that the third respondent was not guilty of this defamation charge must be sustained.

[38] 1992 (1) SA 762 (A) at 783A-C.

[67] This then leaves only the charge of not acting in the best interest of the company. The nub of this charge is based on the fact that the third respondent, having acquired knowledge of the fact that a COQ09 product had been tampered with, did not bring this to the attention of the applicant timeously and properly, and thus brought the company name into disrepute. In this regard, the third respondent testified that she did report the issue of the re-labeled stock to Jeanine as far back as June 2010, and trusted Jeanine to report it to Lloyd, which testimony the second respondent accepted (and in my view properly so). However, and despite this, the second respondent actually still found that the third respondent could have done more to report the matter. The second respondent in essence accepted that the third respondent could have reported this formally in terms of the normal applicable reporting processes and interaction with the applicant's management. The second respondent concluded that the third respondent was indeed guilty of this charge and there is simply no basis to interfere with this conclusion.

[68] The second respondent however then found that dismissal was not appropriate despite the third respondent being guilty of this charge. The second respondent in essence concluded that progressive discipline was appropriate. The applicant has taken issue with this conclusion on the basis that the issue of re-labeling of stock has "serious implications". The applicant's problem is simply that it has provided no alternative basis on which the issue of a fair sanction can be determined or considered. The chairperson of the disciplinary hearing devoted insufficient attention to this issue of sanction, leaving the issue of sanction in essence open for determination by the second respondent.

[69] The powers and functions of CCMA commissioners when dealing with the issue of the fairness of the sanction of dismissal, as currently prescribed in law, was articulated in the judgment of *Sidumo*.[39] In terms of *Sidumo,* what the commissioner has to do is to determine if the employer in dismissing the employee acted fairly. This means the fairness of the conduct of the employer as a whole must be considered in order to determine if the decision arrived at

[39] *Sidumo* (*supra*) footnote 2.

by the employer in dismissing the employee was fair, which is more than just the commissioner applying his or her own sense of fairness in deciding the issue. The commissioner must consider the "totality of circumstances", specifically referring to all the sanction principles identified in the judgment of *Sidumo*.

[70] In applying *Sidumo*, the LAC in *Fidelity Cash Management*[40] held as follows:

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

[71] Further principles that require determination in assessing whether the sanction of dismissal is fair is the consideration of the issue of the breakdown or not of the trust relationship, the existence or not of dishonesty, the

[40] *Fidelity Cash Management Services* (*supra*) footnote 5.

possibility of progressive discipline, the existence or not of remorse, the job function and the employer's disciplinary code and procedure.[41]

[72] In addressing the issue of what a review court must consider in deciding whether the determination of an arbitrator on the issue of the sanction imposed is reviewable, the Court in *National Commissioner of the SA Police Service v Myers and Others*[42] said the following:

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

[73] Unfortunately, the second respondent's reasons articulated in his award as to why dismissal was considered by him to be inappropriate is rather sparse. It does however appear that he so found because he did not consider the charge he found the third respondent guilty of as being so serious and he believed that progressive discipline was appropriate. I consider both these considerations to be valid in the circumstances. I would like to add to this, in considering the issue of an appropriate sanction *in casu*, that (1) there was no real prejudice shown by the applicant to exist; (2) the third respondent had in fact returned the products to the applicant some time earlier; (3) there were deficiencies in the applicant's own stock control system; (4) the third respondent had four years' service with an unblemished disciplinary record; and (5) I do not believe, having proper consideration to the evidence on

[41] See *Sidumo* (*supra*) at paras 116 – 117; *Eskom Holdings Ltd v Fipaza and Others* (2013) 34 ILJ 549 (LAC) at para 54; *Harmony Gold Mining Co Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 912 (LC) at para 22; *Trident SA (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others* (2012) 33 ILJ 494 (LC) at para 16; *Taxi-Trucks Parcel Express (Pty) Ltd v National Bargaining Council for the Road Freight Industry and Others* (2012) 33 ILJ 2985 (LC) at para 18; *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others* (2011) 32 ILJ 1057 (LAC) at para 34; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 1189 (LC) at paras 26 – 27; *City of Cape Town v SA Local Government Bargaining Council and Others (2)* (2011) 32 ILJ 1333 (LC) at paras 27 – 28; *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO and Others* (2010) 31 ILJ 901 (LAC) at paras 37 – 38.

[42] (2012) 33 ILJ 1417 (LAC) at para 99.

record, that there is a break down in the employment relationship just because of this charge, and I consider that the principal issue always was that the applicant blamed the third respondent for being involved with the Carte Blanche program and providing them with the product shown on the program, of which conduct she was actually not guilty. Based on the questions articulated in the judgment of *Myers*, I am of the view that the sanction considered by the second respondent to be appropriate is one that could reasonably be imposed, and there is no basis to interfere with this conclusion.

[74] The applicant has also raised several grounds of review with regard to the second respondent's findings relating to the actual re-labeling of stock, whether such re-labeling exists, whether the applicant was consistently applying its own reporting procedures, and whether the applicant knew about re-labeling or condoned it. In my view, nothing turns on any of this *in casu*. Even assuming that the second respondent acted irregularly in determining these issues and evidence, and making findings on the same as complained of by the applicant, the fact remains that the outcome the second respondent arrived at on the three actual charges against the third respondent in this instance still remains a reasonable outcome. The third respondent was never charged with being involved in or condoning re-labeling. Therefore, these mentioned issues relating to re-labeling do not in any way impact on the determination of the actual charges against the third respondent. Whether or not the applicant re-labeled stock was simply not an issue and did not constitute a component of the misconduct with which the third respondent had been charged. It is my view that the second respondent did not even have to consider the issue of whether re-labeling exists or not in the applicant and what the applicant may have done about it. Truth be told, I think that the reason why the second respondent devoted some time to this is because the applicant placed so much emphasis on it in order to try and distance itself from it and dispel what said about it on Carte Blanche in this regard. The review grounds raised by the applicant in this regard accordingly do not take the matter any further, and cannot assist the applicant is seeking to assail the award of the second respondent.

[75] Similarly, the testimony of the two Cape Town witnesses, Schmidt and Cecile O'Neil, do not take the matter further as well. The applicant equally raised an issue about the second respondent not properly considering and determining their testimony. The fact is that all that these witnesses could contribute was that the third respondent called them and/or they called her, in which conversations she told them about the re-labeled product she had seen and the events surrounding her having witnessed this, and in which she said there may be truth in the Carte Blanche program. These conversations were about the same time as the Carte Blanche program was aired, and would in any event only be applicable to the charge of not acting in the best interest of the company, of which charge the second respondent in any event found her guilty of, and the defamation charge, which I have already dealt with. This evidence, even if accepted in the form and substance as the applicant contends it should be accepted, again simply does not detract from the reasonableness of the outcome arrived at by the second respondent.

[76] Accordingly, and in the light of all of the above, I conclude that the second respondent's determination that the dismissal of the third respondent was substantively unfair is for the most part not an irregularity, and in any event an outcome a reasonable decision maker could come to. The second respondent's finding of substantive unfairness is thus upheld.

The merits of the review: issue of compensation

[77] This the only leaves the issue of relief. The applicant has taken issue with the 12 months' salary compensation award of the second respondent. Now it is so that the second respondent simply plumbed for maximum compensation because the third respondent did not want reinstatement, and did not motivate why he so awarded. In this regard I refer to what the Court said in *Matjhabeng Municipality v Mothupi No and Others*:[43]

> 'The commissioner then decided that R250,000 was a just and equitable amount without giving reasons why he came to that conclusion. In my opinion he should have gone further and given reasons why he accepted that the said

[43] (2011) 32 ILJ 2154 (LC) at paras 47 – 48.

amount was just and equitable, and perhaps also taken into account whether the third respondent was working, how much he was paid, etc. Even if he came to the same conclusion at least one would know why he came to that conclusion. On that basis, it is my conclusion that the failure on the part of the commissioner to justify the compensation amounts to a reviewable irregularity.

Commissioners should be vigilant at all times, especially where they decide not to grant compensation or they grant one or two months or so compensation, or where the maximum compensation is granted, to make sure that they give reasons therefor. Therefore, commissioners should be careful not [to burden] the courts with the task of making inferences from the body of evidence for the reasons for the compensation, although the courts will not fail in their duty in that respect.'

[78] It is trite that the determination of the quantum of compensation awarded in unfair dismissal arbitration proceedings, by a CCMA commissioner, entails the exercise of a discretion. As to how this discretion is to be exercised, reference is made to the well known considerations as set out in *Ferodo (Pty) Ltd v De Ruiter.*[44] In *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO and Others,*[45] the Court held*:*

> *'*The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer.'

[79] Unfortunately, and because of the second respondent's complete lack of

[44] (1993) 14 *ILJ* 974 (LAC). The Court held that '(a) [T]here must be evidence of actual financial loss suffered by the person claiming compensation; (b) There must be proof that the loss was caused by the unfair labour practice; (c) The loss must be foreseeable, ie not too remote or speculative ; (d) The award must endeavour to place the applicant in monetary terms in that position which he would have been had the unfair labour practice not been committed ; (e) In making the award the court must be guided by what is reasonable and fair in the circumstances ; (f) There is a duty on the employee (if he is seeking compensation) to mitigate his damages by taking all reasonable steps to acquire alternative employment.'

[45] (2007) 28 *ILJ* 2238 (LAC) at para 30.

reasoning and motivation why he decided to award the maximum compensation, it is not possible for me to determine if he in fact exercised a judicial discretion from merely a reading of his award. I am accordingly compelled in the circumstances to determine the issue of appropriate compensation based on the evidence already on record myself. In this regard, I consider the following: (1) the dismissal of the third respondent was both substantively and procedurally unfair; (2) Overall, the applicant in essence did not have proper cause of complaint against the third respondent and in my view she was the designated scapegoat because of the Carte Blanche program; (3) the third respondent had four years of unblemished service; (4) the third respondent did seek alternative employment to mitigate her damages, and in fact found alternative employment the next February with a company called Surgical Devices, but was compelled to resign from such employer because the applicant enforced a restraint of trade against her; (6) the third respondent ultimately found employment at a company called Earth Medical on a commission only basis between R2 000 and R5 000 per month, which was still the state of affairs at arbitration; and (7) the in essence obstructive manner in which the applicant conducted the disciplinary case against the third respondent, and the flavor of pre-determination associated with this.

[80] Based on the considerations I have set out above, I can see no reason to interfere with the second respondent's decision to award the third respondent maximum compensation. In these circumstances, an award of maximum compensation would certainly be consistent with the exercise of a judicial discretion. The fact of the matter is that third respondent was at date of the arbitration, considering her employment history and actual salary earned at the applicant, in essence not gainfully employed. She could have been gainfully employed, but this was actually prevented by the applicant. A consideration of the record in this matter convinces me that there was no reason to enforce the restraint in the circumstances of this matter, and I also consider that the applicant even instituted a damages claim against the third respondent for R500 000.00. I cannot help to think that the applicant's conduct with regard to the third respondent has a vindictive streak in it.

[81] As a matter of law, in any event, this Court should not too readily interfere with determinations made by CCMA commissioners with regard to the quantum of compensation. In *Kemp t/a Centralmed v Rawlins,*[46] it was held that in principle, the issue of compensation can be decided by the Court in its own judgment, which principle would also clearly apply to an arbitrator deciding on compensation. The Court in *Kemp* further said, specifically relating to compensation:[47]

> 'From the above it is clear that in the case of a narrow discretion - that is a situation where the tribunal or court has available to it a number of courses from which to choose - its decision can only be interfered with by a court of appeal on very limited grounds such as where the tribunal or court-
>
> (a) did not exercise a judicial discretion; or
>
> (b) exercised its discretion capriciously; or
>
> (c) exercised its discretion upon a wrong principle; or
>
> (d) has not brought its unbiased judgment to bear on the question; or
>
> (e) has not acted for substantial reason (see *Ex parte Neethling and others* 1951 (4) SA 331 (A) at 335); or
>
> (f) has misconducted itself on the facts (Constitutional Court judgment in the *National Coalition for Gay and Lesbian Equality* case at para 11); or
>
> (g) reached a decision in which the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles (Constitutional Court judgment in *National Coalition for Gay & Lesbian Equality* at para 11).'

I do not consider the second respondent's determination of compensation to fall foul of any of the above considerations. There is accordingly no basis to interfere with the second respondent's award of compensation. It is upheld.

Conclusion

[46] (2009) 30 ILJ 2677 (LAC) at para 3; see also *Media Workers Association of SA and Others v Press Corporation of SA Ltd* (1992) 13 ILJ 1391 (A) at 1397I-1398B.
[47] Id at para 21.

[82] Therefore, and having regard to what I have set out above with regard to the merits of the applicant's review application, and based on the application of the review test as I have also set out above, the second respondent simply committed no irregularities, and even where it can be accepted that irregularities indeed existed, the outcome arrived at by the second respondent remains a reasonable outcome. I am satisfied that the second respondent considered all material evidence, properly determined what constituted the evidence properly before him on which he based his conclusions, properly and rationally construed and applied the relevant legal principles, and mostly provided proper reasons for his award. The second respondent certainly properly dealt with the substantial merits of the dispute.

[83] The second respondent's award on the unfairness of the dismissal of the third respondent therefore must be upheld, and his conclusion that the third respondent's dismissal by the applicant was substantively and procedurally unfair, must be sustained. I accordingly so determine.

[84] On the issue of compensation, I conclude that there is simply no basis in fact or in law for me to interfere with the discretion exercised by the second respondent in awarding maximum compensation. I thus also uphold the second respondent's compensation award.

[85] In dealing with the issue of costs, I can see no reason why costs should not follow the result. Certainly, no compelling considerations were presented to me why this should not be the case. I in any event have a wide discretion where it comes to the issue of costs, and in exercising this discretion in the current matter, I do believe a costs order against the applicant is appropriate.

Order

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

1. The applicant's review application is dismissed with costs.

Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant: Advocate F Venter

Instructed by: Fluxmans Inc

For the Third Respondent: S Leyden of Shepstone Wylie Attorneys