



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JA101/2021

In the matter between:

SOUTH AFRICAN REVENUE SERVICE

Appellant

and

**NATIONAL EDUCATION, HEALTH AND ALLIED
WORKERS UNION obo N KULATI AND ONE OTHER**

Respondent

Heard: 4 May 2023

Delivered: 21 June 2023

Coram: Musi JA, Savage and Gqamana AJJA

JUDGMENT

SAVAGE AJA

Introduction

- [1] This appeal, with the leave of this Court, is against the judgment and order of the Labour Court (per Phehane J) in which the appellant's application to review an arbitration award issued by the Commission for Conciliation Mediation and Arbitration (CCMA) was dismissed with no order of costs. This

appeal lies against the Labour Court's decision in relation to the two respondent employees, Ms Precious Kulati and Mr Nhlakanipho Mkhize.

- [2] In August 2016, following a disciplinary hearing, the appellant, the South African Revenue Service (SARS), dismissed four employees for dishonesty. Ms Kulati, Ms Maslopi Mojapelo and Ms Tirhani Nobela, employed as customs inspectors, were found to have falsified customs documentation between 28 and 29 July 2014 in return for equal shares of a R60 000 bribe received from a clearing agent known only as "John", who acted for Alcari 209 CC (Alcari). The fourth employee, Mr Mkhize, who was employed as a junior inspector, was dismissed for failing to disclose to SARS that Ms Nobela had obtained a bribe from John and that he had been asked by her to take R20 000 to Ms Kulati as her share.
- [3] On 1 August 2014, Ms Nobela disclosed the misconduct to Mr Moabi Setshedi, SARS' Operations Manager at its Edenvale branch. The same day she signed a statement in which she recorded that on 28 July 2014, the acting commander at SARS Edenvale, Mr Thuso Oliphant, had allocated her a container to inspect at the South African Container Depot (SACD), with Ms Kulati as second officer. Ms Nobela and Ms Kulati went to the SACD where they found that the container had already been opened by Ms Mojapelo from SARS Alberton. The container was fully unpacked after lunch, when Ms Nobela stated that "we started counting the cargo". More than 500 boxes of shoes were found in the container that had not been declared. According to Ms Nobela, it was agreed that these boxes would not be recorded in return for the payment of R60 000 which was solicited from John and paid to Ms Nobela, Ms Kulati and Ms Mojapelo the following day. She stated that Ms Kulati received her portion of the money at the office. Ms Nobela asked that her name be kept from the fellow officers she had been working with that day and explained that she had "come clean" after attending training on 31 July 2014:

'...because this case was eating me from the day I did that exam. I humble request that you forgive me of my wrongdoings, and I'm willing to give back the money. And again please do not mention my name to [Ms Mojapelo] and

[Ms Kulati], the thing I can do for you in case something like this happens again while I am not involve like in the case. The money is still in my house, and I promise not to use it until I hear from you...'

- [4] On 26 September 2014, Ms Nobela made a second statement, this time to the South African Police Service (SAPS), in which she confirmed that on 28 July 2014, Mr Oliphant had allocated the container to her and Ms Kulati for inspection. In this statement, she reiterated her previous statement that on arrival at the SACD, they found the container already open and that Ms Mojapelo told them she had opened the container. Ms Nobela recorded further details which included that it was Ms Mojapelo who had spoken to John, who sought a favour as there were about 300 boxes of shoes in the container which had not been declared. According to Ms Nobela, Ms Mojapelo said she had already charged John R45 000 not to disclose the extra boxes. The container was offloaded and the counting was done. Ms Mojapelo recorded the quantity of boxes per pallet. Ms Nobela added up the amounts recorded by Ms Mojapelo and found that there were about 500 extra boxes. She continued that:

'[Ms Kulati] then said that the R45 000 which John promised [Ms Mojapelo] won't work as the goods which are extra are not 300 but more... [Ms Kulati] suggested that John must pay R60 000 the following day which is 29-07-14'.

- [5] Ms Nobela stated that Ms Mojapelo informed her that the extra boxes would not be repacked into the container but would be put to one side. Ms Mojapelo said she would speak to Ms Irene Mokadi, who worked at the SACD, to ensure that the depot report corresponded with the inspection count. Ms Nobela then obtained a copy of Ms Mokadi's report and returned to the office with Ms Kulati.

- [6] Ms Nobela recorded the events of 29 July 2014 for the first time in her statement to the SAPS. She stated that on 29 July 2014, she typed a report "about our inspection at [the SACD] being helped by [Ms Kulati]" which she gave to Mr Oliphant. The same day, she was assigned to go with Mr Mkhize to the City Deep (MSC) depot, near the SACD to inspect a container. On arrival, Ms Nobela received a call from Ms Mojapelo "that John is there with

our money at the side of SACD". Ms Nobela drove there with Mr Mkhize. While Mr Mkhize waited in the parking area, Ms Nobela met Ms Mojabelo who told her that they should go to John's vehicle. Ms Nobela indicated that she was afraid and –

'...[Ms Mojabelo] then walked alone to John's vehicle and came back. She then showed me the money and said I must go and take mine from John's vehicle and I said I am afraid and I can't. I then saw John going to our car where Mr Mkhize was sitting in a driver's seat and he opened a back passenger door and put money on the seat. He then left. I went to the car and found money in the back seat. It was four rolls of R10 000 for myself and I gave the other R20 000 to Mr Mkhize to give to [Ms Kulati]. I also explained to Mr Mkhize what the money is for.

On our arrival to our office in Edenvale, I met [Ms Kulati] in a parking lot and I told her that her money is with Mr Mkhize and I also told Mr Mkhize in the presence of [Ms Kulati] that he must give the money to [Ms Kulati]. I then left and went to my office.'

- [7] According to Ms Nobela, from her receipt of the money she did not have peace in her heart and on 1 August 2014, she decided to disclose to Mr Setshedi what had happened. She informed him that she still had the money. The matter was referred to the police and the R20 000 given to her by John was kept by the SAPS as an exhibit. Ms Nobela concluded her statement to the SAPS stating that she had –

'...never been involved in any corrupt activities in my entire life and that is why I couldn't keep any benefit received in the wrong manner.'

- [8] On 20 October 2014, attorneys acting for Alcarl wrote to SARS to advise that the company had paid R60 000 to John, apparently in the bona fide belief that this amount was owed by Alcarl to SARS.

Arbitration award

- [9] Following their dismissal, Ms Kulati, Mr Mkhize and Ms Mojabelo referred an unfair dismissal dispute to the CCMA. At arbitration, the commissioner found that SARS had failed to prove that either Ms Kulati or Mr Mkhize were guilty of

“any conceivable misconduct”. Both of their dismissals were found to have been substantively unfair and they were retrospectively reinstated into their employment, with back pay in the amount of R749 401,28 and R480 000,00 respectively. The dismissal of Ms Mojapelo was found substantively fair.

[10] Ms Nobela testified for SARS under subpoena at the arbitration hearing. She stated that Ms Kulati and Ms Mojapelo were with her when the container was inspected and, in cross-examination, she confirmed that Ms Kulati was present when the boxes were counted. Her evidence was that Ms Mojapelo told Ms Kulati and her that John had offered to pay them R45 000 to overlook the extra boxes not declared, but that due to the number of boxes found, Ms Kulati approached John and the four of them agreed that he would pay R60 000, with Ms Nobela, Ms Kulati and Ms Mojapelo to divide the money equally between them in return for not recording the excess boxes found. The report prepared by Ms Nobela following the inspection included Ms Kulati’s name but was not signed by her. The report “was not a true reflection of what we counted, or what we saw on the day...[because] we conspired to lie”.

[11] On 29 July 2014, having been assigned to do an inspection with Mr Mkhize at the MSC container depot at City Deep, Ms Nobela received a call from Ms Mojapelo. She told Mr Mkhize that “he must accompany me to go to SACD to go and collect the bribe money from John”. They drove to Ms Mojapelo and, on arrival, Ms Nobela said she left Mr Mkhize in the parking area and went to meet Ms Mojapelo. In examination in chief, Ms Nobela stated that she “proceeded with [Ms Mojapelo] to John’s car to take the bribe money”, while Mr Mkhize sat in the car. Later she testified that Ms Mojapelo walked to John’s vehicle and on her return showed Ms Nobela the money she had collected. Ms Mojapelo told Ms Nobela to go to John’s vehicle to fetch her money but Ms Nobela said she was afraid. She then testified that John had walked to the back seat of the car driven by Mr Mkhize and that he had left the money in four rolls of R10 000 for her there.

[12] Ms Nobela testified that she gave R20 000 to Mr Mkhize for him to give to Ms Kulati at the office and that she explained to Mr Mkhize what the money was for. When Ms Nobela and Mr Mkhize arrived at SARS Edenvale, they met Ms

Kulati in the parking lot. Ms Nobela told Ms Kulati that her money was with Mr Mkhize. She told Mr Mkhize to give the money to Ms Kulati. Ms Nobela then went to her office. She did not see Mr Mkhize giving Ms Kulati her R20 000. She also testified that once back at the office, she met Ms Kulati and informed her that her money was with Mr Mkhize. She went with Mr Mkhize to Ms Kulati and told him that he must give Ms Kulati her money. Ms Nobela then left. The same day, Ms Nobela typed a report about the inspection at the SACD and gave it to Mr Oliphant.

[13] Ms Mojapelo testified that no additional boxes were found in the Alcari container and denied that a bribe of R60 000 had been agreed with John in return for overlooking more than 500 extra boxes of shoes not declared. She testified that she did not know where Ms Kulati was when the boxes were counted and could not say whether Ms Kulati had been involved in counting. She did not know that a re-count was ordered by Mr Setshedi on 15 August 2014 during which 586 extra boxes of shoes were found in the container.

[14] Ms Kulati, in her evidence, also denied knowledge of excess boxes found in the container or any offer of a bribe made by John. She confirmed that on 28 July 2014 she was instructed to inspect the Alcari container at the SACD with Ms Nobela. At the container, they found Ms Mojapelo and John. Ms Kulati said she “tried to count but I did not count” because Ms Nobela was being “disruptive”. When Ms Kulati went to buy food for lunch she left John with Ms Nobela at the container. On her return, she sat in the car with Ms Nobela. Ms Mojapelo joined them in the car for less than 15 minutes. Ms Kulati went to the bathroom and Ms Nobela and Ms Mojapelo returned to the container. When Ms Kulati arrived at the container, Ms Nobela and Ms Mojapelo had completed the count. Ms Nobela was described as behaving “*like a person that does not want me to count because she was busy saying to me that some boxes have 12 pairs inside and other boxes have 24 pairs inside. I think she disturbed me 3 or 4 times and while I was there, I received a call from the office*” and was instructed by Mr Oliphant to open another container. She did not return to the Alcari container and later went to Ms Nobela and informed her that they could go. The two then left the site.

- [15] Because she did not count the boxes, Ms Kulati testified that she did not know how many there were and she was not told that any excess had been found. Her signature was not included on the report because she had not counted the boxes. Ms Kulati said she knew nothing about the money from John and did not receive anything from him. She admitted that two people are required to work on a container but stated that she left when she was told by her superior to inspect another container.
- [16] In his evidence, Mr Mkhize stated that the reason Ms Nobela had given for omitting reference to him in her first statement, namely that she “was tired”, was very strange and that he did not know why she would lie about him. He asked SARS to investigate and obtain the footage of a camera directly where he had parked the car, because such footage would have exonerated him, but that footage was apparently deleted after seven days. He testified that on their arrival at the SACD, Ms Nobela got out of the car to go to the toilet and that, as he parked the car, he saw her coming out of the reception with John. John did not come to the car. Mr Mkhize denied that Ms Nobela gave him money to give to Mr Kulati. He testified that when he and Ms Nobela arrived back at the SARS Edenvale office, Ms Kulati was not in the parking lot. He denied that he was aware of any corrupt conduct on the part of Ms Nobela.
- [17] The commissioner found Ms Nobela to be a poor witness who had contradicted herself and her evidence was approached with “extreme caution”. Material contradictions in her account were found to exist regarding who opened the Alcan container, who was present when it was opened and who was present when its contents were counted. Her statements to SARS and the SAPS were found to be contradictory, as was her evidence regarding the events of 29 July 2014. It was noted that she testified initially that she went to John’s vehicle with Ms Mojapelo to fetch money from John, but in cross-examination said she did not see John giving Ms Mojapelo the money and in her statement to the SAPS Ms Nobela recorded that Ms Mojapelo had walked to John’s vehicle alone. The commissioner rejected Ms Nobela’s explanation that she had only mentioned Mr Mkhize in her statement to the SAPS because she had been tired at the time that she gave her first

statement; and queried why Ms Nobela would have asked SARS not to disclose the contents of her first statement to either Ms Mojapelo or Ms Kulati. Her version that she had told Mr Mkhize of the misconduct and given R20 000 to Mr Mkhize for him to take to Ms Kulati was found to be questionable on the basis that it was unlikely that she would have risked her entire career by sharing such damning and scandalous information with Mr Mkhize when there was nothing in it for him and no indication that he was going to “share the spoils” with Ms Kulati.

- [18] The commissioner accepted that Alcari had confirmed the payment of R60 000 to John but found that Ms Nobela and Ms Mojapelo, assisted by John, had counted the boxes and falsely certified a reduced number of boxes. Ms Kulati was found not to have participated in the misconduct in that she had not counted the boxes and had not been present when the count was done, and when she was, had been prevented by Ms Nobela from counting. She had also not signed any report which recorded the incorrect quantity of boxes. It was noted that Ms Mojapelo, who was found to have been involved in the misconduct, had confirmed that Ms Kulati was not present at the counting of the boxes and that she had not signed anything related to the count. Furthermore, there was no evidence that Ms Kulati had received any money. SARS was therefore found to have failed to discharge the onus to prove that Ms Kulati and Mr Mkhize had committed the misconduct in respect of which they had been dismissed.

Judgment of the Labour Court

- [19] In an *ex tempore* judgment, the Labour Court dismissed SARS’ review application *inter alia* on the basis that the award of the commissioner fell within the bounds of reasonableness required. The Court accepted that Ms Nobela had contradicted herself materially on several occasions in her testimony as to who opened the container, who was present when it was opened and when its contents were counted and that her two written statements had been contradictory. SARS was found to have failed to discharge the onus of proving the misconduct alleged against Ms Kulati and

Mr Mkhize. Consequently, the review application was dismissed with no order of costs.

On appeal

- [20] SARS argued before this Court that, although not a model of clarity, any inconsistencies in Ms Nobela's evidence were not sufficiently material to impact upon her credibility or warrant the rejection of her evidence. She testified on at least three occasions that Ms Mojapelo opened the container; that the examination report recorded that John and Ms Mokadi were present when the container was opened; and that Ms Mojapelo did not inform Ms Nobela whether there was anyone else present when it was opened. This evidence, it was submitted, was not contradictory. In addition, Ms Nobela testified that Ms Kulati and Ms Mojapelo were with her when she did the inspection and repeated in cross-examination that Ms Kulati was present during the counting of boxes. She did not therefore contradict herself materially on this aspect, nor did she have reason to lie. As to her two statements, Ms Nobela testified that there was no difference between them, with the SAPS statement only having contained more details, whereas her SARS statement had been "*just a summary*" and did not give all the details because she "*was from work and it was late and [she] was tired*".
- [21] The conclusion reached that SARS had not discharged the onus of proof was based on the negative credibility finding made by the commissioner against Ms Nobela, together with the finding that Ms Kulati did not participate in the misconduct because she did not sign the examination report. However, the unpack tally worksheet indicated that the container was examined by Ms Kulati, Ms Mojapelo and Ms Nobela and even though Ms Kulati did not sign the examination report she clearly participated in the examination of boxes. The evidence was undisputed that Alcari paid John R60 000 and that Ms Nobela received R40 000 of this. Mr Mkhize saw Ms Nobela with John and would have asked himself what their meeting was about. He was therefore dishonest in being aware of the misconduct committed by Ms Nobela, Ms Kulati and Ms Mojapelo but not reporting it to SARS. For all of these reasons, it was submitted that the award of the commissioner was not reasonable

insofar as it ignored crucial evidence implicating both Ms Kulati and Mr Mkhize, with account taken of circumstantial evidence that favoured Ms Kulati and Mr Mkhize but not SARS. Given the serious nature of the serious misconduct committed, recognised by the commissioner in relation to Ms Mojapelo, dismissal was appropriate since the trust relationship had broken down.

[22] It was argued for the respondents that the material contradictions in Ms Nobela's evidence regarding who opened the container and who was present when it was opened, warranted the rejection of her evidence as inconsistent and unreliable. The examination report did not record when Ms Kulati was present, nor who opened the container, and Ms Kulati did not sign the report. As a result, the report did not corroborate Ms Nobela's evidence. Ms Kulati was not part of negotiations with John, nor was she present when money was handed over by John. Ms Nobela did not see John give Ms Mojapelo money and that there was no evidence that Ms Kulati was present when any money was distributed by John or that she received any of the money. Account was taken of the inconsistencies between Ms Nobela's two statements, including that she only mentioned having given Mr Mkhize money for Ms Kulati in the SAPS statement. The probabilities did not support her evidence that she told him of the misconduct and gave him money to take to Ms Kulati, more so when he would not benefit from the transaction.

[23] It was submitted for the respondents that the evidence showed that SARS had failed to discharge the onus to prove its case against Ms Kulati and Mr Mkhize. On an assessment of the totality of the evidence the decision of the commissioner was therefore reasonable and the judgment of the Labour Court correct. It was submitted that the appeal should therefore be dismissed with costs.

Evaluation

[24] The task of a commissioner was to decide whether SARS' decision to dismiss Ms Kulati and Mr Mkhize was fair through considering all relevant circumstances,¹ rather than deciding afresh what he would do or deferring to

the decision of the employer. To determine whether the misconduct was committed, a conventional process of factual adjudication was to be adopted, while taking into account the totality of circumstances.² As a general rule, the process of factual adjudication requires that when it is suggested that a witness is not speaking the truth on a particular point, such imputation be drawn to the attention of the witness in cross-examination to afford them an opportunity to give an explanation and defend their character.³ If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct.⁴ Adherence to this rule ensures fairness⁵ and allows a proper consideration of the evidence, with findings capable of being made on the disputed issues through a consideration of the credibility of the various factual witnesses, their reliability and the probabilities.⁶

[25] It is useful to return to the legal maxims which form some of the foundations of our law. Pertinent to this case is the fact that the maxim *semel mentitus, semper mentitur* (once untruthful, always untruthful) and *falsum in uno, falsum in omnibus* (false in one thing, false in all) do not apply in our law of evidence.⁷ Untruthful evidence or a false statement does not always justify the most extreme conclusion and the weight to be attached to such evidence must be considered having regard to the circumstances of each case,⁸ which include the nature, extent, materiality and impact of the false testimony and the possible reasons why such testimony was given. In addition, care is to be taken not to find against a person merely as punishment for untruthful evidence.⁹ Where a witness is shown to have deliberately lied on one point, it does not follow that a conclusion must be drawn that their evidence on another point cannot safely be relied upon.¹⁰

¹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at para 79.

² *Sidumo* id at para 78.

³ *President of the Republic of South Africa v South African Rugby Football Union (SARFU)* 2000 (1) SA 1; 1999 (10) BCLR 1059.

⁴ *Id* at para 61.

⁵ *S v Boesak* [2000] ZACC 25; 2001 (1) BCLR 36 (CC); 2001 (1) SA 912 (CC) para 26.

⁶ *Stellenbosch Farmers' Winery Group another v Martell et Cie and others* [2002] ZASCA 98; 2003 (1) SA 11 (SCA) at para 5.

⁷ *Rex v Gumede* 1949 (3) SA 749 (A).

⁸ *S v Mtsweni* 1985 (1) SA 590 (A).

⁹ *S v Burger and Others* 2010 (2) SACR 1 (SCA) at para 30.

- [26] The record of proceedings indicates that the arbitration hearing was negatively impacted by the commissioner's continuous interjections during the course of witness testimony, often in a manner which interrupted the line of evidence and caused unnecessary confusion. Although this caused each of the representatives to take issue with the commissioner's conduct at different times during the course of proceedings, it was nevertheless not of such a nature that it led to an irregularity in the conduct of proceedings. The commissioner's interventionist approach to the proceedings, did however impact on his approach to and the manner of his assessment of the evidence. From the arbitration award it is apparent that he was focused on the inconsistencies in the evidence of Ms Nobela, without having careful regard to whether competing versions had been put to her by the employees' representatives, what her response to such versions was, and why she would lie to falsely implicate her colleagues. Similarly, the commissioner did not carefully consider the totality of the evidence, including those facts that were not in dispute, consider whether the evidence of Ms Kulati and Ms Mojapelo was credible and reliable and have careful regard to the probabilities.
- [27] Ms Nobela's evidence was inconsistent and contradictory in a number of respects. Yet, this did not justify the wholesale rejection of all aspects of her evidence without careful regard to the totality of the circumstances, the evidence led, the credibility and reliability of the versions advanced and the probabilities. And, although critical of her evidence, the commissioner did not choose a wholesale rejection of her evidence.
- [28] Ms Nobela testified on at least three occasions that Ms Mojapelo opened the container. Yet, the commissioner found that she had advanced varied versions as to who opened the container, when this occurred and who was present when it was opened. In spite of this, little turned on this evidence given that there was no dispute that more than 500 boxes of shoes were found in the container which had not been declared to SARS. A more central aspect of Ms Nobela's evidence related to who examined the container. She repeatedly testified that Ms Kulati and Ms Mojapelo were with her when the

¹⁰ *S v Oosthuizen* 1982 (3) SA 571 (T).

inspection was undertaken. In cross-examination she repeated that Ms Kulati was present during counting; and Ms Kulati's version that Ms Nobela had prevented her from counting the boxes, despite the fact that she had been instructed by Mr Oliphant to examine the container with Ms Nobela, was not put to Ms Nobela in cross-examination.

[29] Ms Kulati in her evidence provided a confusing account as to when she was on the scene of the count, testifying that she had gone to the shops, to the bathroom and for lunch at different times. Yet, of primary importance was, that despite efforts to remove herself from the scene, on her own version, Ms Kulati was present when the boxes were being counted where she claimed Ms Nobela actively prevented her from counting the boxes. However, her version that she was prevented from counting boxes by Ms Nobela was not supported by the evidence of Ms Mojaelo who testified that she did not know where Ms Kulati was when the boxes were counted and that she could not say whether Ms Kulati had been involved in counting. In addition, no explanation was provided by Ms Kulati as to why, if Ms Nobela had prevented her from counting, Ms Mojaelo would have lied about this and attempted to place her away from the scene.

[30] Furthermore, since Ms Kulati had been instructed by Mr Oliphant to examine the container with Ms Nobela, account should properly have been taken by the commissioner of the fact that Ms Kulati, on her return to the office, took no steps to inform him of Ms Nobela's misconduct in preventing her from examining the container or of the fact that she had not undertaken the examination with Ms Nobela as required of her but had left the task to Ms Nobela. In addition, it was a relevant consideration, one also overlooked by the commissioner, that Ms Kulati was aware that a report of the examination was required, yet when it was produced, she took no steps to distance herself from such report or inform Mr Oliphant that her name should not be included on it given that she had not examined the container since she had been prevented by Ms Nobela from doing so. These considerations should reasonably have been taken into account by the commissioner in considering

the credibility of Ms Kulati as a witness and the reliability of her account, with regard had to the probabilities. They were not.

[31] Ms Nobela's evidence was that Ms Mojapelo had indicated that she had agreed with John that he would pay R45 000 as a bribe for overlooking 300 boxes not declared, but that when it became apparent that there were more than 500 undeclared boxes in the container, Ms Kulati approached John and, with the approval of Ms Mojapelo and Ms Nobela, it was agreed that he would pay them R60 000 for doing the same. Ms Nobela's evidence as to how the amount of R60 000 had been agreed ought properly to have been assessed by the commissioner against the undisputed evidence that Alcari had paid R60 000 to John; the evidence that Ms Nobela handed R20 000 in her possession to the SAPS; that the commissioner accepted Ms Nobela's version that Ms Mojapelo received money from John; and that Mr Mkhize saw Ms Nobela walking out of the reception with John on 29 July 2014. Although the commissioner rejected certain aspects of Ms Nobela's evidence, it is material that the only evidence on which he could reasonably have relied to find that Ms Mojapelo had received money from John on 29 July 2014 was that of Ms Nobela, despite the fact that he had determined that her evidence was to be approached with "extreme caution". In order to accept such an important aspect of her evidence, the commissioner would have to have had regard to why, if Ms Nobela's account was untruthful, she would lie about events on the day when by doing so she had implicated herself in criminal misconduct and when there was no evidence that she had a poor relationship with her colleagues which could have provided a motive for falsely implicating them in such misconduct.

[32] The commissioner placed much emphasis on the fact that Ms Nobela had signed two inconsistent statements, which he found to have undermined the veracity of her account. Ms Nobela denied that there was a distinction between the statements, stating that the second statement given to the SAPS contained more details, whereas the first statement to SARS was "just a summary" which did not provide all the details and that when she gave it, she "was from work and it was late and [she] was tired". This explanation was

rejected by the commissioner who found that she had not explained why she had not mentioned the events of 29 July 2014 in the first statement or why she had not recorded the role of Mr Mkhize.

[33] The two statements clearly differed in material respects, with Mr Mkhize and his alleged role having been omitted in its entirety from the first statement given to SARS, in spite of the importance of such role in having driven Ms Nobela to collect the bribe and paying Ms Kulati her portion of it. Having decided to disclose the serious misconduct committed, Ms Nobela's explanation why she had only partially disclosed selective relevant material facts, was difficult to understand when the facts were fresh in her mind; and the commissioner cannot be faulted for rejecting her explanation that it was fatigue that explained such omission when on her own version she was motivated to come clean.

[34] Turning to the commissioner's finding that SARS had not discharged the onus of proving that Ms Kulati or Mr Mkhize were guilty of misconduct, the task of the review court was to determine whether the decision reached, on the material before the commissioner, was one that a reasonable commissioner could not reach. For the reasons set out above, the commissioner's finding in relation to Ms Kulati did not fall within the ambit of reasonableness required and in finding differently, the Labour Court erred. Having been tasked with examining the Alcari container, Ms Kulati failed to do so. Her claim that she was prevented from doing so was improbable, having regard to the evidence. She did not report this misconduct of which she accused Ms Nobela to SARS and failed to explain why she did not object to her name being included on a report in respect of an examination she was apparently prevented from undertaking. Crucial evidence, which the commissioner accepted implicated Ms Mojapelo, was unreasonably found not to implicate Ms Kulati. This included that the payment of R60 000 had been negotiated and agreed with John, with Ms Kulati directly involved in such negotiations; that it had been agreed that the money paid was to be shared by Ms Nobela, Ms Mojapelo and Ms Kulati; that Alcari had paid R60 000 to John; that John had paid the money over to Ms Nobela and Ms Mojapelo the following day in terms of the

agreement reached; and that Ms Nobela, who had disclosed the misconduct, which included her own, had handed over her share of R20 000 received to the SAPS.

- [35] The evidence proved that Ms Kulati was complicit in the misconduct and had been part of the scheme devised with John, with objective evidence and available circumstantial evidence supporting such a finding. In overlooking this and reaching a different conclusion, the commissioner acted unreasonably, and, in failing to find as much, the Labour Court erred.
- [36] SARS took issue with the commissioner's findings in relation to Mr Mkhize, on the basis that an unreasonable decision was arrived at since Mr Mkhize ought properly to have been found to have committed the misconduct alleged. SARS' case against Mr Mkhize was that he drove Ms Nobela, who told him of the misconduct, to collect money from John, that he witnessed John paying money to Ms Nobela, and that Ms Nobela asked him to take Ms Kulati's share of the money to her but that did not disclose any of this to his employer. To determine whether the dismissal of Mr Mkhize was fair required careful regard to have been by the commissioner to the evidence and the probabilities. In undertaking this exercise, it was necessary for the commissioner to consider why Ms Nobela, having decided to disclose the misconduct to SARS, did not mention Mr Mkhize's participation in it in her first statement despite the fact that the events in question were fresh in her mind at the time. Furthermore, although Ms Nobela expressed concern that Ms Kulati and Ms Mojaelo not be informed she had disclosed their misconduct, she chose to protect Mr Mkhize. Furthermore, when Ms Nobela did implicate Mr Mkhize, in her statement to the SAPS and in her testimony at arbitration, she gave no explanation why she would use him to deliver Ms Kulati's share of the money, as opposed to doing so herself. Nor did she suggest why, if she had asked Mr Mkhize to deliver the money, he would agree to do so for no consideration, without having been part of the misconduct and given the real risk involved in doing so. The conflicting evidence given by Ms Nobela, as a single witness, as to how the money was delivered to John, was in relation to Mr Mkhize, unreliable and not corroborated. Similarly, were her versions as to the

circumstances she and Mr Mkhize met Ms Kulati on their return to SARS Edenvale. The commissioner cannot be faulted, in weighing up such evidence, in finding that SARS had not proved its case against Mr Mkhize.

[37] It is so that Mr Mkhize did not disclose that he saw Ms Nobela with John, or that he drove her to meet John. However, even if it is accepted that he ought to have been suspicious about the reason for a meeting between Ms Nobela and a clearing agent under the circumstances that it occurred, as a junior examiner Mr Mkhize's failure to report the meeting to his employer, although perhaps unwise, does not in itself prove the misconduct alleged against him. For all these reasons, having regard to the material before the commissioner, the decision reached in relation to the dismissal of Mr Mkhize was reasonable and in finding as much, the Labour Court cannot be faulted.

[38] Turning to the sanction imposed by SARS, given the serious nature of the misconduct committed by Ms Kulati, there can be no dispute that the sanction of dismissal was fair. As was made clear in *De Beers Consolidated Mines Ltd v CCMA and others*:¹¹

'Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.'

[39] The honesty and integrity of employees employed at the country's national tax collection authority is of the utmost importance not only for the country, but also in ensuring the legitimacy and credibility of state institutions. The commissioner reached a decision which on the material before him was not reasonable in relation to Ms Kulati when the decision to dismiss her for the misconduct committed was fair. The same cannot be said for Mr Mkhize.

[40] For these reasons, the appeal must succeed in part, in relation only to the dismissal of Ms Kulati. Having regard to considerations of law and fairness,

¹¹ [2000] ZALAC 10; [2000] 9 BLLR 995 (LAC) at para 22.

there is no reason why costs should follow the result, nor was a costs order sought by SARS against the respondents.

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

Order

1. The appeal succeeds in part with no order of costs.
2. The order of the Labour Court is set aside and substituted as follows:
 - ‘1. The review application insofar as it relates to the dismissal of Mr Nhlakanipho Mkhize is dismissed.
 2. The review application insofar as it relates to the dismissal of Ms Precious Kulati succeeds, with the award of the commissioner in relation only to Ms Kulati set aside and substituted as follows:

“The dismissal of Ms Precious Kulati was substantively fair.”
 3. No order of costs is made.’

SAVAGE AJA

Musi JA and Gqamana AJA agree.

APPEARANCES:

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LABOUR APPEAL COURT