THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2132 / 21

In the matter between:

ASSOCIATION OF MINEWORKERS AND

CONSTRUCTION WORKERS UNION (AMCU)

obo O J EYARABANG **Applicants**

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

DAVID PETERSON *N.O.* (AS COMMISSIONER) **Second Respondent**

ASSMANG LTD (BLACKROCK MINE OPERATIONS) **Third Respondent**

Heard: **24 October 2023**

Delivered: **18 March 2024**

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 18 March 2024

Summary: CCMA arbitration proceedings – review of proceedings, decisions and awards of commissioners – s 145 of LRA 1995 – determination of conduct of arbitrator, gross irregularities and reasonable outcome

Evidence – evaluation and determination thereof – proper assessment of evidence and probabilities by arbitrator – no basis to interfere with arbitrator's conclusions on the evidence, credibility and preferring particular evidence

Dismissal – breach of rule – principles and evidence considered – conduct of employee constituting clear contravention of essential company rule – constitutes serious misconduct placing employer at risk and causing financial harm – employee clearly obstructing proper search of his bag – conduct of employee highly unusual – arbitrator drawing proper inference from such conduct in finding that employee committed misconduct

Dismissal – conduct of employee – conduct tantamount to dishonesty – dismissal justified

Dismissal – fairness of sanction – issue not placed in dispute in arbitration – not competent to raise such issue on review – dismissal of employee in any event fair and justified if fairness of sanction is considered

Review of award – conclusion of arbitrator correct and/or reasonable – arbitration award upheld

JUDGMENT

SNYMAN, AJ

<u>Introduction</u>

[1] The applicant has brought an application to review and set aside an arbitration award issued by the second respondent in his capacity as an arbitrator of the Commission for Conciliation, Mediation and Arbitration (CCMA), the first respondent. In terms of this arbitration award, the second respondent found that the dismissal of the individual applicant by the third respondent was substantively fair (procedural fairness was not in issue). The review application has been brought in terms of section 145 of the Labour Relations Act[1] (the LRA).

[2] The applicants were dissatisfied with the finding of the second respondent that the dismissal of the individual applicant was substantively fair. The applicants have therefore applied that the determination of substantive fairness made by the second respondent be reviewed and set aside, and the applicants seek consequential relief to the effect that a finding be made that the individual applicant's dismissal was substantively unfair, and he be retrospectively reinstated to the date of his dismissal.

[3] The arbitration award of the second respondent is dated 12 July 2021 and was handed down that same date. The applicants' review application was filed on 12 October 2021. However, such review application, by virtue of the provisions of section 145(1) of the LRA, had to have been brought within six weeks of 12 July 2021, thus being on or before 23 August 2021. It follows that the review application is seven weeks late, and condonation was required.

<u>Condonation</u>

[4] The applicants applied for condonation by way of a separate application for condonation filed within a week of the review application itself. The requirements for condonation are trite and are set out in the well-known judgment of *Melane v Santam Insurance Co Ltd*[2]. These requirements entail a consideration of the length of the delay, the explanation for the delay, the importance of the case (prejudice) and the prospects of success of the

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[1] Act 66 of 1995 (as amended).
[2] 1962 (4) SA 531 (A) at 532C-E. See also, specifically relating to applications for condonation in the case of the late filing of a review application, *A Hardrodt (SA) (Pty) Ltd v Behardien and Others* (2002) 23 ILJ 1229 (LAC) at para 4.

applicant. The requirements are interrelated, and must be holistically considered, with the proviso that if there is no explanation for the delay, then the prospects of success may well become irrelevant.[3]

[5] I will first consider the length of the delay. It is true that a delay of seven weeks is the kind of delay that would border on becoming excessive, and thus required a proper explanation.

[6] Turning next to the explanation for the delay, it was explained that the arbitration award was received on 12 July 2021 in the AMCU region, and then sent to the legal department on 30 July 2021. This delay is explained on the basis that before an award is sent to the legal department for its attention, it is first properly assessed in the region, which does take some time. However, and when the award was received by the legal department of AMCU, it acted promptly. It was finally assessed by a paralegal in such department, Nomkhosi Khumalo (Khumalo), and then sent to the applicant's attorneys a few days later on 2 August 2021 to provide a legal opinion as to whether there were prospects of success in proceeding with a review.

[7] The award was sent to Nicole Musiker (Musiker) at the applicants' attorneys by e-mail on 2 August 2021. She explains that her practice is largely made up of AMCU work, and she provides many legal opinions to AMCU every week. She received many communications from Khumalo, and in this case, she received two other instructions from Khumalo on 2 August 2021, however she did not receive the instruction relating to this matter. Musiker explained why she did not receive this communication, which was a service provider problem. As a result of miscommunication between Khumalo and Musiker, it was only realised on 22 September 2021 that the instruction never came to the attention of Musiker, when Khumalo called Musiker, and it was immediately sent again that same date.

[8] Musiker then immediately attended to the matter, and provided opinion on 23 September 2021. The opinion was forwarded to the region of AMCU to

[3] See *Moila v Shai No and Others* (2007) 28 ILJ 1028 (LAC) at para 34; *Colett v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 1948 (LAC) at para 38.

consider, and the region then instructed on 27 September 2021 that the review be pursued. This however also required the approval of the national office, which was then provided on 6 October 2021, when Musiker was instructed to proceed with the review. The review application was then filed less than a week later.

[9] In my view, the explanation for the period between 2 August and 22 September 2021 is rather thin. Whilst I accept that Musiker was not aware of the matter, Khumalo could have done a lot more to follow up on the matter when no opinion was forthcoming from Musiker. However, it cannot be ignored that when receiving the award from the region, Khumalo at least did act promptly in sending the same to Musiker for opinion. Therefore, although one can say the Khumalo's attendance to the matter after having sent the same to Musiker lacked the necessary diligence, I do not believe it is of a sufficient magnitude to non-suit the applicants where it comes to the explanation provided. And finally, when the miscommunication was realised, the award was immediately again sent to Musiker, opinion provided, approval obtained, and the review filed, all within the space of about three weeks, which in my view is prompt and expeditious action.

[10] It is clear to me that at all relevant times, the applicants more or less actively pursued the matter, and were always intent on pursuing it to finality. Was it not for the miscommunication that accounted for a period of about seven weeks, I am convinced that the review application would have been filed in time. Although AMCU would be open to legitimate criticism for not following up more actively when nothing was forthcoming from Musiker, I do not believe this should be attributed to the individual applicant in this case. Whilst the explanation provided is on the edge of being considered unacceptable, what saves the applicants, in my view, is the prompt and decisive action that was taken once the miscommunication was realised. Overall considered, the applicants have thus, in my view, provided a proper explanation for the delay in this instance.

[11] On the issue of prejudice, it is undoubtedly so that this consideration favours the applicants. If condonation is not granted, the review application will fail, in

an instance where I believe it concerns an issue that should be finally determined by this Court. Fairness dictates that the applicants must be given an opportunity to present their review case in this regard to this Court. It may be added that when this matter was argued in Court before me, condonation was not strenuously opposed by the third respondent, and both parties instead chose to rather focus on the merits of the review.

[12] Finally, the issue of prospects of success is interwoven with the merits of the review application, and should not be considered separately in this instance. Condonation is thus essential to enable the merits of the review application to be properly and fairly ventilated.

[13] I am therefore inclined to grant the applicants' application for condonation for the late filing of their review application, and I shall now attend to deciding this review application by first setting out the relevant background facts.

[14] For ease of reference, I will refer in this judgment to the applicant trade union as '*AMCU*' and the individual applicant as '*Eyarabang*'.

<u>The relevant background</u>

[15] The third respondent conducts business as a manganese mining operator. Eyarabang was employed by the third respondent as a support worker at the third respondent's Multi-Skilled and Blast Section at its mine near Hotazel, in the Northern Cape Province. Eyarabang commenced employment with the third respondent on 13 November 2011.

[16] The manganese material mined by the third respondent has substantial value. It is material that carries with it a severe risk of being pilfered by employees. For this reason, the third respondent has strict security measures in place by way of a detailed security policy. One of the rules contained in the security policy is that all times, without exception, when an employee leaves the premises, any bag carried by the employee must be thoroughly searched by security guards posted at the shaft exit gate.

[17] In this instance, Eyarabang was on night shift duty on 24 / 25 November 2020. It was common cause that he left work at around 01h28 in the early morning of 25 November 2020, which was well before his shift ended. The third respondent submitted into evidence undisputed CCTV surveillance footage (the footage) of the movements of Eyarabang that early morning when leaving the workplace with a backpack. The footage will be dealt with in more detail later in this judgment.

[18] What is however clear from the footage is that Eyarabang is seen entering the security room at the shaft exit gates at around 01h24 on 25 November 2020, without carrying any backpack, where he loiters for about a minute simply talking to one of the two security guards on duty, before leaving the security room and walking back to the area of his workplace at the shaft. He is then seen walking back from the shaft about a minute later to the security room at the shaft exit gates, carrying a backpack, which backpack even on the footage appearing to be bulky and heavy, considering how it was carried by Eyarabang.

[19] According to Maggy Seikaneng (Saikaneng), one of the security guards on duty in the security room, and who testified for the third respondent, when Eyarabang had earlier came to the security room without a backpack, he was speaking to her colleague also on duty trying to establish who the security guards were that were on duty. This testimony was backed up by the other security guard on duty in the security room, being Isagwe Dithebe (Dithebe), who also testified for the third respondent. Dithebe testified that Eyarabang came to the security room and asked him who was on duty. This appears in line with the footage, as Eyarabang is seen speaking to Dithebe before leaving the room.

[20] Seikaneng testified that when Eyarabang returned to the security room with his backpack, he appeared frightened, and refused to allow his backpack to be searched. Again, this testimony arrears in line with the footage. The footage shows Eyarabang placing his backpack on a table as if to allow it to be searched, but the backpack is then never searched, because Eyarabang removed it off the table virtually seconds after placing it on the table and

before any security guard could get near to it. The footage shows that he then keeps hold of the backpack and certainly does not present it to any of the two security guards to open and search. In fact, the footage showed that one of the colleagues of Eyarabang, Victor Seleleko (Seleleko) entered the security room at more or less the same time as Eyarabang, and it was clear from the footage that Selekelo also had a bag which he placed on the table and he left it there, where it was opened and thoroughly searched by Dithebe. By way of simple comparison, this never happened where it came to the backpack of Eyarabang.

[21] Next, Seikaneng specifically testified that Eyarabang refused to allow his backpack to be searched. This testimony was confirmed by Dithebe. Unfortunately, and from the footage, one cannot hear the exchange between Seikakeng and Eyarabang at this time, but it is clear from the footage that there was some kind of debate between them with Seikaneng gesturing towards the backpack, whilst Eyarabang is seen effectively clinging to the backpack.

[22] According to the testimony of Seikaneng, and when Eyarabang refused to allow his backpack to be searched, she then decided to go to the telephone in the security room to call the control room to report this refusal. The footage shows her in fact walking away from Eyarabang to the back of the security room. whilst he was still standing at the table holding the backpack. Whilst she is walking away, the footage shows Eyarabang rapidly exiting the security room thought the shaft exit gate, with the backpack.

[23] Dithebe testified that when Eyarabang and Seleleko were rapidly exiting through the shaft exit gates, he tried to call them back, but they refused to co-operate. The footage shows that Dithebe certainly turned into their direction as they existed the gates.

[24] What the next stage of the footage shows is also highly unusual. It shows Eyarabang and Seleleko rapidly moving away from the shaft exit gate. The pace was almost a jog. The distinct impression created is that they were running away. They are then seen jumping into a silver-grey pickup vehicle,

which vehicle then in turn rapidly sped away from the premises and out the gate into the adjacent public road. Dithebe confirmed in his testimony that he saw Eyarabang and Seleleko jumping into this vehicle which then sped away.

[25] As to the explanation provided by Eyarabang for all the aforesaid, he stated that he had permission from his supervisor to leave work early. He explained that he went to the security room to check if someone had left something for him there, being a Tupperware container. He insisted that his backpack was properly searched and that he never refused to have it searched. As far as he was concerned, and when he left the security room and out the shaft exit gate, everything was fine.

[26] Eyarabang was suspended on 28 November 2020. On 18 January 2021, he was notified to attend a disciplinary hearing to be held on 21 January 2021. He would face two charges in the disciplinary hearing. The first charge was that he seriously breached security procedures, in that he refused to be searched and left in a '*runaway vehicle*'. The second charge was unauthorised possession of manganese associated specimen stones, which change was based on the probability that he was carrying such items in the backpack he left with on 25 November 2020. The disciplinary hearing then ultimately took place on 1 February 2021, and concluded on 10 February 2021 when the chairperson recommended the dismissal of Eyarabang, and he was then dismissed on the same date.

[27] On 9 March 2021, AMCU referred an unfair dismissal dispute to the CCMA on behalf of Eyarabang. The dispute was unsuccessfully conciliated on 6 April 2021. The dispute was then referred to arbitration by AMCU on 7 April 2021.

[28] The dispute came before the second respondent as CCMA arbitrator on 26 May and 1 July 2021. In the arbitration before second respondent, it was contended that the dismissal of Eyarabang was substantively unfair. Eyarabang sought fully retrospective reinstatement as consequential relief. It may be added that the parties also concluded a pre-arbitration minute on 26 May 2021. As to why the dismissal of Eyarabang was substantively unfair, the

cause of complaint was that it could not be proven that Eyarabang committed any misconduct. Procedural fairness was not in dispute.

[29] In his award, the second respondent held that the dismissal of Eyarabang was substantively fair. The second respondent in essence rejected all the defences offered by Eyarabang as being false. The second respondent considered the footage, and held that it properly corroborated the version presented by the third respondent through its two witnesses. The second respondent also preferred the evidence of Seikaneng and Dithebe over that of Eyarabang, where the same differed. He also considered that Eyarabang had failed to call crucial witnesses to corroborate his version. These conclusions by the second respondent prompted the current review application, which I will now turn to deciding by first setting out the applicable test for review.

<u>The test for review</u>

[30] The test for review is trite. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[4] the Court held that '*the reasonableness standard should now suffuse s 145 of the LRA*', and that the threshold test for the reasonableness of an award was: *'… Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'*[5]*.* This means that the award in question is tested against the facts before the arbitrator to ascertain if it meets the requirement of reasonableness.[6] In conducting this test it is always necessary and important for the Court to enquire into and consider the merits of the matter and the entire evidence on record in deciding what is reasonable.[7] In *Herholdt v Nedbank Ltd and Another*[8] the Court said:

[4] (2007) 28 ILJ 2405 (CC).
[5] Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96.
[6] See *Duncanmec (Pty) Ltd v Gaylard NO and Others* (2018) 39 ILJ 2633 (CC) at paras 43.
[7] Id at para 41.
[8] (2013) 34 *ILJ* 2795 (SCA) at para 25. See also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC) at para 14; *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.

> '… 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.'

[31] In sum, applying the correct review test has a logical chronology. First, is there a failure or error on the part of the arbitrator. Second, and where there is such a failure or error, it must be shown that the outcome arrived at by the arbitrator was unreasonable, based on all the evidence and issues before the arbitrator, even if it may be for different reasons or on different grounds as those referred to by the arbitrator.[9] Third, it would only be if the consideration of the evidence and issues before the arbitrator shows that the outcome arrived at by the arbitrator cannot be sustained on any grounds, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, that the review application would succeed.[10]

<u>Analysis</u>

[32] At the outset of the arbitration, the second respondent engaged with the parties to narrow the issues in dispute. The second respondent was presented with a signed pre-arbitration minute dated 26 May 2021, which minute recorded that the applicants disputed substantive fairness on the basis that no rule was transgressed by Eyerabang. In terms of this minute, the issue of the fairness of the sanction of dismissal was not disputed. Based on the further engagement between the second respondent and the parties, it was established that the rule in the third respondent that employees and their bags must be searched upon leaving the premises was in existence, was valid and reasonable, that Eyarabang was familiar with this rule, and the rule had been

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[9] *Fidelity Cash Management Service (supra)* at para 102.
[10] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others* (2015) 36 ILJ 1453 (LAC) at para 12.

consistently applied by the third respondent in the past. The only issue to be determined was whether the rule had been contravened by Eyarabang. There was an extensive debate between Ponatshego Tau (Tau), the AMCU representative in the arbitration, and the second respondent, about whether it was disputed that dismissal was an appropriate sanction in this case. Although Tau states in the course of this exchange that he disagrees that the sanction of dismissal was appropriate, it turned out that he was challenging the fairness of the sanction on the basis that there was no breach of the rule.

[33] It is a trite principle that an issue placed beyond contestation by way of a pre-arbitration agreement (minute) cannot be raised as an issue in the arbitration, as the parties are bound by the limitation of the issues they have agreed to.[11] As specifically said in *Filta-Matix* (*Pty) Ltd v Freudenberg and Others*:[12] '*… If a party elects to limit the ambit of his case, the election is usually binding …*'. The applicants would similarly be bound by the case as articulated in the opening address at the arbitration.[13] In *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman NO and Others*[14] the Court held:

> 'The effect of the events at the commencement of the arbitration, as specifically set out above, is similar to a pretrial agreement and has the same consequences. As there are no pleadings in CCMA arbitrations, the court has specifically dealt with the significance of opening addresses. …'

[34] Based on the content of the pre-arbitration minute, as well as the exchange between the second respondent and Tau as well as Tau's opening address in the arbitration, the second respondent believed that the fairness of the sanction of dismissal was not in issue and need not be decided by him. In my view, he cannot be faulted for so concluding. To have such understanding based on the opening exchanges is certainly reasonable, especially if considered in the context of the pre-arbitration minute, which was never

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[11] See *GE Security (Africa) v Airey and Others* (2011) 32 *ILJ* 2078 (LAC) at para 20 – 21.
[12] 1998 (1) SA 606 (SCA) at 614B-D. See also *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd and Another* (2000) 21 *ILJ* 142 (LAC) at paras 16 and 83.
[13] See *Fidelity Cash Management Service* (*supra*) at para 23.
[14] (2013) 34 ILJ 2347 (LC) at para 62. See also para 61 of the judgment.

sought to be corrected. It may be added that no evidence was presented by any of the parties on the issue of dismissal as an appropriate sanction, which appears to also be in line with the above understanding of the issues in dispute. And finally, the issue was not raised in the closing argument presented by Tau. I do not believe this should be a live issue on review, as it simply was not required that the second respondent decide it. As held in *Brodie v Commission for Conciliation, Mediation and Arbitration and Others*[15]:

> '… Reference is made to *Albany Bakeries Ltd v Van Wyk & others* (2005) 26 ILJ 2142 (LAC), where it was held that it was prohibited for a review applicant to raise on review a case never placed before the arbitrator. …'

But in any event, I shall nonetheless deal with dismissal as an appropriate sanction in this case, in order to be complete, later in this judgment.

[35] Starting with the core dispute as to whether Eyabarang breach the rule and thus committed the misconduct with which he had been charged, the second respondent was faced with mutually destructive versions. This factual dispute had to be decided by the second respondent in line with the following principles enunciated in *SFW Group Ltd and Another v Martell et Cie and Others*[16], where the Court said:

> '…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 ...'

[36] Advocate Cook, representing the applicants, invited me to carefully consider the footage because, as far as he was concerned, this footage actually showed that Eyarabang never refused to have his backpack searched and

[15] (2013) 34 ILJ 608 (LC) at para 33. See also *Albany Bakeries Ltd v Van Wyk and Others* (2005) 26 ILJ 2142 (LAC) at para 25; *Uthukela District Municipality v Khoza and Others* [2015] ZALCD 19 (20 March 2015) at paras 32 – 33.

[16] 2003 (1) SA 11 (SCA) at para 5. See also *Blitz Printers v Commission for Conciliation, Mediation and Arbitration and Others [*2015] JOL 33126 (LC) at para 37; *Kok v Commission for Conciliation, Mediation and Arbitration and Others* [2015] JOL 32888 (LC); *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 *ILJ* 452 (LC) at para 20

that the backpack was in fact searched and nothing untoward was found in it. He appeared to accept that if the footage showed the opposite, the applicants' case would actually be shot. I have accepted this invitation, and unfortunately for Advocate Cook, I am of the firm view that the footage indeed shows the opposite, to the fatal detriment of the applicants' case.

[37] But before I deal with the footage, I would like to start with one pertinent anomaly leading up to the incident. This anomaly is that Eyarabang left work early before the end of his shift. He then attempted to explain it by saying he had permission from his supervisor. However, he did not call his supervisor to testify to confirm his version, an issue the second respondent was very much alive to, having referred to it in his award. So why did he leave early? This must weigh heavily against the applicants when deciding which probabilities to accept with regard to the second charge.[17] As said in *ABSA Investment Management Services (Pty) Ltd v Crowhurst*:[18]

> '... it is long established that the failure of a party to call an available witness may found an adverse inference, the inference being that the witness will not support - and may even damage - that party's case. Compare Zeffertt et al SA Law of Evidence (5 ed) at 128-30.'

[38] Turning next to the footage, it is in my view appropriate, considering the invitation extended by Advocate Cook, to weigh it up against the explanation presented by Eyabarang for the events on 25 November 2020. The first part of the explanation was that he came to the security office to check if someone had left a Tupperware container for him. The second part of the explanation is that he never refused that his backpack be searched. The third part of the explanation is that his backpack was searched to the satisfaction of the security guards. And finally, he contends that he left as normal and did not hurry away.

[17] See *General Food Industries Ltd v Food and Allied Workers Union* (2004) 25 ILJ 1260 (LAC) at para 46; *Simelane and Others v Letamo Estate* (2007) 28 ILJ 2053 (LC) at paras 22 and 23; *United People's Union of SA on behalf of Khumalo v Maxiprest Tyres (Pty) Ltd* (2009) 30 ILJ 1379 (LC) at para 29.
[18] (2006) 27 ILJ 107 (LAC) at para 14.

[39] In my view, and as the second respondent correctly appreciated, the footage spoke for itself. And the footage was undisputed evidence. Having viewed this footage, I am quite satisfied that the explanation that Eyabarang came to the security office at the shaft exit gates, before he left, to check if someone left a Tupperware container for him, is false. It is quite apparent from the footage that Eyabarang is not looking for anything in the security office. He simply loiters around, speaks shortly to Dithabe, and leaves. If he came there to ask if someone left a Tupperware container for him, then surely it would take a few seconds to just ask the security guards if there was something for him, and they could answer yes or no. This is not what happened. The first part of the explanation by Eyarabang is thus entirely improbable and actually lacking in credibility.

[40] There is also another probability that works against Eyabarang's version as to why he went to the security office earlier. Why would he first go to the security office to check if someone left a Tupperware container for him there, then go back to the shaft to collect his belongings, and then go back to the security office to exit the workplace. Why not simply check if someone left the Tupperware container for him at the same time when he is leaving. What he did makes no sense in such context. And this is even without considering the corroborated evidence of Seikaneng and Dithebe about what Eyabarang was actually doing there earlier. The second respondent, based on this, finds '*… it probable that the applicant did not ask for Tupperware at the gate during his first visit there, but rather to check on the security strength at the gate …*'. In my view, the second respondent cannot be faulted for so finding. It is a rational and reasonable conclusion, fully supported by the facts.

[41] The next consideration is whether Eyabarang refused that his backpack be searched. I do not understand how the applicants can say that the footage showed that Eyabarang's backpack was searched. This is simply not what the footage shows, which footage is in my view as clear as day. The footage shows that Eyabarang placed the backpack on a table as if it was being made available to be searched. But the backpack was on the table for a few

seconds, and before any of the security guards could even touch it, Eyabarang picked it up, and held it. It is equally clear that the backpack was never searched, and not one of the security guards was given an opportunity to even look inside the backpack. In fact, if one compares the manner in which the bag of the Seleleka was searched right next to Eyabarang, it is patently apparent that Eyabarang's backpack was not searched. Add to this footage the testimony of Seikaneng and Dithebe that Eyabarang refused that his backpack be searched, there is little doubt that Eyabarang indeed deliberately prevented that his backpack be searched. And finally, Seleleka, who was with Eyabarang at the security office at the same time, and who could have corroborated Eyabarang's version that he never refused that his backpack be searched, was never called as a witness. The second respondent considered all this evidence in his award, and in my view correctly concluded that the version presented by the third respondent that Eyabarang refused to have his backpack searched was true. His finding in this regard is certainly a reasonable conclusion, based on the facts.

[42] The footage also shows that there is some debate between Eyabarang and Seikaneng whilst he is holding his backpack, and that she is gesturing towards his backpack. The fact is that whilst Eyabarang is still standing at the table holding his backpack, without it as yet having been searched, Seikaneng walks away to call the control room. As soon as she moved away, Eyabarang basically scampers out the gate. Dithebe testified that he called Eyabarang back but Eyabarang did not comply. The footage suggests that Dithebe was indeed calling Eyabarang, considering the manner in which he turned to Eyabarang whist he was exiting the shaft gate.

[43] It follows that the conclusion by the second respondent that Eyabarang committed misconduct as contemplated by the first charge, being a serious breach of security procedure in refusing to be searched, is unassailable on review. It is a finding that is fully supported by the evidence and the probabilities, and must be upheld on review.

[44] This brings me to the second charge, being that of the unauthorised possession of manganese material. It is true that Eyabarang was never actually found in possession of such materials and his backpack was never opened to see what was inside. Whether Eyabarang committed misconduct as contemplated by this charge was therefore determined on the inferences that had to be drawn from a number of pertinent probabilities. What must be considered is what is called the '*inherent probabilities*'.[19] The determination of probabilities entails an inference to be drawn from the evidence as a whole, on the basis of what the Court said in *SA Post Office v De Lacy and Another*[20]:

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

[45] Deciding a matter on the probabilities entails a complete consideration of all the evidence, as a whole, in order to decide which outcome is the most logical, natural and plausible out of a number of possible different outcomes.[21] As said in *Bates and Lloyd Aviation (Pty) Ltd v Aviation Insurance Co*[22]:

> '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

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[19] See *SFW Group* (*supra*) at para 5; *National Union of Mineworkers* (Id fn 14) at para 34; *Mphigalale v Safety and Security Sectoral Bargaining Council and Others* (2012) 33 ILJ 1464 (LC) at para 12; *Sasol Mining* (*Pty*) *Ltd v Ngqeleni NO and others Sasol Mining* (2011) 32 ILJ 723 (LC) at para 8.

[20] 2009 (5) SA 255 (SCA) at para 35. 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; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 945 (LC) at para 37.

[21] See: *SFW Group* (*supra*) at para 5; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 945 (LC) at para 34; *Mphigalale v Safety and Security Sectoral Bargaining Council and Others* (2012) 33 ILJ 1464 (LC) at para 12; *Sasol Mining* (*Pty*) *Ltd v Ngqeleni NO and Others* (2011) 32 ILJ 723 (LC) at para 8.

[22] 1985 (3) SA 916 (A) at 939I-J.

that hypothesis which seems to be the most natural and plausible (in the sense of acceptable, credible or suitable).'

[46] What are then the inherent probabilities *in casu* relating to this second charge? The first is that it was common cause, as confirmed by the second respondent, that Eyarabang had access to the materials and had his backpack with him at his workplace, as the footage shows him collecting the backpack from there before going to the shaft exit gate. Second, the bag was heavy, on the undisputed facts. How can the bag be so heavy if it only contained, as suggested by Eyarabang, a lunch box and water bottle? And third, the manner in which Eyarabang conducted himself with regard to the backpack must be the clincher, as will be next addressed.

[47] As stated above, the evidence that is undeniable (being the footage), as considered with the testimony of Seikaneng and Dithebe that must be accepted, makes it clear that Eyarabang refused / prevented his backpack from being searched, resulting in it never being searched. In this context, it must also once again be considered that Eyarabang in essence conducted a reconnaissance mission as to the status of security before collecting and then seeking to depart with his backpack. I also cannot help but consider that Seleleka arriving in the security room at exactly the same time and his bag then being searched served as a distraction. However, and what puts matters over the top, so to speak, is that as soon as Seikaneng turned her back to call the control room, Eyarabang did nothing short of bolting with the bag out the shaft exit gate. The manner in which he and Seleleka are seen moving at pace away from the shaft exit gate is telling. It certainly shows that there was something untoward.

[48] The final consideration is what then happens outside the shaft exit gate. The footage shows that Eyarabang and Seleleka moving at a rapid pace towards what is in my view a waiting vehicle, being a silver-grey pickup. According to the evidence, this was not a vehicle used by Eyarabang to travel to work, and the vehicle was waiting at a point where vehicles are not normally parked. They then equally rapidly climb in the vehicle, and the vehicle departs at

speed. The last piece of footage shows the vehicle exiting the third respondent's premisses at high speed into the public road. There events are surely quite unusual, and if considered with all that had gone before, equally indicates something untoward.

[49] So, and in sum, the following probabilities are pertinent where it comes to establishing the misconduct on the second charge. First, Eyarabang leaves work early without explanation. Second, there is the highly unusual behaviour of Eyabarang attending at the security room at the shaft exit gate, which was intended to check security strength, before he actually collected his backpack to leave the premises. Third, it is clear that the backpack is heavy and bulky, and unlikely to simply contain a lunch box and water bottle as suggested by Eyabarang. Fourth, Eyarabang refused that his backpack be searched. Fifth, it is undeniable that Eyabarang did all he could to prevent his bag from being searched, and consequently, it was never searched. Sixth, the rapid manner in which Eyarabang existed the shaft gate as soon as Seikaneng in essence turned her back to call the control room, was telling. And finally, the rapid exit and then approach of Eyarabang to a waiting vehicle, which vehicle then exits the premises at speed, simply adds it all together. All this considered, the most plausible and logical inference to be drawn from all of these facts must be that that Eyarabang was in unauthorised possession of manganese material in his backack, and the second respondent's finding to this effect cannot be faulted. As said in *Cooper and Another NNO v Merchant Trade Finance Ltd*[23]:

> '… If the facts permit of more than one inference, the Court must select the most "plausible" or probable inference. If this favours the litigant on whom the *onus* rests he is entitled to judgment …'

[50] This only leaves the issue of credibility. There can be no doubt that the second respondent preferred the testimony given by Seikaneng and Dithebe over the testimony of Eyarabang. The second respondent in several instances

[23] 2000 (3) SA 1009 (SCA) at para 7. See also *Minister of Police v Safety and Security Sectoral Bargaining Council and Others* (2023) 44 ILJ 1017 (LAC) at para 16.

considered the evidence of Eyarabang to be false. It weighed heavily on the second respondent that Eyarabang persisted in contending that his backpack was searched in the face of the clear footage that this was not the case. Insofar as the grounds of review raised by the applicants include an attack on the credibility findings made by the second respondent, it must be said that this Court should be loath to interfere with credibility findings of arbitrators who have the opportunity to observe witnesses, gauge their demeanour and listen to their testimony in real time. A review Court, only seized with a record, does not have this important benefit. As held in *Standerton Mills (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*:[24]

> '... 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. …'

[51] It is my view that this Court should only interfere with credibility findings made by CCMA arbitrators, if the evidence on the record before the Court shows that the credibility findings of the arbitrator are entirely at odds with or completely out of kilter with the probabilities and all the evidence actually on the record and when considered as a whole.[25] A proper conspectus of the record *in casu* simply does not establish a basis for interference on these grounds. I am satisfied that the testimony presented by the second respondent's two witnesses were credible and concise, and they corroborated one another in all respects. Their testimony was also corroborated by the undisputed footage. Their testimony emerged virtually unscathed from their cross examination. Therefore, little fault can be found in the second respondent, as a general proposition, preferring the evidence of the third respondent's witnesses. Of course, and once the testimony presented by the third respondent's witnesses is to be preferred, the applicants face a difficulty,

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[24] (2012) 33 ILJ 485 (LC) at para 18.

[25] See *National Union of Mineworkers* (*supra*) at para 31; *Truworths Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2009) 30 ILJ 677 (LC) at para 25; *Moodley v Illovo Gledhow and Others* (2004) 25 *ILJ* 1462 (LC) at para 22; *Kgoadi v Commission for Conciliation, Mediation and Arbitration and Others* [2014] JOL 31908 (LC) at paras 51 – 52.

because it would then be proven that Eyarabang refused to have his backpack searched, which would be fatal to the applicants' case.

[52] Finally, some comparable examples in the case law bear reference. In *Harmony Gold Mining Co Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[26] the Court dealt with evidence led by two security officers in a CCMA arbitration on behalf of the employer, to the effect that an employee disposed of two tins he had been carrying in a white plastic bag containing his clothing and personal belongings, when he was pursued by the security guards, by throwing the tins over a wall. It was never established what was contained in these tins, however the employee was charged and dismissed for misappropriating gold material. The Court first reasoned as follows:[27]

> 'Credibility findings can be important, but it seems that sometimes the principles governing when recourse should be had to credibility findings are misunderstood. The principles set out in *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others* should not be misconstrued to suggest that credibility findings are a necessary foundation of any judgment in proceedings where viva voce evidence is led. On the contrary, what the SCA emphasised in *SFW* is that credibility findings are a tool to be used when a court is faced with irreconcilable versions and when the general evaluation of probabilities does not yield a result …'

The Court then concluded:[28]

> 'Had he first evaluated the relative probabilities of each version, and the corroborative evidence of Wewege coupled with the fact that Valashiya's version was untested with either Cossa or Wewege, the arbitrator would have found it impossible to reasonably arrive at the conclusion that Harmony could not prove its case on a balance of

[26] (2018) 39 ILJ 1059 (LC).
[27] Id at para 13.
[28] Id at para 16.

probabilities. Given the nature of the misconduct, which is attempted theft, there can be little doubt that dismissal was an appropriate sanction …'

[53] The second respondent had regard to the judgment in *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[29], considering that he specifically referred to it in his award. The following *dictum* in that judgment is apposite *in casu*:[30]

> 'Indeed, I find it difficult to comprehend the reasonableness of the grounds on which the commissioner came to the conclusion that the explanation furnished by the employee as to her possession or handling of the blouse and the belt, in the manner that she did on those successive days, was honest and probable. In my view, these explanations by the employee were highly improbable, on the papers alone without even the aid of viewing the DVD footage. A viewer of the DVD footage is left without any doubt that the employee's version ought to have been rejected, not only as highly improbable, but as a glaring and shameless fabrication. It is also to be pointed out that the employee herself conceded that concealing her own belt in the manner that she did was 'a stupid thing' for her to have done. Therefore, in my view, it could hardly be imagined that such conduct lent any credence to the employee's explanation of events, relating to the belt incident, to warrant or deserve description of her version as honest, credible and probable, as the commissioner found to be the case here.'

[54] For all the reasons as summarized above, the second respondent's finding that Eyarabang had committed the misconduct as contemplated by the first and second charges is beyond contestation on review. It is certainly a finding that resorts well within the bands of a reasonable outcome, based on all the evidence properly before him. His assessment and determination of the

[29] (2011) 32 ILJ 2455 (LAC).
[30] Id at para 35.

evidence is beyond reproach. His conclusions must therefore be upheld on review.

[55] As touched on above, the applicants have taken issue with the second respondent not considering whether dismissal was an appropriate and fair sanction in this case. Despite what I have said earlier in this judgment about whether this challenge can be competently brought, I shall nonetheless consider whether dismissal was a fair and appropriate sanction in this case. In my view, and for the reasons set out below, this is undoubtedly the case.

[56] In this case, and overall considered, the offence committed by Eyarabang with regard to being in unauthorised possession of manganese material, was a dishonesty offence. It is an offence categorised under the heading of '*theft and fraud*' in the third respondent's disciplinary code. Even the first charge of a serious breach of security rules must be considered in that context, since the act of refusal as contemplated by this charge was one of the important enablers of the misconduct perpetrated as contemplated by the second charge. So, and in short, what Eyarabang did in this case was nothing short of dishonest. The fact of the matter is that as a general proposition, dishonesty is the kind of misconduct that justifies the sanction of dismissal as an appropriate and fair sanction.[31] In *SA Society of Bank Officials and Another v Standard Bank of SA and Others*[32] it was held as follows:

> 'Dishonesty as an aspect of misconduct is a generic term embracing all forms of conduct involving deception. This court in *Nedcor Bank Ltd v Frank & others* defined dishonesty as a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently. Deceitfulness can manifest itself in various forms, which include providing false information, non-disclosure of information, pilfering, theft and fraud. The fiduciary duty owed by an employee to

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[31] *Toyota SA Motors (Pty) Ltd v Radebe and Others* (2000) 21 *ILJ* 340 (LAC) at para 15; *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO and Others* (2010) 31 *ILJ* 901 (LAC) at paras 35 and 37; *Absa Bank Ltd v Naidu and Others* (2015) 36 ILJ 602 (LAC) at para 52.

[32] (2022) 43 ILJ 1794 (LAC) at para 17. See also *Continental Oil Mills (Pty) Ltd v Singh NO and Others* (2013) 34 ILJ 2573 (LC) 29 – 34; *Consani Engineering (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 1707 (LC) at para 23.

> the employer generally renders any dishonest conduct a material breach of the employment relationship, thereby justifying summary dismissal. …'

[57] There can thus be little doubt that Eyarabang's misconduct was very serious. He in effect acted in contravention of his duty of good faith towards the third respondent as his employer. The circumstances surrounding the events in this case smacks of maleficence, and there is little doubt that Eyarabang sought to escape responsibility based on a contrived and false defence and explanation. What was actually required of Eyarabang, and in which he failed, is neatly articulated in *ABSA Bank Ltd v Naidu*[33] as follows:

> …. it followed that she owed a fiduciary responsibility *vis-à-vis* the appellant towards ensuring that, at all times, she acted and performed her duties in a manner that was in the best interests of both the appellant and its clients. …'

[58] Insofar as Eyarabang's length of service (being some 10 years) and clean disciplinary record is considered, as referred to by the applicants in the founding affidavit, it is simply insufficient to save Eyarabang from being dismissed. This is because of the nature of the misconduct he had perpetrated. This was specifically recognized in *Toyota SA Motors (Pty) Ltd v Radebe and Others*[34], where the Court said:

> 'Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal …'

[59] The applicants also complain that there was no evidence of the break down in the trust relationship. This was indeed the case *in casu*, because of the issue

[33] [2015] 1 BLLR 1 (LAC) at paras 54.

[34] (2000) 21 ILJ 340 (LAC) at para 15. See also *Schwartz v Sasol Polymers and Others* (2017) 38 ILJ 915 (LAC) at para 26; *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO and Others* (2017) 38 ILJ 881 (LAC) at para 28; *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others* (2008) 29 ILJ 1180 (LC) at para 42.

of fairness the sanction of dismissal not actually being in dispute. But even in the absence of such evidence, it simply does not matter where it comes to the dismissal of Eyarabang being considered fair and justified. For some offences, such as those relating to dishonesty, dismissal may follow without evidence about a break down in the trust relationship. As was pertinently said in *Impala Platinum Ltd v Jansen and Others*[35]:

> 'Since *Edcon*, this court has repeatedly stated that where an employee is found guilty of gross misconduct it is not necessary to lead evidence pertaining to a breakdown in the trust relationship as it cannot be expected of an employer to retain a delinquent employee in its employ.'

And in *Woolworths (Pty) Ltd v Mabija and Others*[36], the Court held:

> 'The fact that the employer did not lead evidence as to the breakdown of the trust relationship does not necessarily mean that the conduct of the employee, regardless of its obvious gross seriousness or dishonesty, cannot be visited with a dismissal without any evidence as to the impact of the misconduct. In some cases, the more outstandingly bad conduct of an employee would warrant an inference that the trust relationship has been destroyed. …'

[60] In these circumstances, direct evidence about the breakdown in the trust relationship is not necessary to substantiate dismissal as a fair sanction. The misconduct committed by Eyarabang is the kind of misconduct that justified dismissal, even in the absence of evidence concerning the trust relationship. The Court in *Malaka v General Public Service Sectoral Bargaining Council and Others*[37] appositely described the position as follows:

> 'The evidence reveals that the appellant's dishonest conduct rendered continued employment intolerable and incapable of restitution. Conduct, such as we have here, is incompatible with the

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[35] (2017) 38 ILJ 896 (LAC) at para 13. See also *Schwartz* (*supra*) at para 30; *G4S Secure Solutions* (*supra*) at para 30; *Anglo Platinum* (*supra*) at para 19; *Rustenburg Platinum Mines Ltd v United Association of SA on behalf of Pietersen and Others* (2018) 39 ILJ 1330 (LC) at para 59.
[36] (2016) 37 *ILJ* 1380 (LAC) at para 21. See also *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 860 (LAC) at paras 34 – 35.
[37] (2020) 41 ILJ 2783 (LAC) at para 34.

trust and confidence necessary for the continuation of the employment relationship. The Department of Justice was entitled, in the circumstances, to end the employment relationship …'

[61] In my view, the following *dictum* in *Burton and Others v Member of Executive Council, Department of Health, Eastern Cape Province and Others*[38] is equally applicable *in casu*:

'While the long-service and disciplinary record of the appellants were relevant considerations, the misconduct committed, and the harm which resulted from it, was of a serious nature and underpinned by dishonesty on the part of senior public sector employees. In *Naidu* this court recognised that '[g]enerally, a sanction of dismissal is justifiable and, indeed, warranted where the dishonesty involved is of a gross nature'. …'

[62] In the end, it was simply too risky for the third respondent to continue with employing Eyarabang, considering all that transpired in this case. It was appropriate, in the context of risk management, to bring the employment relationship to an end. As said in *De Beers Consolidated Mines Ltd v Commission for Conciliation*, *Mediation and Arbitration and Others*[39]:

'A 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. …'

<u>Conclusion</u>

[63] Therefore, based on all the reasons set out above, I conclude that the second respondent's arbitration award is simply not reviewable. I am satisfied that the second respondent's findings of facts are properly supported by the evidence before him, in particular the uncontested footage. His views concerning Eyarabang and his conduct are justified. Insofar as the issue of the outcome arrived at by the second respondent may be considered on the basis of it

[38] (2022) 43 ILJ 2284 (LAC) at para 75. See also *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2022) 43 ILJ 839 (LAC) at para 13.
[39] (2000) 21 ILJ 1051 (LAC) at para 22.

being reasonable or unreasonable, there is in my view no doubt that it would comfortably resort within the bands of reasonableness as required, in order to be sustainable on review. The applicants' review application thus falls to be dismissed.

Costs

[64] This then leaves only the issue of costs. In terms of the provisions of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. I am aware of what the Constitutional Court said with regard to costs in employment disputes as expressed in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[40]. In exercising this judicial discretion, the same Court recently re-affirmed the principle set in *Zungu supra* and stated that '*when making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties.*'[41]

[65] I believe that the applicants should not have pursued this case and I was tempted to make a costs award against the applicants. However, I do not believe that the applicants acted in an entirely unreasonable and frivolous manner in pursuing this case. I also consider that the case was prosecuted in a proper manner by the applicants. These factors, coupled with an overall consideration of fairness to both parties, leaves me convinced that it would be appropriate and fair to make no order as to costs.

[66] In the premises, the following order is made:

Order

1. The late filing of the applicants' review application is condoned.

2. The applicants' review application is dismissed.

3. There is no order as to costs.

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[40] (2018) 39 ILJ 523 (CC) at para 25.
[41] *Long v South African Breweries (Pty) Ltd and Others* (2019) 40 ILJ 965 (CC) at para 30.

S. Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants:	Advocate A Cook
Instructed by:	LDA Inc Attorneys
For the Third Respondent:	Advocate M Van As
Instructed by:	Cliffe Dekker Hofmeyr Inc Attorneys