

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NO JA 53/07

In the matter between:

Azwitamisi Simon Mavhungu

Appellant

and

Tsogo Sun Group (Montecasino)

1st Respondent

**Commission for Conciliation
And Arbitration**

2nd Respondent

Mapallo Tsatsimpe

3rd Respondent

Judgment

Tlaletsi AJA

Introduction

[1] This is an appeal against the judgment of the Labour Court delivered on 11 October 2007. The appellant was employed by the first respondent as credit cashier. He was dismissed from his employment with effect from 16 November 2005 pursuant to a disciplinary enquiry on allegations of misconduct. The appellant was not satisfied with his dismissal as he contended that his dismissal was substantively unfair. Appellant did not challenge the procedural fairness of his dismissal.

[2] The appellant referred a dispute of unfair dismissal to the second respondent (the Commission for Conciliation, Mediation and Arbitration) ("the CCMA"). The dispute was arbitrated by the third respondent, a commissioner of the CCMA on 1 December

2006. The commissioner issued an award on 12 December 2006. The commissioner found the dismissal of the appellant to be substantively fair and made no order as to costs.

- [3] Aggrieved by the award of the commissioner, the appellant brought an application in the Labour Court for the review and setting aside of the award of the commissioner. The appellant's application for review was dismissed with costs on 11 October 2007. He applied for leave to appeal against the judgment of the Labour Court and his application was refused on 6 December 2007. He obtained leave to appeal from this Court after he petitioned the Judge President of this Court. According to the first respondent, its Answering Affidavit to the petition was erroneously filed in a wrong file and was therefore not part of the record for the petition.

Factual background

- [4] The first respondent is conducting the business of a casino. It deals with guests and the public in general on a daily basis. It expects its employees to conduct themselves in an acceptable manner. The first respondent also deals with large amounts of cash and requires extra care to be exercised by its cashiers. It has a rule or policy in terms whereof cash variances are dealt with in terms of disciplinary procedures.
- [5] It is common cause that the appellant was during 2003 dismissed from the employ of the first respondent after having been found guilty of insubordination. He referred a dispute of unfair dismissal to the CCMA. The parties agreed to resolve their dispute and entered into a settlement agreement. The terms of the said agreement were *inter alia* the following;
- 5.1 the appellant was reinstated in his position;

- 5.2 the first respondent was to investigate certain allegations made by the appellant regarding non-payment of monies allegedly due to the appellant and to pay him monies due to him if he is found to be entitled to such payment;
- 5.3 the appellant would not be paid any money as back pay arising from his reinstatement and that the appellant would accept and sign a final written warning which would remain in force for a period of twelve months commencing 1 June 2003;
- 5.4 the parties agreed to regard the period in which the appellant had been dismissed until his reinstatement as a period of suspension without pay;
- 5.5 the appellant undertook to obey all lawful instructions issued to him by his "*line manager*" and other senior personnel in keeping with his contract of employment.

[6] The incident that led to the appellant's dismissal took place on 27 September 2005. On this day the appellant was supposed to attend a disciplinary enquiry against him relating to allegations of unexplained variances in the cash flow balances. The said enquiry had on a previous occasion been postponed to 27 September 2005. However, on this day as well, the enquiry did not take place. What follows are the parties' versions regarding the event that had led to the dispute as presented at the arbitration.

Arbitration proceedings

[7] The first respondent tendered the evidence of Ms Scheenagh Rabka("Rabka") and Mr Dirk De Villiers ("De Villiers"). Ms Rabka testified that she had been working for eight years for the first respondent. The appellant's duties as a credit cashier entailed serving guests, performing financial transactions relating to

credit cards, cheques, foreign currency or larger amounts of cash. He reported to his supervisor (Shift Manager) who in turn reported to Rabka. The appellant was therefore Rabka's subordinate.

[8] Rabka testified that when she reported for her shift at 4pm on 27 September 2005 she received a report that the disciplinary enquiry that was scheduled to take place against the appellant did not take place. She did not know the reason why the enquiry had not taken place that day. She mentioned that as she was sitting in her office, when the appellant "stormed" into her office and started shouting, and waving a finger at her. He was very aggressive and was leaning over her desk angrily, shouting. She tried to find out what was happening but the appellant did not give her any chance to finish even one sentence. He was saying a lot of things. What she could hear from him was "*that management was not fair*". She suspected that his conduct had to do with the disciplinary enquiry that was supposed to be held that day. She tried to tell him not to speak to her in that manner.

[9] Rabka mentioned that she walked out of her office and went to the shift manager's desk in order to get the shift schedule so that she could reschedule the date of the enquiry. The appellant followed her and continued to shout at her. She requested appellant to wait so that he could sign the amended notice of the enquiry as a means of diffusing the situation. The appellant refused, and continued to shout and wave his finger at her. The time was around 5pm and the cashiers of the shift that were knocking off were present and were busy "cashing up". The employees of the shift that reported with Rabka were also present. She mentioned that there were patrons present at the

time because their casino normally starts to be busy from 2pm and 3pm. All these people were in a position to see and hear what the appellant was doing and saying even though he tried to lower his voice when he was at the cashier's booth. At the time, she continued, six out of seven cashier booths were in operation.

[10]She described the appellant as a person who does not respect management and its decisions. She said he is short tempered, rude, insubordinate and insolent. He is the kind of person who does not listen to others and who would not give anyone a chance to speak to him. She testified that to put him back to his position at the first respondent would be detrimental to staff members, management and guests. First respondent has a staff complement of about hundred and ninety (190) in their department and they expect each one to be responsible for their own conduct and to follow procedures. They can therefore not devote their time to the appellant to ensure that he is friendly, polite and can control his temper. They do not have time to "*baby-sit*" the appellant.

[11]Rabka testified that she did not intend to hold the appellant's enquiry after his working hours. Neither did she want appellant to work overtime. All that she expected was for the appellant to wait only for two minutes to be served with and accept an amended notice of enquiry. She found it convenient and expedient to do it then whilst staff members belonging to different shifts who were to participate in the enquiry were still available. That would obviate any possible inconvenience to all other staff members involved in the enquiry. She denied that she pushed or shouted at the appellant. She did however, tell him that she would not allow that she be spoken to the way the appellant did as her husband and children do not speak to her in that manner. She mentioned further that the actions of the appellant were recorded on the

CCTV video and were also noted by the chairperson of the internal disciplinary enquiry. The video tape subsequently went missing.

[12]De Villiers confirmed that he was a shift manager and the appellant was his subordinate. At the time of the incident he was sitting at the shift manager's desk in front of the manager's desk working on the computer. This desk is their biggest cash desk on the main floor where their guests cash their "chips" or get money for gambling purposes. Whilst working he noticed Rabka standing at the shift manager's desk with appellant. Rabka asked the appellant to wait as she wanted to serve him with a reissued of a notification for an enquiry. The appellant refused and mentioned that it was now his time and not the company's time at that point in time. Rabka asked him repeatedly and the appellant became aggressive, leaned towards her, wagging his finger, spoke loudly in a disrespectful manner. This happened in full view of the junior staff, himself and members of the public.

[13]He testified that this was not the first incident he observed of the appellant. He mentioned that he on a previous occasion wanted to give the appellant a notice to attend a disciplinary enquiry. He refused to accept it. He realised that the appellant was losing his temper and told him that he was going to hand over the matter to other assistants to issue the notice. The appellant became aggressive and tried to grab the document from his hand. He tried to shield it but he ultimately managed to grab it from his hand. This was in full view of members of the public. A disciplinary enquiry was held because of his conduct and he was dismissed after being found guilty. This incident became the subject of the dispute which led to the disciplinary enquiry and the conclusion of the settlement agreement previously referred to herein.

[14]De Villiers testified further that the appellant can at times be “*very calm and collected*”. However, at least on two occasions that he had observed him, as soon as he had to deal with disciplinary matters against him, he lost his temper. It is for his conduct that they had decided that whenever he had to be served with a notice to attend a disciplinary enquiry, it had to be done in the presence of witnesses. De Villiers testified further that he could not remember the exact words mentioned by the appellant during the incident with Rabka except that he refused to wait and that it was now his time and not the company’s time. He denied that the appellant approached him during this ordeal with Rabka to request a shift roster. He also denied ever giving the shift roster to the appellant.

[15]The appellant’s version of the events was that Rabka sent Bheki Dlamini (the cashier supervisor) to tell him and to insist that the appellant should work overtime. He explained his reasons to Dlamini why he could not work overtime. His main reason was that he had no agreement with management to work overtime as the respondent’s policy required that an employee had to consent to working overtime. Dlamini told him that Rabka gave an instruction that if he was not agreeing to working overtime he should then come to her. The appellant went to Rabka. He met Rabka in front of her office on her way from the cash desk manager. He requested to see her and she invited him to her office. Inside her office he explained to her why he wanted to see her. Rabka immediately started shouting at him, telling him that he is going to work overtime and that his enquiry had been postponed several times. He explained to her that as an employee he had to consent to working overtime. He mentioned that Rabka pushed him out of her office and told him that she did not have time to explain.

[16] The appellant testified that he left Rabka and as he was walking towards Dlamini, Rabka called him back. When he returned to her she was still shouting at him insisting that he had to work overtime. The appellant went to De Villiers' counter and requested from him the shift roster so that he could look at possible dates for the purpose of rescheduling the date of the enquiry. De Villiers gave him the shift roster. He in turn gave it to Rabka who was still insisting that he must work overtime. He mentioned that when the shouting by Rabka was taking place there were no customers around. The only people present were De Villiers, Dlamini and himself. He could not recall whether "*Viola*" was present in the administration office.

[17] The appellant explained further that when he entered the office of Rabka at her invitation, he asked her to reschedule the date of hearing and gave her alternative days. He did so because he had already heard that she was insisting on him working overtime so that the hearing could be finalised. He denied that he was unruly, insolent or aggressive. He also disputed the remark by the chairperson of the internal disciplinary hearing that he observed on the video footage that he appeared to be unruly. He explained that there was a conspiracy against him by Rabka and De Villiers to have him dismissed. It is for this reason that they falsely accused him of the charges against him. He further denied that he ever grabbed a notification of a date document from De Villiers on a previous occasion. He mentioned further that even on the date of the present incident his "float" (money) could not balance because management deliberately gave him less money so that they could find something against him. He testified that the first respondent had a tendency of exploiting its employees by not respecting the labour laws and its own policies and victimised

those who questioned such conduct. He also believed that he was being discriminated against by management. He was however seeking reinstatement despite all what he complained about.

[18] Dlamini who testified as the appellant's witness stated that the appellant was scheduled to appear at a disciplinary enquiry at 3pm that day. He (Dlamini) was the initiator of the enquiry and had to report for duty earlier than his 4pm shift so that he could participate in the enquiry. On arrival he found appellant struggling to balance his "*float*". He waited for him until his time for the enquiry went past. When he finished balancing his "*float*" at about 5pm, he told him that the chairperson of the enquiry wanted the enquiry to proceed as he was also instructed by Rabka that it had to proceed. The appellant told him that he was not happy with that. He referred appellant to Viola who was the manager who had conveyed the instruction to him.

[19] He testified that appellant went to Viola who in turn referred him to Rabka. He does not know what happened inside Rabka's office. He saw appellant coming out of Rabka's office being followed by her. He could hear from where he was seated that Rabka was insisting that appellant had to work overtime because the hearing had been postponed several times. Dlamini mentioned that appellant was "*obviously*" not happy with that instruction. The two stood in front of De Villiers who was sitting at his desk. He then saw De Villiers hand over a paper to appellant who in turn handed it to Rabka. He does not know what that paper was. Neither did he hear what the appellant could have said to De Villiers before he was given the paper. The appellant thereafter came back to him so that he could assist him with the "*balancing*" of his "*float*" as he was not going let him go without having concluded the exercise.

[20]Dlamini explained that he was sitting about 10 metres away from De Villiers' desk. He could hear that Rabka was the one who was shouting. He could hear that appellant was not happy about working overtime, but he was not shouting. He could not remember whether there were customers in the vicinity as he was concentrating on working on reconciliation of the float. He mentioned further that the hearing could be presided over by any other supervisor who was on the same shift with the appellant and not necessarily the one that had been assigned to preside that day.

[21]The charges against the appellant were (i) gross insubordination, (ii) unruly behaviour, and (iii) breach of contract of employment. In her award the commissioner mentioned that appellant had been found guilty of unruly behaviour only by the chairperson of the disciplinary enquiry and as such she would only confine herself to this charge when considering whether appellant's dismissal was substantively unfair.

[22]In analysing the evidence the commissioner found that Rabka's evidence was supported by De Villiers' and that her request was clear and specific and had nothing to do with overtime work. She preferred the respondent's version that guests were present on the basis that in the institution such as the respondent there is no way that there could be no guests as guest are its core business. She found appellant's version that there were no guests to be improbable. The commissioner found the evidence of Dlamini unhelpful as he was seated some distance away from where the incident happened and as a result could not hear everything that was said. She further held that Dlamini wanted to put the entire fault on Rabka and display the appellant as a victim who was unfairly dismissed. She found that Dlamini only wanted to help his

friend or colleague and could not withstand cross-examination of what he had said in evidence in chief.

[23] In relation to sanction the commissioner held that she was not convinced that there was a good working relationship between appellant and the respondent. She stated that appellant did not dispute the fact that he challenged authority. With regard to appellant's contention that he had no problem with the respondent and that he was prepared to work for the appellant and that his only problem was with management, the commissioner held that appellant could not separate management from the respondent as they have been placed in authority by the respondent and are the people that appellant should work with. The commissioner found the dismissal of the appellant to have been effected for a fair reason.

Proceedings in the Labour Court

[24] The appellant refused to accept the award of the commissioner and instituted review proceedings in the Labour Court. He sought an order that the award be reviewed and set aside and that the matter be referred back to the second respondent for arbitration *de novo* before a commission other than the third respondent and costs in the event of any opposition.

[25] In the review application the appellant only challenged the substantive fairness of his dismissal. The alleged grounds of review contained in the founding affidavit were that the commissioner did not "*apply his mind to the facts on hand*" in that:

- 25.1 She ignored and failed to consider crucial evidence to the effect that he was told by the respondent to work overtime against his consent;
- 25.2 She ignored an admission by Rabka during cross-examination that she could not remember what he said to her while shouting despite the fact that he was speaking in the English language which is well understood by her;
- 25.3 She erred in finding that De Villiers' evidence supported Rabka's version that he shouted and pointed a finger at her when De Villiers confirmed during cross-examination that he did not hear what they said as he was busy with a computer;
- 25.4 She ignored the evidence of Dlamini that he saw De Villiers hand over a paper to him;
- 25.5 That the commissioner erred in finding that he was found guilty of unruly behaviour when in fact the chairperson of the enquiry stated that he did not find him guilty of unruly behaviour.

[26] With regard to the alleged ground that the commissioner ignored the relevant evidence, the Labour Court recognised that the commissioner made credibility findings in favour of the first respondent's witnesses and against the appellant and his witness and that a review court should be extremely reluctant to set aside findings of fact and credibility made by a trier of fact such as the commissioner. The Labour Court held that there is a rational connection between the evidence that was placed before the commissioner (that is that the appellant became angry and unruly when Rabka wanted to hand a new disciplinary hearing notice to him) and the conclusion reached by the commissioner, and found no basis to interfere with the finding of the commissioner.

[27] The second ground that the commissioner held that the appellant was found guilty of unruly behaviour when it was in fact not the case the Labour Court referred to the relevant parts of the transcript of the evidence and found that the recording by the chairperson that there was insufficient evidence to substantiate unruly behaviour must be a typographical error as evidence on record clearly indicates that the chairperson was concerned with the charge of unruly behaviour and found that there was sufficient evidence to sustain a conviction. As pointed out already, the application for review was subsequently dismissed with costs.

The Appeal

[28] The appellant has raised a number of issues and allegations as grounds upon which he is appealing against the judgment of the Labour Court. These may be summarised as hereunder. The Labour Court:

- 28.1 erred in finding that on the facts presented the appellant was instructed by Rabka that he should not leave because she wants to serve him with a notice of the date of the disciplinary enquiry and that the appellant did not take kind to that and uttered abusive words in the presence of fellow employees and guests;
- 28.2 ignored and failed to consider crucial evidence to the effect that appellant was instructed to work overtime which he was never required by the first respondent's policy;
- 28.3 erred in finding that Rabka's version was supported by De Villiers when in fact De Villiers testified that he did not hear or see exactly what transpired on the day in question;
- 28.4 "erroneously considered gross irregularity by the third respondent, that applicant's witness was rejected because he was distant away and he does not have all information

required to determine if applicant was dismissed fairly or not. Hence Mr De Villiers testified that he does not have all information required as he was busy on a computer. Third respondent grossly ignored appellants' witness to favour first respondent, it is therefore unfair."

28.5 erred in finding that there is a rational connection between the evidence that was placed before third respondent. First respondent failed to present CCTV Tape Footage as concrete evidence to show the appellant's behaviour.

28.6 erred in applying the decision of the Labour Appeal Court "in **Carephone (Pty) Ltd v Morcus NO & Others (1998) 19 ILJ 1425 (LAC)** and the unreported judgment of **NAVSA AJ** in the constitutional Court matter of **Zidumo & Another v Rustenburg Platinum Mines & Others** in attempt to sustain the irregularities committed by third respondent and to fail the trite of law and justice."

28.7 "erred in not applying *Trite Law* pertaining to probabilities inference to true facts in dispute. No evidence was presented to conclude that Appellant misconducted."

28.8 "erred in not recognizing, alternatively not taking proper or full cognizance of the *Constitution of South Africa* and more specifically the Act namely , *Labour Relations Act 66 of 1995 section 192(2)* and *Code of Good Practice, Schedule 82(4)*"

28.9 the presiding judge "*furthered more, his Unfairness by ignoring act 168(3). Issuing an order while he was not supposed to hear the matter as he issued the judgment*".

[29] In this Court advocate L Memela appeared on behalf of the appellant. He is also the Counsel that prepared the heads of argument on behalf of the appellant. In the heads, Counsel did not deal with the many issues raised by the appellant as his

grounds of appeal in both the founding and supplementary affidavits. In essence he submitted that the court *a quo* erred in deciding the merits in favour of the first respondent and that the appeal should be upheld with costs. He did refer to some parts of the evidence in an attempt to show some contradictions in the evidence of Rabka and De Villiers.

[30] Section 145 of the Act provides that any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the CCMA may apply to the Labour Court for an order setting aside the arbitration award. A defect referred to above means that the commissioner;

30.1 committed misconduct in relation to the duties of the commissioner as an arbitrator;

30.2 committed a gross irregularity in the conduct of the arbitration proceedings; or

30.3 exceeded the commissioner's powers; or

30.4 that an award had been improperly obtained.

[31] The Constitutional Court in ***Sidumo & Another v Rustenburg Platinum Mines Ltd & Other*** [2007]12 BLLR 1097 (CC) (2007) 28 ILJ 2405 (CC) held that the above grounds of review are suffused by reasonableness because a CCMA arbitration award, as an administrative action must, as required by the Constitution be lawful, reasonable and procedurally fair. The test laid down by the Constitutional Court in determining whether a CCMA commissioner's arbitration award is reasonable or unreasonable is to ask the question whether or not the decision or finding reached by the commissioner is one that a reasonable decision maker could not reach.

[32] As to the applicability of the rationality test or the test in **Carephone (Pty) Ltd v Marcus NO & others** 1993 (3) SA 304 (LAC) this Court per **Zondo JP** in **Fidelity Cash Management Service v CCMA & Others** [2008]3 BLLR 197(LAC) held as follows at para [102]:

"What is the difference between the approach enunciated in Carephone, supra and that enunciated in Sidumo with regard to the grounds of review set out in section 145 of the Act? The difference seems to me to be two-fold. Firstly, Carephone sought to construe section 145 so as to bring it in line with a constitutional imperative at the time, which was to the effect that an administrative action had to be justifiable in relation to the reasons given for it, whereas Sidumo seeks to construe section 145 so as to meet the current constitutional requirement that an administrative action must be lawful, reasonable and procedurally fair. It seems to me that even if there may have been a debate under Carephone and, prior to Sidumo, on whether a commissioner's decision for which he or she has given bad reasons could be said to be justifiable if there were other reasons based on the record before him or her which he or she did not articulate but which could sustain the decision which he or she made, there can be no doubt now under Sidumo that the reasonableness or otherwise of a commissioner's decision does not depend- at least not solely- upon the reasons that the commissioner gives for the decision. In many cases, the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision-maker could or could not reach. However, other reasons upon which the commissioner did not rely, to support his or her decision or finding but which can render the decision reasonable or unreasonable, can be taken into account. This would clearly be

the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D,E and F upon which he did not rely but could have relied which are enough to sustain the decision.”

- [33]** The learned Judge President held further that it would often happen that in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the court feels that it would have arrived at a different decision or finding to that reached by the commissioner. In that instance, the Court held, the court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal in terms of the Act primarily is given to the commissioner and that the system would never work if the court would interfere with every decision or arbitration award of the CCMA simply because it would have dealt with the matter differently. (para[98]). The court held further that:

“The Court will need to remind itself that it is dealing with the matter on review and the test on review is not whether or not the dismissal is fair or unfair but whether or not the commissioner’s decision, one way or another, is one that a reasonable decision-maker could not reach in all the circumstances.”

The distinction between review and appeal should therefore at all times be observed when considering applications to the arbitration awards issued under the auspices of the CCMA.

- [34]** It would appear that the attack directed on the award of the third respondent in this matter is mainly directed at the

correctness of the award particularly in preferring the version of the first respondent's witnesses *vis-à-vis* that of the appellant. The attack, in my view, leans more on the side of an appeal than the review. This conclusion is fortified by the fact that the appellant, both in founding and supporting documents, did not identify any of the grounds of review provided in section 145 of the Act that he is relying upon both in the founding and the supplementary affidavits to the review application. In my view it is required of an applicant for review to identify the real grounds provided in law upon which he/she seeks to review the award of a commissioner of the CCMA.

[35] It is evident from the record as a whole that the commissioner took into account both the credibility of the witnesses and the probabilities of the case before her and the extent of corroboration of the versions presented to her. The commissioner was faced with two diametrically opposed versions of the appellant and the first respondent. It is not correct as it was alleged that the commissioner ignored or failed to consider the evidence that the appellant was told by the respondent to work overtime against his consent. The commissioner accepted Rabka's version that she never requested or instructed that the appellant should work overtime. She only requested him to wait for a few minutes so that she could reissue a notice to attend a disciplinary enquiry. It is only the appellant who stated that he was instructed to work overtime. His witness, Dlamini did not testify that he told Dlamini that Rabka informed him to convey to the appellant that he should work overtime. He only made an allegation based on hearsay that the manager who was supposed to preside over the enquiry (Viola) had been instructed to continue with the hearing that day. Viola was not called to testify to confirm the alleged instruction from Rabka. I find it

improbable that the appellant would complain that he was instructed to work overtime which he rejected but was prepared to stay behind with Dlamini to balance his float after the altercation with Rabka. Whether Rabka told the appellant to work over time or not is neither here nor there. This case is about the conduct of the appellant toward Rabka and not the instruction to work overtime. It was not even the appellant's defence that he was provoked by being instructed to work overtime and as a result he acted as he did. He denied ever having been unruly and that instead Rabka is the one who was unruly.

- [36]** The other aspect is that if indeed Rabka wanted the appellant to work overtime, or hold an enquiry after his working hours nothing is said about what prevented from continuing with the enquiry that she so insisted to proceed with. I say this because on the appellants' version he did nothing wrong as he was calm and that Rabka was the aggressor. What is also strange is that the appellant's attorney put a proposition to Rabka during cross-examination that his instructions were that "*(she) insisted that the (appellant) should remain after hours for the enquiry, which he was never notified about*". This was mentioned on more than one occasion. The appellant also gave the impression that she was only notified of the enquiry that day and that Rabka never intended to reschedule the enquiry. This version contradicts the common cause fact that the appellant had a pending enquiry which had been postponed on previous occasions and was scheduled to be held that day. I find it strange that Rabka would agree to speak to the appellant in her office and all of a sudden without being provoked, push the appellant out of her office only because he does not want to allow a disciplinary enquiry to happen.

[37] The commissioner's finding that the evidence of Rabka and De Villiers corroborated each other on the attempt to reschedule the hearing and whether customers and other staff were present is supported by the record. It is to be noted that De Villiers was at the shift manager's desk where the incident took place. He was in a better position to hear and see what happened as opposed to Dlamini who was some distance away. I also find it strange that Dlamini could only hear what Rabka was saying and not be in a position to hear what the appellant was saying. His hearing seemed selective. De Villiers testified that he did not see what happened inside the office. If he was really part of the conspiracy against the appellant as he alleged, he could easily have designed his evidence to suit that of Rabka about the incident that happened inside the office. It was suggested that De Villiers might have developed an attitude against the appellant because of the earlier incident that led to the dismissal of the appellant. This suggestion is speculative and is not supported by any admissible and reliable evidence. It is also surprising that Dlamini would see De Villiers hand over a paper to the appellant and not hear the discussions about the paper. Obviously this version is intended to corroborate the version of the appellant that he went and obtained a shift roster from De Villiers. De Villiers has denied ever handing any paper to the appellant. His version is more probable on this aspect and was correctly preferred by the commissioner.

[38] The appellant submitted that the commissioner should have drawn an adverse inference because of the first respondent's failure to produce evidence of the CCTV. As submitted on behalf of the first respondent, it is implicit from the award and the findings that follow the summary of the appellant's evidence,

that the commissioner obviously did not accept this submission and accepted the *bona fides* of the first respondent's on this issue. Rather than decide the matter on this basis she reasonably chose to evaluate the evidence and direct testimony of the witnesses. I can think of no reason for the first respondent to deliberately conceal this evidence which supported its version. The chairperson of the enquiry in his findings remarked that *"from the tape evidence, the statement from Dirk De Villiers and the case presented by Scheenagh's Rabka, it is clear that you are the aggressor in this situation. I feel that your body language and gestures on the tape evidence was inappropriate and as such also constituted a further form of insubordination"*. This finding by the chairperson was not challenged during the arbitration. The only issue raised was the absence of the video footage. Surely if the video footage was indeed available, the first respondent would have made sure to make it available to support the recorded observation by the chairperson of the internal disciplinary enquiry.

- [39]** The appellant as a witness was not impressive. The record is replete with instances where he was evasive and argumentative when cross-examined. He portrayed himself as a victim that the company was bent on conspiring with everybody to have him dismissed. He even went to the extent of stating as a fact that on the day of the incident the employees of the first respondent deliberately gave him "*false change*" so that his '*float*' should not balance in order for them to have charges preferred against him. It is surprising that respondent's employees would do such a thing and at the same time want to hold an outstanding enquiry after hours. The appellant did not explain whether his float ultimately balanced or whether it did not balance as designed by the first respondent. If the float did not balance, it meant that he

was to be charged once again for variance cash in line with the respondent common course policy. This version of deliberately giving him a “*false charge*” and conspiracy was not even put to the witnesses for the first respondent as well as Dlamini.

[40] I am of the view that the finding by the Labour Court that what was reflected in the findings of the chairperson of the enquiry that he “*find that there is insufficient evidence to substantiate unruly behaviour*” is a typographical error is the correct finding. It is true that the appellants did not approach their case on that basis. That aspect was never raised in the opening statement to the arbitration. Neither was it raised during cross-examination of the first respondent’s witness. It was only raised during evidence in chief of the appellant for him to give it his preferred interpretation. The evidence presented and the finding by the chairperson all indicate that the appellant was found to have behaved unruly otherwise there would not have been any reason to dismiss him.

[41] It cannot be suggested that no reasonable decision maker could have made the findings that the commissioner made in his award. Her value judgment that the trust relationship between the parties did not exist cannot be faulted. It was never the appellant’s case that the dismissal of the appellant if found guilty of the misconduct would be an inappropriate sanction. In my view it is not necessary to deal with the allegations that the Labour Court did not take cognisance of the LRA and the Constitution, or that the review Judge was not supposed to have heard the matter and that he acted unfairly. These allegations are all unfounded and were correctly not argued and were correctly not addressed in the appellant’s heads of argument.

[42] What remains is the issue relating to costs. There are in my view no grounds to interfere with the order of the Labour Court about the costs. However, I am of the view that it would be in accordance with the requirements of the law and fairness that each party should pay its costs on appeal.

[43] In the result I make the following order.

1. The appeal is dismissed.
2. Each party is to pay its costs.

Tlaletsi AJA

I agree

Waglay ADJP

I agree

Sangoni AJA

Date of hearing: 26 November 2009.

Date of Judgment:	29 January 2009
For the Appellant:	Adv. L Memela
Instructed by:	Mzamo Attorneys
For the respondent:	Adv. F A Boda
Instructed by:	Deneys Reitz Attorneys