



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D485/2012

In the matter between:

PRADEEP JAYI SINGH

Applicant

and

ETHEKWINI MUNICIPALITY

(TREASURY DEPARTMENT)

First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Second Respondent

HUMPHREY NDABA N. O.

Third Respondent

Heard: 13 June 2014

Delivered: 30 October 2014

Summary: Review of award on alleged failure to prove misconduct and misconception of impact of dishonesty – principle of consistency - an employer should never be held to be acting inconsistently with its disciplinary measures when its employees flout its disciplinary rules, unless there is evidence that such infractions came to its knowledge and it nevertheless took

no disciplinary action – misconduct proved and dismissal was fair.

JUDGMENT

CELE J

Introduction

- [1] The Applicant seeks an order that the arbitration award handed down by the Third Respondent acting under the auspices of the Second Respondent under case number EMD 091014 on or about 17 April 2013 be reviewed and set aside, alternatively corrected with a finding that the appropriate relief ought to have been re-instatement as opposed to merely compensation. The review application is based on section 145 (2) of the Labour Relations Act¹. The First Respondent opposed the application and raised an *in limine* point, that the Applicant has acquiesced in the arbitration award and accordingly, waived his rights to review such award.

Background facts

- [2] The Applicant was employed by the First Respondent as a Manager: Capital Expenditure Unit, which is a Senior Managerial position in the Treasury Department of the First Respondent. On the 16 February 2010, the Applicant was suspended by the First Respondent on suspicion of having committed various acts of misconduct and he was served with a notice of a disciplinary enquiry on 11 May 2010.
- [3] The charges preferred against the Applicant emanated from the employment of a Ms Dineshree Naidoo, also known as Megan, by the First Respondent in its Coastal Stormwater and Catchment Management (“the CSCM”) as an Administration Officer in 2008. In applying for the post, Ms Naidoo had submitted her curriculum Vitae (“CV”) through the Applicant who e-mailed it, using his work e-mail address to the Council on 17 October 2008. The CV

¹ Act Number 66 of 1995, hereafter referred to as the Act.

indicated that the Applicant was her referee; that she had not been convicted of any criminal offence and that she was, at the time of application, working at the First Respondent's Treasury Division as an accounts officer from January 2006 to current date. At the time of the application Ms Naidoo had been convicted of Fraud by a Regional Court and was awaiting sentencing. She lied about her employment as she was an employee of Toyota since September 2008, having just left Volvo Truck and Bus Motors at Amanzimtoti where she worked from 2006 to 2008 as a Financial Administrator. While Ms Naidoo worked for Volvo she committed various counts of fraud amounting approximately to R8, 5 million within a period of three months. She was then arrested, criminally charged and convicted on a guilty plea. She was released on bail pending sentencing when she applied for a position with the first respondent.

- [4] Ms Naidoo had earlier worked for the First Respondent. She joined as an intern with two others in 2003. The three were allocated to various authorities as budget intern in a training process. She trained under the Applicant for a month. When Ms Naidoo wanted to buy her first motor vehicle, a Chevrolet Aveo, she was assisted by the Applicant who went along with her, giving her advice and speaking to the sales representative to see to it that Ms Naidoo was getting value for her money. When Ms Naidoo was twice involved in accidents he helped her to process the insurance claims and to repair the motor vehicle. He loaned her R11000 00 on each occasion of the accident to pay for the excess. The Applicant would constantly give financial advice to his junior staff, including Ms Naidoo. She left the employment of the First Respondent in 2005.
- [5] In 2008 and while working for Volvo, Ms Naidoo committed fraud on diverse occasions by electronically transferring moneys from the Volvo Bank account to her Bank account. In April 2008, she transferred money from the Volvo account to her account and then transferred R50 000.00 of that money to the account of the Applicant. For about three times Ms Naidoo and the Applicant visited Audi Motors at Umhlanga as Ms Naidoo wanted to purchase a motor vehicle. They were assisted by the Sales Representative, Mr Lamont

Erasmus. The Applicant supplied his e-mail address to be used by Mr Erasmus in the car purchase deal as Ms Naidoo said that she did not want to use hers to obviate her work colleagues coming to know that she was buying the Audi TT. Mr Erasmus e-mailed the offer to purchase to the Applicant. He passed it on to Ms Naidoo who on 13 May 2008 signed the offer for the Audi TT in the amount of R411 675.00. It was a cash sale. Mr Erasmus asked her the licensing and registration address to be used for the car. She deferred the answer to the Applicant and the two pondered on the issue for a moment and 5 Lagoon Drive Umhlanga was written by Ms Naidoo in the appropriate form, upon advice from the Applicant.

- [6] On 17 May 2008, the Applicant accompanied her to Royal Hotel to meet with an estate agent as she wanted to purchase an immovable property. On 18 May 2008, she signed an offer R1 million to purchase that immovable property with the address 1 Ocean Gardens, 115 Waterkant Road in Durban North. On 28 May 2008, she paid for the Audi TT motor vehicle. A few days later the car arrived for delivery to Ms Naidoo. She indicated to Mr Erasmus that she could not take delivery of the motor vehicle because the property to which delivery was to be made was under renovations and its drive way was not yet ready for use. Mr Erasmus understood the property spoken of as being one in 1 Ocean Gardens, 115 Waterkant Road in Durban North. According to the Applicant that was reference to 16 Fieldbury Place, Eastbury in Phoenix, where Ms Naidoo was living at the time. From all the deliberations which the Applicant and Ms Naidoo had with Mr Erasmus, an impression left in Mr Erasmus' mind was that the two were lovers. According to Mr Erasmus, Ms Naidoo had said that the Applicant was her future husband and that once the deal for the purchase of the property at 1 Ocean Gardens, 115 Waterkant Road in Durban North was completed, the two would move in to it. In his evidence the Applicant denied this, averring that his relationship with Ms Naidoo was like that of father and daughter. According to Mr Erasmus the Applicant had, without any solicitation, said that the money issue was sensitive because that money to buy the Audi was the proceeds from her late husband's estate. On the contrary, the Applicant said that what Ms Naidoo told him was that she had won a lotto of R1 million. He, however, denied

having discussed the financial source of Ms Naidoo with Mr Erasmus.

- [7] While working for Volvo Ms Naidoo had to commute daily to her residential place in Phoenix. Daily travelling had a toll on her. Sometime in the middle of 2008 she mulled over resignation. She consulted the Applicant and sent him a draft letter of resignation. He considered the letter by effecting some corrections and he made what he considered to be appropriate additions to it and forwarded it to her. She did resign and in September 2008 she went to join Toyota. There was a vacancy for an Administration Officer in the CSCM of the first respondent. Ms Naidoo applied for that position. The applicant sent her CV and an application form through his official e-mail system. The Applicant's version was that she gave him a memory stick with the CV and the application form. All he did was to drag and drop the documents from the memory stick and to forward same to the Council without reading them.
- [8] Later the Applicant had a work related telephone discussion with Mr Geoff Tooley of the CSCM and in the course of that discussion he asked Mr Tooley if the vacancy in his department had been filled. The response he received was that the post had not yet been filled. The Applicant told him that Ms Naidoo had applied for the position and Mr Tooley undertook to check if the application was in the jacket. After about two to three weeks the Applicant telephoned Mr Tooley to check on the application. Mr Tooley told him that he had seen the application and had noticed that Ms Naidoo made the Applicant her referee and he asked how she worked. The Applicant said that she worked well. In June 2009, Ms Naidoo was then employed by the First Respondent.
- [9] In February 2010, the Applicant and Ms Naidoo were arrested by the police in connection with fraud case of Ms Naidoo. The Applicant was released on bail on the next day and when he returned to work he was put on suspension. Ms Naidoo was sentenced to a term of imprisonment while the criminal charge was withdrawn against the Applicant. The First Respondent served the Applicant, as indicated with misconduct charges. The disciplinary enquiry proceeded on 08 to 10 June 2010, presided over by Mr P. Du Plessis, Deputy Head Income in the Department of Treasury and the Applicant was

represented by his trade union, IMATU. He was found to have committed the acts of misconduct he was charged with and was dismissed. He lodged an internal appeal which was never scheduled for a hearing. As at date of his dismissal, the Applicant had been employed by the First Respondent for a period of approximately 24 years.

[10] The Applicant referred an unfair dismissal dispute for conciliation and thereafter for arbitration. The Third Respondent was appointed to arbitrate it. The acts of misconduct in relation to which the Applicant referred the dispute to arbitration were essentially the following:

- Charge 1(c): Gross dishonesty in that during 2008/2009 the applicant failed to act in the interests of the respondent by withholding pertinent information regarding Ms Naidoo's personal circumstances and previous employment from the respondent;
- Charge 1(d): Gross dishonesty in that during 2007 the applicant misrepresented the address of his private business as that of 5 Lagoon Drive, Umhlanga Rocks, which is in fact the address of the respondent's offices in Umhlanga Rocks;
- Charge 2: Gross negligence in that on or before 2008 the applicant failed to disclose private business interests as a director of inter alia a company called "The Business Zone 1080 CC";
- Charge 3: Other acts of misconduct which constitute just cause for dismissal, in that during 2007 the applicant failed to comply with the code of conduct for employees in the municipal employment when he utilized a council property address on his private company stationary and did not act in the best interest of the respondent;
- Charge 4(b): Gross insubordination in that on or about April 2009 the applicant canvassed the manager at Coastal Storm Water & Catchment Management regarding the recruitment & employment of Megan Ms Naidoo in contravention of the respondent's policies and procedures; and

- Charge 4(c): Gross insubordination in that on or before 2009 the applicant failed to comply with instructions from the Council regarding disclosure of other business interests as well as Municipal Managers Brief 1/2000.

[11] The dismissal of the Applicant by the First Respondent stood as common cause. The First Respondent had to prove the fairness thereof and to discharge that onus it called and led the evidence of three witnesses. The witnesses were Messrs Stefanus Rudolf Coetzee, a private investigator of Intelligence Recovery Solutions, whose services were utilised by the First Respondent to investigate this matter, Lamont Erasmus, employed as a Sales Executive at Volvo Umhlanga Motor vehicle sales branch and Chris Nagooroo, the Head of the Expenditure Unit for the Treasury Department of the First Respondent. The Applicant called as his witness Mr Geoffrey Allan Tooley, a Senior Manager at the Storm Water and Catchment Management Department of the First Respondent and the Applicant also testified.

[12] The Third Respondent found that the First Respondent had successfully proved the guilt of the Applicant on only two acts of misconduct, namely:

- Charge 1(c): Gross dishonesty in that during 2008/2009 the applicant failed to act in the interests of the respondent by withholding pertinent information regarding Ms Naidoo's personal circumstances and previous employment from the respondent;
- Charge 1(d): Gross dishonesty in that during 2007 the applicant misrepresented the address of his private business as that of 5 Lagoon Drive, Umhlanga Rocks, which is in fact the address of the respondent's offices in Umhlanga Rocks

[13] In relation to the two charges the Third Respondent found that in determining procedural fairness the fundamental issue was to ensure that the employee was afforded an opportunity to ask questions and respond to allegations made against him. In the circumstances, the Third Respondent was satisfied that the dismissal was procedurally unfair only (his emphasis) with regard to First Respondent's failure to schedule an appeal. Applicant's dismissal was substantively unfair only (his emphasis) due to inconsistency relating to other

employees who used First Respondent's address to falsely enhance their status not being charged.

- [14] The Third Respondent said that the Applicant was found guilty of dishonesty and failing to act in good faith towards his employer to disclose Ms Naidoo's dishonest conduct and that he did not show any remorse as he stuck to his version that he did not know about any dishonest conduct pertaining to Ms Naidoo. He held that the acts of dishonesty for which Applicant was found guilty and Applicant's failure to show remorse on the charge of failure to disclose Ms Naidoo's acts of dishonesty rendered continued employment intolerable. He found that an order of reinstatement would be inappropriate in the circumstances and he ordered the First Respondent to pay the Applicant a compensatory amount of R114 587, 32, an equivalent of four month's salary, within 21 days of receipt of the award.
- [15] On 4 May 2012, the Applicant's attorneys called upon the First Respondent to make payment of the compensation amount awarded by the Third Respondent to the Applicant and provided his banking details for that purpose. On 29 May 2012, the Applicant served a copy of the review application on the First Respondent's attorneys. Then on 30 May 2012, the First Respondent paid to the Applicant the full amount owing in terms of the award. The Applicant accepted such payment and did not stipulate any conditions for such acceptance. Nor has he tendered repayment thereof.

Chief findings of the third respondent

- [16] Only those findings that are the subject of the review application need be outlined. In regard to the first infraction of withholding pertinent information, the third respondent found that:
- an employee owed an employer a duty of good faith (a fiduciary duty);
 - Mr Erasmus had testified that Ms Naidoo had purchased an Audi TT in the sum of R411 675.00 from Volvo in May 2008. At the time Ms Naidoo was accompanied by the Applicant. Ms Naidoo had informed Mr Erasmus that the Applicant was her future husband. On 13 May 2008, Ms Naidoo signed the offer to purchase the vehicle and reflected the Applicant's

email address as her email address. She did not want to use her email address as she did not want people at work to know she was purchasing the Audi TT;

- The Applicant had on one occasion advised Mr Erasmus that the money issue was sensitive as money to purchase the car had come from her deceased husband's estate. However, the Applicant denied making a statement to Mr Erasmus regarding money coming from the deceased estate. The Applicant testified that Ms Naidoo had in fact advised him that she had won a substantial amount of money at the Sun Coast Casino.
- Ms Naidoo had written the physical address in respect of the vehicle registration forms to be that of the First Respondent with a postal address of 1 Ocean Gardens Drive. Ms Naidoo indicated that she was not sure which address to use as she and the Applicant would be moving into the new property, referring to the address of Ocean Gardens. The Applicant had conceded that he accompanied Ms Naidoo and suggested to her to write the address 5 lagoon Drive.
- The Third Respondent had to determine the inherent probabilities on a "lesser scale" of balance of probabilities and not the higher scale of beyond a reasonable doubt. The First Respondent had to prove that Applicant knew about Ms Naidoo's dishonesty and he had a fiduciary duty to disclose this to his employer. The fact that Applicant had suggested that Ms Naidoo was to use his employer's address evidenced that he was someone who would assist Ms Naidoo to falsely enhance her status through the use of his employer's address.
- In determining inherent improbabilities of the aspect of the evidence whether Applicant had informed Mr Erasmus of the source of Ms Naidoo's money the Third Respondent reasoned that:
 - a. Mr Erasmus' candour and demeanour in the witness box was satisfactory;
 - b. Mr Erasmus was an independent witness and had no reason to fabricate against the applicant;
 - c. The argument raised by the Applicant's representative that Mr

Erasmus was probably mistaking Applicant for another client was not put to Lamont under cross examination;

- d. Applicant's representative only put that he was going to dispute mentioning Ms Naidoo's source of the money;
- e. The issue of Ms Naidoo winning the *lotto* left more questions than answers as any reasonable person in the Applicant's shoes would have enquired about the Audi and property which was supposed to have been purchased when Ms Naidoo handed him the flash disc with her CV contained on it;
- f. According to the Applicant he only knew about her dishonesty when they were both arrested;
- g. The Applicant's version was highly improbable;
- h. The Applicant failed to call Ms Naidoo even though he had the choice to do so. Accordingly, Mr Erasmus' evidence that Applicant had told him that Ms Naidoo was purchasing the car from proceeds of her late husband's estate; and since it was not in dispute that Ms Naidoo had never married, the more probable inference was that the Applicant was hiding the dishonest source of Ms Naidoo's income;
- i. Applicant had a fiduciary duty to disclose the dishonest sources when she applied for a job and he failed to do so which rendered him guilty of a failure to disclose pertinent information.

[17] In regard to the second infraction, the Third Respondent found that the Applicant was guilty of dishonesty in using the address of the First Respondent as his business address, in order to "falsely profile his private business". The Third Respondent however, found that it was "commonly known that employees would use the Umhlanga based address when applying for motor vehicle registration even when they did not live or work at such address simply to falsely profile their status". The Third Respondent

found that any act of dishonesty impacted on the operational risk of an enterprise and that the sentiments in the *De Beers Consolidated Mines* case referred to were apposite and relevant when assessing acts of dishonesty. He found however, that the First Respondent had acted inconsistently by failing to investigate and charge those other employees which it confirmed had used First Respondent's address as their own in order to enhance their personal profiles.

- [18] When the Third Respondent determined the appropriateness of the sanction to be imposed, he found that the acts of dishonesty for which the Applicant was found guilty and the Applicant's failure to show remorse on the charge of failure to disclose Ms Naidoo's dishonesty rendered continued employment intolerable, making re-instatement inappropriate.

The *in-limine* point raised

- [19] The First Respondent raised *in limine*, that the Applicant acquiesced in the arbitration award and accordingly, waived his rights to review such award when on 30 May 2012 the first respondent paid to the applicant the full amount owing in terms of the award. The applicant accepted such payment and did not stipulate any conditions for such acceptance. Nor did he tender the repayment thereof. The submission was that the voluntary payment, or acceptance of payment as the case might be, in terms of a judgment, was usually sufficient to satisfy a court that a party has acquiesced in that judgment². It was further submitted that such acquiescence was confirmed, *in casu*, where payment was received and accepted in response to a specific request from the applicant. In the circumstances, the applicant's right to pursue the review application was said to have become perempted and that the application fell to be dismissed with costs.

- [20] The Applicant submitted that it was correct that the amount was paid and received by him. He said that at no time did the First Respondent contend that in making payment which it was obliged to make in terms of the

² See *NUMSA and Others v Fast Freeze* (1992) 13 ILJ 963 (LAC)

arbitration award, and the Applicant's acceptance of it, was to be construed as a waiver of his right to review the award. The payment was made unconditionally and accepted by the Applicant unconditionally. He further said that the payment of the compensatory portion of the award was fully consistent with an intention to proceed with the review of the arbitration award, in that the relief sought, to wit, substitution of the award with a finding that re-instatement ought to have been granted and not merely compensation, would only serve to increase the compensatory portion of the award payable to the applicant and not reduce it.

- [21] On 4 May 2012, the Applicant's attorneys called upon the First Respondent to make payment of the compensation awarded to the Applicant and provided his banking details for that purpose. It is of particular note that on 28 May 2012, the notice of motion was signed and on 29 May 2012, the Applicant deposed to the founding affidavit in support of the application for review which, it is common cause, was on the same date served to the First Respondent's attorneys. It was only a day thereafter that the First Respondent paid to the Applicant the full amount in terms of the award. In the review, the Applicant set out in detail why he believed the award of the Third Respondent was not that of a reasonable decision maker and the relief he sought, which was that the award be reviewed and set aside, alternatively reviewed and corrected.
- [22] In my view, through the receipt of the review application, the First Respondent would have been acutely aware of the fact that the Applicant was not acquiescing in the award. Nor was he, on the objective facts before me, waiving his rights by virtue of the receipt of the payment as he had already demonstrated that he was exercising his right to review the award. This is not a case where he received payment and only thereafter initiated the review proceedings³.
- [23] I have taken note as well that there is no cross-review application that was filed in which the First Respondent sought relief substituting the order for

³ See *Balasana v Motor Bargaining Council and Others* (2011) 32 ILJ 297 (LC) where this Court, per Molahlehi J still found that waiver had not been proved by the employer.

payment of compensation with a dismissal of the Applicant's review application. Accordingly, no conclusion as to a waiver of the Applicant's rights to review the award ought to result from the acceptance of payment in terms of the award.

Grounds for review

[24] Various submissions were made by the Applicant in support of the review application. It was contended, inter alia, that:

- It was a material misdirection of law and fact that any (applicant's emphasis) act of dishonesty impacts upon the operational risks of the employer and hence would impliedly justify dismissal. In fact established jurisprudence is to the contrary, namely that it is not every act of dishonesty that justifies dismissal. The third respondent erred on all scores rendering the award reviewable. The third respondent misconceived the enquiry by proceeding from the premise that any act of dishonesty impacts on the acceptable level of operational risks to be borne by an employer;
- This premise led to the finding that the applicant's dismissal for this infraction was thus only substantively unfair because of a lack of consistency in disciplining employees for this infraction. The fundamental flaw in the third respondent's logic is that a lack of consistency demonstrates that an employer has not / does not consider the type of infraction as sufficient to warrant dismissal (i.e. an operational risk) and hence the inconsistent application of discipline, which is (without any proper justification for the distinction) inherently unfair;
- The third respondent thus misconceived the nature of the enquiry, failed to apply his mind to the relevant legal principles and the facts of the matter. This led to an unreasonable result in that it constituted a decision which a reasonable decision maker could not have reached on the evidence before him had he in fact applied his mind to the appropriate facts and legal enquiry.

In this regard, the third respondent exceeded his powers by failing to hand down an award which a reasonable decision maker would have reached;

- The finding of substantive unfairness due only to inconsistency relating to other employees who used the first respondent's address to falsely enhance their status not being charged, meant by clear implication that the charge of withholding allegedly pertinent information did not justify dismissal. This had to be so when regard was had to the determination of the appropriate sanction to be imposed;
- Consistency as a reason for a dismissal being unfair does not constitute a circumstance surrounding dismissal which would render continued employment intolerable. It does not in and of itself both render the dismissal unfair and preclude reinstatement. The parity principle is a consideration of fairness which demonstrates that continued employment was indeed determined to be possible notwithstanding commission of the alleged infraction. The third respondent's finding to the contrary is based on a misconception of the law in this regard and rendered his finding unreasonable.
- A failure to show remorse was only remotely connected to the dismissal. It was not a particular circumstance surrounding the dismissal. The finding was in any event not justified in light of the evidence before the third respondent whose findings as to the applicant's guilt on the charge of withholding pertinent information was not only unreasonable in relation to the reasons provided, which demonstrate a singular lack of rationality, but are also unsustainable and hence unreasonable in relation to the evidence before him;
- The third respondent simply accepted Mr Erasmus' evidence. He did not consider the obvious concerns raised regarding his ability to recollect correctly the events, or the concessions made by him in cross examination concerning his evidence, which in large part amounted to no more than speculation. The third

respondent failed, thus to consider Mr Erasmus' reliability as a witness, when same was plainly called into question;

- The third respondent failed to determine the probabilities of the applicant's version that he had only found out the details of Ms Naidoo's dishonesty after he had been arrested in 2010. He failed to have regard to the evidence of the timing of the acquisition of the vehicle, her arrest, whether the applicant knew thereof or attended court, when the CV was submitted in relation to Ms Naidoo's conviction and when the applicant was arrested. The third respondent clearly denied the applicant a full and fair hearing in this regard;
- In determining the sanction, the third respondent failed to have regard to what operational risk the applicant posed, even had he been guilty of withholding information, which he plainly was not. He had a clean record and had been employed for 24 years;
- The first respondent had plainly not proved the charge of misconduct against the applicant. Dismissal was, in any event, not the appropriate sanction, and on either score re-instatement was not precluded; and
- The third respondent further failed to determine the issues surrounding the question of costs and only determined the one reserved costs order, further evidence of his failure to properly determine the issues in dispute before him.

[25] The First Respondent made various submissions in opposing the review application. It was submitted that the Third Respondent's findings on dishonesty and a failure to act in good faith on the part of the Applicant were apparent from the Applicant's own evidence in that:

- He intentionally misrepresented to Volvo that he operated a business from the address of the first respondent;
- He conceded that such misrepresentation was not right, especially as it was not done with the permission of his employer.

- He conceded that he should have been charged with unauthorized use of the first respondent's address as it was illegal to have actually done that.

[26] It was said that in contending that his colleagues should also have been disciplined, the Applicant failed to appreciate the distinction between his conduct and that of his peers in that he represented to Volvo that he was conducting a business from the address in question. Also, there was no suggestion that any other person used the address for any purpose other than to register their motor vehicles in order to obtain an 'NUR' number plate. Further, he encouraged a third party, Naidoo, to use the First Respondent's address in order to enhance her status in circumstances where the transaction was illegal and attracted criminal censure.

[27] It was submitted that the gravity of the Applicant's conduct surpassed the level of misrepresentation which was attributed to his colleagues and was clearly distinguishable. More importantly, the failure to discipline his colleagues did not have the effect of erasing the Applicant's misconduct as it remained a relevant consideration in determining the appropriateness of reinstatement.

[28] In respect of the duty to disclose the Applicant was said to have not contended that he was under no duty to disclose Ms Naidoo's dishonest dealings to the first respondent if he had knowledge thereof. He simply denies that he knew about it at the time that she applied for the position with the first respondent. In determining the probabilities that the Applicant was aware of the dishonesty on the part of Ms Naidoo, the following evidence was material:

- (a) His friendship with Ms Naidoo dates back to 2003 and Ms Naidoo attended family functions at his home.
- (b) Over the years, they developed more of a father/daughter relationship than anything else and she looked to him for advice in any of the things that she wanted to do. She sought his assistance and advice when she bought her first car, a

Chevrolet Aveo. He accompanied her to the dealership and helped her to negotiate the terms of purchase. When she had two accidents with the Aveo, he assisted her with getting the car repaired as well as processing the insurance claims. In respect of each of the accidents, he advanced her the money to pay the excess charges in the amounts of R11000.00 and R12000.00 respectively.

- (c) He assisted her in drafting her letter of resignation to Volvo.
- (d) When he sent Ms Naidoo's CV to the HR Department, he did so in a manner which conveyed the impression that it came directly from Naidoo and that she was an internal applicant. Pursuant to forwarding her CV to HR, he made two telephone calls to Mr Tooley wherein he enquired about the status of such application.
- (e) He accompanied Ms Naidoo two or three times to the Audi dealership in order to assist her in negotiating the purchase of an Audi TT. He asked that the invoice be sent to his email address so that he could verify the contents. Ms Naidoo told the salesman, Lamont, that she did not want the people with whom she worked to know that she was purchasing the vehicle.
- (f) Mr Erasmus testified that the applicant told him that the source of Ms Naidoo's money was her deceased husband's estate. During or about the same time the applicant assisted Ms Naidoo in negotiating the purchase of an immovable property. He attended on the property and met with the sales agent.
- (g) Ms Naidoo allegedly repaid the monies lent to her 7 years later in an arbitrary sum of R50000.00.
- (h) At a criminal court Ms Naidoo pleaded guilty and was convicted in Oct 2008.
- (i) Ms Naidoo was employed by the first respondent in April 2009.

- (j) The applicant and Ms Naidoo maintained the close friendship during the period that she was convicted and when applied for employment with the first respondent as was apparent from his involvement with her application.
- (k) He forgave Ms Naidoo for involving him in her criminal activities.
- (l) He and Naidoo were represented by the same attorney.
- (m) Ms Naidoo failed to give evidence on his behalf despite the purported concern on the part of her and her family that he does not lose his job as a result of her conduct.

[29] It was submitted that on a conspectus of the evidence, the probabilities, inherent or otherwise were overwhelmingly in favour of a finding that the Applicant was aware of Ms Naidoo's dishonest conduct. At the very least, it was untenable to argue that such a finding was not one which fell within the band of decisions that a reasonable decision maker could make on the available material.

Evaluation

[30] The test to use in review applications which seek to impugn an award of a commissioner is one set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁴ as explained in a number of decisions including *Herholdt v Nedbank Ltd and Others*⁵ where the Court *inter alia* said that:

[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls 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

⁴ [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC) at paras 106 to 110.

⁵ [2013] 11 BLLR 1074 (SCA).

before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable’.

[31] Also of importance, in *Fidelity Cash Management Service v CCMA and Others*⁶, the Labour Appeal Court stated in relation to the *Sidumo* test that:

‘...there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner’s decision does not depend – at least 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 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...’

[32] Further, in *Gold Fields Mining SA (Pty) Ltd v CCMA*⁷, Court held that:

[16] 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 decisions he or she arrived at.

[17] The fact that an arbitrator committed a process-related irregularity is not in itself a sufficient ground for interference by the reviewing court. The fact that an arbitrator commits a process-related irregularity does not mean that the decision reached is necessarily one that a reasonable commissioner in the place of the arbitrator could not reach.

[18] In a review conducted under s145 (2) (a) (c) (ii) of the LRA, the review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal

⁶ (2008) 29 ILJ 964 (LAC), at para 102,

⁷ [2014] BLLR 20 (LAC)

with one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the review court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.

[19] To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in section 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly. This is also confirmed in the decision of *CUSA v Tao Ying Metal Industries*.⁸

[33] As correctly submitted by Ms Naidoo for the First Respondent, in seeking to impugn the award, the Applicant embarked upon a tortuous and piecemeal dissection of the commissioner's reasoning in an attempt to demonstrate that he misconceived the nature of the enquiry, failed to apply the relevant legal principles, exceeded his powers and/or committed a gross irregularity in the conduct of the proceedings. To evaluate every factor individually and independently, as done by the applicant, is to defeat the very requirement set out in section 138 of the Act which merely requires the Third Respondent as arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and to do so expeditiously and fairly.

[34] In this application, mine is to ascertain whether the Third Respondent considered the principal issue before him; evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the

⁸ 2009 (2) SA 204 (CC) at paragraphs 64 and 65 where the court held that: '...commissioners are required to "deal with the substantial merits of the dispute with the minimum of legal formalities." This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, arbitrators must be allowed a significant measure of latitude in the performance of their functions. Thus the LRA permits commissioners to "conduct the arbitration in a manner that the commissioner considers appropriate". But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do. An arbitrator must, as the LRA requires, "deal with the substantial merits of the dispute". This can only be done by ascertaining the real dispute between the parties.'

decisions he arrived at. The fact that he might have committed a process-related irregularity, even if it be so, is not in itself a sufficient ground for interference by the reviewing court.

Whether any act dishonesty impacts upon the operational risks of the employer

- [35] The Applicant has correctly stated the legal principle that it is not every act of dishonesty that justifies dismissal⁹. The finding by the Third Respondent that any act of dishonesty does impact upon the operational risks of the employer is certainly true. The next probe would then turn on the extent of such impact, in which instance every case must be judged on its merits. There are cases where a dismissal would be justified and there are those where it might not be, depending on various considerations, such as the safety measures of the employer, the type of work involved, etc. The Applicant went on an errand to say that by implication what the third respondent said, in general, impliedly justified dismissal. In any event, the consequential finding made by the Third Respondent favoured the Applicant and therefore this ground for review, with all its submissions, has no merits as the Third Respondent has not been shown to have misconceived the nature of the enquiry.

Gross dishonesty for a failure to act in the best interest of the employer.

- [36] In respect of the misconduct charge of gross dishonesty for a failure to act in the best interest of the First Respondent the evidence of Mr Erasmus is decisive. The Third Respondent accepted his evidence when it differed from that of the Applicant. The first consideration is that, the reason why Ms Naidoo is said to have not wanted to make use of her e-mail address for the offer to purchase the Audi is not plausible. Access to e-mails is through the use of a password. Ms Naidoo had absolute access to her e-mails. When the offer to purchase came through her e-mail, she could print it at her leisure and then delete the e-mail or save it in her confidential file. In fact the Applicant would have had to probe why her colleagues were not to know about the purchase

⁹ *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 1051 (LAC) and *Toyota SA Motors (Pty) Ltd v Radebe and Others* (2000) 21 ILJ 340 (LAC) at 346G-H.

as it would be a matter of time to see her driving the Audi. According to his information she had won a lotto and was buying a nice car. So why hide the fact, was a question the Applicant had to ask. This factor alone suggests that the Applicant knew that Ms Naidoo had something to hide from her colleagues and the applicant went along with it.

[36] The source of money to buy the Audi is the second matter for consideration. Mr Erasmus was very adamant on his version that the money issue was sensitive as the money was the proceeds from the estate of her late husband. Assuming then that the version of the Applicant that the issue never arose for a discussion, then Mr Erasmus either lied, deliberately so, or mistakenly imported the facts of another matter to this one. Two contradictory versions that could not co-exist confronted the Third Respondent. He was steeped in the trial atmosphere. The transcribed record bears no sign that the Third Respondent committed any defect, as defined, or issued an unreasonable finding in this respect. The version of Mr Erasmus on this issue should however, not be seen in isolation and therefore the next issue needs to be considered.

[37] Thirdly, the issue of the purchase of the immovable property at 1 Ocean Gardens, 115 Waterkant Road has some pointer to the truth in this matter. The Applicant has not denied that the purchase of the property came in for a discussion in the purchase of the Audi. According to Mr Erasmus this issue arose when the address to which the Audi was to be delivered came up. His understanding was that it was this property that was the subject of renovations, making delivery inconvenient at the time, that the Applicant and Ms Naidoo would move into the property together and that the Applicant was Ms Naidoo's future husband. There is no other context in which this address came up for a discussion. If the Audi was to be delivered at 16 Fieldbury Place, Phoenix, one has to ask why Ms Naidoo made any reference to 1 Ocean Gardens, Waterkant. If Ms Naidoo was saying that she would move into Waterkant property with someone other than the Applicant, it remains unexplained what this had to do with the purchase of the Audi and why Mr Erasmus had to hear of it. In my view, the probabilities favoured the

acceptance of the version of Mr Erasmus and the rejection of that of the Applicant on this issue. The third respondent made that finding, which should therefore not be disturbed.

[39] When the three issues are then seen together, they paint a picture of the Applicant who probably knew the criminal activities of Ms Naidoo and he decided to go along with them, luckily escaping a criminal conviction and therefore seeking his job back. He was too close to Ms Naidoo and yet would have the Third Respondent believe it was no concern of his where the money for the Audi came from. The lotto money was used up in the purchase of the immovable property. He also received R50 000.00 from Ms Naidoo. He willingly assumed the role of being her financial advisor and yet was the least bothered of the source of her financial abilities. Conveniently, he dragged and dropped her application for the job from the memory stick and sent it without reading it. The application form misrepresented the status of Ms Naidoo to the serious prejudice of the first respondent. Even if his version were true in this regard, which is not, he ought to have read the documents to make sure he did not communicate to his employer information he did not want to associate himself with. This conduct was certainly a gross failure to act in the best interest of his employer. Further, he encouraged a third party, Ms Naidoo, to use the First Respondent's address in order to enhance her status in circumstances where the transaction was illegal and attracted criminal censure. He happened to have been discussing work related issues with Mr Tooley when he asked him about Ms Naidoo's application. Conveniently the Applicant did not know the role, if any played by Mr Tooley in the recruitment process, yet he deemed it proper to ask him about the application, knowing that Mr Tooley frequently acted as a Deputy Director. He miraculously escaped conviction on the charge of canvassing with the manager, Mr Tooley.

[40] He is fortunate in this application that there is no counter review application by the First Respondent to challenge the gains he made in the award, including the compensatory order. In respect of the unauthorized usage of the business address the Third Respondent was told that other employees used the address as well, but he was never told that the First Respondent became

aware of it and condoned it. An employer should never be held to be acting inconsistently with its disciplinary measures when its employees flout its disciplinary rules, unless there is evidence that such infractions came to its knowledge and it nevertheless took no disciplinary action.

[41] In my view, the First Respondent proved that the Applicant committed the misconduct of gross dishonesty for a failure to act in the best interest of the First Respondent by withholding from it pertinent information regarding Ms Naidoo's personal circumstances. Other grounds of review have not come across as having any merits.

[42] The misconduct committed by the Applicant, who was a senior personnel was certainly of a serious nature that the First Respondent was entitled no longer to trust him. The Applicant displayed manipulative attributes in the commission of the misconduct such that his long experience with his employer, while important, weighs less than the infraction committed. In the circumstances, a failure not to re-instate the Applicant is not found to have been visited by any defect and that the decision reached by the Third Respondent was also reasonable.

[43] I therefore proceed to make the following order:

1. The application to review the arbitration in this matter is dismissed.
2. No costs order is made.

Cele J

Judge of the Labour Court of South Africa.

APPEARANCES:

For the Applicant: Ms C A Nel

Instructed by: Calitz Crockart & Associates.

For the First respondent: Ms L Naidoo

Instructed by: Kathy James Attorneys

LABOUR COURT