



REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no. JR446/2011

In the matter between:

SOUTH AFRICAN BROADCASTING

CORPORATION LTD (SABC)

Applicant

and

CCMA

First Respondent

COMMISSIONER FAIZEL MOOI N.O

Second Respondent

MEDIA WORKERS ASSOCIATION OF

SOUTH AFRICA (MWASA)

Third Respondent

LIONEL NCALA

Fourth Respondent

Heard: 20 April 2012

Delivered: 7 August 2012

Headnote: Review – dismissal for misconduct – review test analysed – latitude commissioners enjoy in conducting hearings - evaluation of evidence – shifting of evidentiary burden – misdirections of commissioner not amounting to reviewable irregularities – Application dismissed.

JUDGMENT

WHITCHER AJ

Introduction

- 1] This is an application to review and set aside an arbitration award issued under case no GAJB26897-10 by the Second Respondent [“the commissioner”]. The commissioner found that the dismissal of the Fourth Respondent [“Ncala”] was substantively unfair and ordered his retrospective reinstatement.
- 2] Ncala was employed by the applicant since 1995. At the time of his dismissal, he was employed as a National Sales Manager. In May 2010, following an investigation by Mr Kok, a forensic auditor from the applicant’s internal audit department, Ncala was charged with five acts of misconduct. He was found guilty of charge 1: non-disclosure of business interests or membership as prescribed in the SABC Personnel Regulations in respect of four enterprises; charge 4: contravention of the SABC electronic mail policy by soliciting and conducting private business using the employer’s email facility; and charge 5: dishonesty, alternatively making a misrepresentation by submitting excessive claims for using his private vehicle for the employer’s business, claiming 1180 kms not entitled to (to the value of some R4 766.38). He was dismissed on 16 August 2010.

3] Two witnesses testified at the arbitration: Kok on behalf of the employer and Ncala in his own defence. The commissioner confirmed the findings of guilt in respect of charges 1 and 4 only. Concerning charge 1, the commissioner concluded that Ncala had not declared his membership of three entities. In respect of the fourth enterprise, Capello, although there had been contact between Ncala and Capello, the evidence that he was the owner or had a formal business interest in the entity was insufficient. In any event, the nature of the contact established did not disclose a conflict of interest that warranted dismissal.

4] In respect of charge 5 the commissioner found that:

‘The evidence against the applicant on this charge is not clear cut. The applicant’s argument that he never admitted to making a mistake on his kilometres to Mr Kok at his interview as he would not have pleaded not guilty if he did so is credible and I am prepared to give him the benefit of the doubt on this point. The applicant’s argument that his mileage is higher than what Kok’s map indicated as he visited a number of government departments in a given area that he visited is credible especially as Mr Kok did not produce a copy of the map on which he based his calculations.

The biggest problem is... where the applicant indicated that on 3rd November 2008 his odometer reading when he returned to the SABC was 9080 and when he departed on business on 4th November 2008 the odometer reading was still 9080. This cannot be correct as the applicant conceded going home between the two trips. He tried to explain this discrepancy by stating that the kilometres were taken over at the end of the month. While this explanation is not entirely convincing the respondent faces two problems:

Firstly, the applicant’s claim was checked at the time by two people who did not testify as they had left the respondent’s employ. If the applicant was dishonest in his claims and normal adjustments were not made to his claim at the end of the month, it is strange that two people did not pick this up at the time. The applicant testified that alleged discrepancies in his claim were not actioned as his senior was aware of how he worked. As the witnesses who approved the payment of the mileage did not testify I have to give the

applicant the benefit of the doubt on his claim that his seniors were aware of how he worked and they therefore found no discrepancies in his claim.

Secondly, the claims in issue were made in 2008 and the applicant was only charged in 2010. The principle of fairness requires an enquiry to be held within a reasonable time.'

5] The commissioner found that the sanction of dismissal was unfair for the following reasons:

'No disciplinary code was produced which indicated that dismissal was the appropriate sanction on any or all of the charges, including charge 5 as opposed to a written or a final written warning.

The applicant worked for the respondent for about 15 years with a clean disciplinary record and his length of service is a strong mitigating factor favouring a sanction less than dismissal.

While the applicant on two of the charges breached company policy... Mr Kok conceded that the applicant did not come across any conflict of interests. The only possible conflict of interest was the applicant taking a few minutes to reply to Capello's emails. This is a minor misconduct. If the applicant had not declared his interests in any companies doing business with the SABC then the matter would have been sufficiently serious to warrant a dismissal. This is not the situation...and the applicant's breach caused no actual prejudice to the respondent, thereby justifying a lesser sanction.

Even if the applicant was guilty of dishonesty relating to charge 5, which he could not be for the reasons furnished... it is not clear that this was a dismissible offence as no code was provided and it was not convincingly proved that the applicant gained by the amount set out in the charge sheet as his argument that he visited a number of government departments when he went to a certain area thereby legitimately increasing his mileage was not strongly refuted. The only clear discrepancy proved was where the applicant did not account for the mileage to his home and back on 3rd and 4th November 2008 which was not serious enough to justify dismissal.'

The applicant's grounds of review

- 6] A summary of the applicant's contentions is set out below. The detail of the complaints is addressed in the analysis of the application.
- 7] Concerning charge 1, there was no rational connection between the evidence before the commissioner and his findings in respect of Capello, especially the absence of a dismissible conflict of interest.
- 8] Concerning charge 5, the issue of an undue delay was never raised during the proceedings. The applicant was thus not given a hearing on this issue and the commissioner took into account irrelevant and unsubstantiated material which materially influenced his decision.
- 9] The commissioner denied the applicant the opportunity to lead material evidence, namely that of Naicker to corroborate the evidence of Kok regarding the interview with Ncala.
- 10] The commissioner misdirected himself in assessing the evidence.
- 11] No rational reasons were given for the credibility finding in favour of Ncala against Kok. There is no indication that the commissioner considered the probabilities first, before relying on the credibility of the witnesses.
- 12] It was absurd to have relied on the fact that Kok did not produce a copy of the map on which he based his calculations, given that the commissioner had ruled that it was not necessary for Kok to produce the map. As such, the commissioner denied the applicant an opportunity to present what the commissioner considered to have been material evidence.
- 13] Concerning the odometer reading, it was absurd to rely on Ncala's superiors having approved his travel claims, as they had based their approvals on trust, and even more bizarre, on the 2 year delay issue. Moreover, it was unwarranted to have taken into consideration the absence of evidence by Ncala's superiors, because there was other evidence led by Kok that proved

that in other instances Ncala had inflated his travel claims.

- 14] There was no rational basis to suggest that in the absence of a disciplinary code, dismissal for dishonesty was not a fair sanction. The commissioner failed to appreciate the impact Ncala's misconduct had on the employment relationship. Moreover, in deciding substantive fairness, the commissioner was pre-occupied with charge 5. Having found that the charge had not been proven, he ought to have disregarded it for purposes of considering whether or not dismissal was a fair sanction. Instead, he made repeated references to it in his award and it clearly influenced his mind in deciding the fairness of the sanction. The commissioner did not, as he was required, consider the fairness of the sanction in the light of the charges which he found to have been proved.
- 15] The applicant referred to the Labour Appeal Court's decision in *Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO and Others*.¹ In that case, an administrative clerk was dismissed for falsely recording that he had worked 81 hours, which he had not. The commissioner found that the sanction of dismissal was too severe and ordered the employee's reinstatement. The LAC found that, given the position of trust the employee held at the employer and that he had committed what amounted to gross dishonesty and fraud, retaining the employee would have been severely detrimental to the employer's operational requirements. The employee's conduct had rendered the working relationship intolerable.
- 16] The commissioner reinstated Ncala although he had requested compensation.
- 17] The commissioner irregularly awarded Ncala an extra two weeks' compensation based on an assumption that it would take two weeks before the parties received the award. However the award was sent two days after the arbitration.

¹ [2010] 5 BLLR 513 (LAC).

18] I have not set out the many helpful opposing submissions made by the third and fourth respondents because I have incorporated these in my analysis of the application.

The review test

19] Firstly, it is relevant to re-state some trite evidentiary rules. The *onus* was on the applicant to prove the allegations against Ncala by showing that, on all the evidence presented by both parties, its version is more probable or likely than Ncala's version. Where the evidence permits more than one reasonable inference, one pointing to guilt and the other to innocence, the selected inference must, by the balancing of probabilities, be the more plausible conclusion of the possible inferences. Initially, the employer need only establish a *prima facie* case of misconduct against the employee and, where this is done, the evidentiary burden shifts to the employee to provide a credible and probable explanation for his actions. In the absence of such, the arbitrator could reasonably infer that the employee is guilty of the said misconduct and the employer has discharged its onus. An employee is not entitled to the benefit of the doubt, as to the convincing nature of his explanation. On raising a particular defence, an evidentiary burden falls upon the employee to establish that his version is likely. In an assessment of the evidence, the issue of the credibility and probability or improbability of a version are not separate inquiries but part of a single investigation into the acceptability of a version – measured against each other – to arrive at a decision that one version is more probable.

20] The essential test in deciding whether an arbitration award should be reviewed is the following: is the award one that a reasonable decision-maker could not reach? In deciding this application, I find it useful to apply the distinction between two forms of unreasonableness encapsulated in the *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*² test for review and made explicit in a number of subsequent judgments of this court.

² (2007) 28 ILJ 2405 (CC).

In *SA Airways (Pty) Ltd v Blackburn and Others*,³ *Nedbank Ltd v CCMA, Grobler NO and Herholdt*,⁴ *Sasol Mining (Pty) Ltd v Ngqeleni NO and Others*⁵ and *Gaga v Anglo Platinum Ltd and Others*,⁶ two categories of challenge to the reasonableness of an award were identified. Awards are reviewable on both result-based and process-based grounds. The former challenge succeeds if the result of the award is incapable of justification on all the material before the commissioner. The latter succeeds if an arbitrator commits a gross irregularity in the form of a material failure of law or the failure to apply his mind to materially relevant facts.

21] Notwithstanding the blurring of the line in labour law between grounds for appeal and review, it is still necessary that an applicant seeking to have an award set aside present more than a list of the arbitrator's misdirections. In respect of the result, both on guilt and sanction, it is not sufficient to argue that the decision was wrong but that it was *incapable* of being reached by a reasonable arbitrator. In respect of process, the complained of irregularities must be *material*.

22] I agree with the position adopted in *Sasol* by van Niekerk J in relation to process-related unreasonableness. This is that an applicant must "establish no more than that the result of the award may (and not would) have been different if the commissioner had properly acquitted him or herself". However what needs to be established in the first instance is that the commissioner did not properly acquit himself. It is not proper to argue that because a process-related act by a commissioner had the potential to change the result, therefore the commissioner did not properly acquit himself.

23] In evaluating whether a commissioner properly acquitted himself in relation to a process-related issue, it should be borne in mind that there is not always only one correct way in which a commissioner may act. Certain process-related questions that arise in arbitrations are, not unreasonably, decided in

3 SA [2010] 3 BLLR 305 (LC).

4 (unreported LC judgment by Gush J, case no D242/09, dated 25/10/2010).

5 (2011) 32 ILJ 723 (LC).

6 (2012) 33 ILJ 329 (LAC).

opposite ways. By way of example, an arbitrator who rules that a fifth *alibi* witness is unnecessary is not necessarily failing to acquit himself properly. At the same time, the decision to permit the testimony of the fifth alibi witness is also not necessarily wrong. Though in both cases it could be argued on review that allowing or not allowing the fifth witness *may* have turned the case on its head, this is not the issue. To use the language of *Sasol*, the primary issue is whether the commissioner properly acquitted himself. The unreasonableness of his actions flows from an established, material failure or irregularity on the commissioner's part.

24] In making this determination, it is necessary to note that commissioners enjoy a certain latitude of discretion flowing from section 138 of the Labour Relations Act to decide how to conduct arbitration hearings. Among others, it is a function of theirs to attempt to 'move things along'. Litigants are certainly entitled to a fair hearing and there are clear principles to be enforced by reviewing courts to ensure the legality of the adjudication process. These include that a commissioner must not ignore material evidence and must properly apply his mind. However, a fair outcome must be achieved speedily and with the minimum of legal formalities, lest one of the other purposes of the LRA, to facilitate the effective resolution of disputes [see section 1 (d) (iv) of the LRA], be sacrificed. A reviewing court must therefore allow certain essentially discretionary powers and functions of commissioners, especially as to the conduct of the hearing, to be exercised and recognise that, in some instances, what might constitute a legal irregularity in a court is but a legalistic quibble in the CCMA.⁷ As expressed in *Sidumo*, decisions as to fairness are primarily in the "domain of the commissioner". The creation of this domain is part of the "legislative intent" identified in *Sidumo*, the use of which means that "decisions by different commissioners may lead to different results" without this court necessarily being able to interfere.

25] I will apply these general observations concerning the test for outcome and procedure-related unreasonableness to the applicant's specific grounds of

⁷ See *Naraindath v CCMA and Others* (2000) 21 ILJ 1151 (LC) at para 42 and *The Foschini Group v Maidi* [2010] 7 BLLR 689 (LAC) at para 33.

review hereunder. In the meantime, I note that, while the commissioner's decision-making was criticised as being 'absurd', 'bizarre' or 'disingenuous', the true grounds of complaint seem to be less substantial and less material. In essence, after an analysis of the evidence presented, the commissioner's overall conclusion was that Ncala was guilty of two less serious charges, for which the penalty of dismissal was found to be unfair. The commissioner found Ncala not guilty on the more serious charge.

26] The difficulty the applicant faced at the CCMA is that it brought only a single witness, a forensic auditor, to discharge the burden of proof it bore. He was able to give evidence of wrongdoing that arose, *ex facie*, certain documents authored by Ncala (a outside business interest disclosure form, certain emails to Capello and his travel claims). The Labour Appeal Court has already found it acceptable for a witness who was not personally involved in making data inputs or storing and retrieving them to give evidence in which he analyses and draw conclusions from this data.⁸ This evidence from the forensic auditor, Kok, was reliable and Ncala did not dispute that he authored these documents. However, when disputes of fact arose about the context and work practise in which the travel claims were made, Kok was not in a position to deny what amounted to a plausible explanation in defense. When a dispute of fact arose about the seriousness of those acts of misconduct that were proven, Ncala's failure to declare business interests and his breach of SABC internet usage policy, Kok's testimony was not sufficient to counter compelling arguments in mitigation of sanction.

27] In sum, while some of the applicant's criticisms of the commissioner's award have an element of validity and while he may have expressed himself better in evaluating the evidence, none of this, in my view, warrants the Court's intervention on review for reasons set out below.

Non-disclosure of business interests

28] Ncala was found guilty of the non-disclosure of business interests in respect

⁸ The *Foschini Group* (supra) [2010] 7 BLLR 689 (LAC) at para 38.

of three companies. The commissioner rightly rejected the argument that his belated declaration in April 2009 constituted compliance with the applicant's rules. However, the commissioner regarded this misconduct, in both its nature and context, and on a first offence after 15 years of service, to be insufficiently serious to justify dismissal.

29] I find no reason to interfere with the finding on sanction. The commissioner, in my view, properly appreciated the severity of this misconduct when he declined to confirm Ncala's dismissal. He, not unreasonably, took into account the uncontested evidence that two of the three entities were dormant and the remaining one was a vehicle for trading Telkom shares. This allowed him to note that no conflict of interest existed between Ncala's private business interests and his employment duties. The applicant's witness, Kok, also conceded as much.

30] It may well be that a company has some over-arching business interest in the scrupulous and complete declaration of all outside businesses owned by its employees such that any non-compliance, even on a first offence and where no conflict of interest exists, nevertheless constitutes an irretrievable breach of the employment relationship. However, the applicant, whose duty it was to do so in the context of sanction, placed insufficient evidence of the seriousness of this infraction before the commissioner to warrant a finding that the trust relationship had irretrievably broken down.⁹

31] This seems to be why the commissioner commented about the absence, as evidence, of the applicant's disciplinary code. Such a document normally records the penalties an employer regards as appropriate for particular acts of misconduct, which an employer is generally free to set. However, without reference to such a code, there was in this case no authoritative evidence about how seriously the employer views the effects of this particular act of misconduct on the employment relationship. In cases where dismissal is not an obviously appropriate sanction for a particular act of misconduct, a commissioner does not unreasonably expect an employer to lead evidence on

⁹ See *Edcon Ltd v Pillemer NO and Others* (2009) 30 ILJ 2642 (SCA).

what its disciplinary code provides.

32]The applicant is critical of the commissioner for suggesting in his award (paragraph 24) that Ncala had a greater obligation to disclose actively trading companies as opposed to dormant companies in order to comply with the disclosure policy. This is because the form provided to employees to disclose their business interests does not 'mention' dormant companies.

33]Even if this is a misdirection, it is not material. The result is unaffected. From the point of view of sanction, nothing turns on the distinction the commissioner draws between active and dormant business entities. Even if all three companies were actively trading but in circumstances where there was no conflict of interest, it would not be unreasonable to decline to dismiss Ncala, especially in light of the mitigating factors already mentioned.

The Capello franchise

34]The applicant alleged that Ncala was the owner of a fourth business, a Capello franchise, which he also failed to declare. Ncala denied owning this business at the time and consequently he had nothing to declare. He said he was still in the process of acquiring ownership. The commissioner resolved this dispute of fact in favour of Ncala. I find no reason to interfere with the finding that Ncala did not own the Capello franchise and thus did not breach the disclosure policy in regard to this business.

35]Ncala's denial was corroborated by the CIPRO documents, which were entered as evidence. Evidence by Kok to the contrary of his conversations with people at the Capello store was hearsay and the commissioner was entitled to afford it low weight if it was admissible at all.

36]As regards other evidence of Ncala's association with Capello (an invitation to a year-end function, Ncala's name being on a store contact list and arrangements for Ncala to attend franchisee training), the commissioner, in my view, did not ignore or fail to properly apply his mind to this evidence. He

took it into account. The applicant's real dissatisfaction is that the commissioner declined to draw an inference from this evidence that Ncala was the formal business owner. It was not unreasonable to decline to draw this inference. The commissioner, not without justification, accepted Ncala's explanations for how he came to be included in the above-mentioned communications without owning (and having to declare) the franchise.

37] Interestingly, having regard to the transcripts of evidence, even Kok conceded that Ncala was 'in the process of acquiring' an interest in the franchise and did not make the necessary stronger allegation that it had actually been acquired.

Contravention of the SABC internet usage policy.

38] Ncala was also found guilty of contravening the applicant's internet usage policy, which he ought to have known about, in respect of mails sent by him relating to the Capello franchise. However, here too the commissioner properly appreciated the severity of this misconduct when he found dismissal an unfair sanction. In line with what I have set out above, insufficient evidence was led by the applicant to establish that this infraction had so serious an effect on the employment relationship to justify dismissal on a first offence and after 15 years service. The commissioner's decision on sanction was thus not unreasonable or incapable of being justified.

Travel claims

39] Ncala was found not guilty on the third, more serious count. This is of dishonesty or misrepresentation in respect of some of his travel claims. The evidence that Ncala inflated some of his claims comes from the applicant's sole witness, Kok. Kok used an 'electronic map' to calculate the distance of the journeys Ncala logged. Kok then compared the distances Ncala claimed to the distances the electronic map calculated those journeys to be. All in all, the excess claimed was for 1180 km, which translates into a monetary value of R4 766.36.

40] The applicant's challenge started with the commissioner's mention of the two-year delay in the applicant disciplining Ncala. The applicant pointed out that this issue was never raised in defence. It argued that the commissioner was not entitled to raise the issue *meru motu* and by doing so committed a reviewable irregularity or process related unreasonableness. It further argued that the commissioner was not entitled to make an adverse finding against the applicant without its reasons being heard on the issue of the delay. In addition, the commissioner misconstrued the evidence about any 'delay'. Although the 'fiddling' of the travel claims allegedly took place in 2008, this fact was only discovered after an investigation in 2009. The investigation was finalised on 15 March 2010. Mr Ncala was charged just over two months later on 20 May 2010, hardly a blameworthy delay, the applicant argues.

41] Since the allegations of dishonest conduct by Ncala may reasonably lead to dismissal, the applicant argued that the commissioner's dispensing with the charge on the basis of delay, on its own warranted the award being set aside. The problem with this argument is that, within the overall structure of the award, the finding that there had been an undue delay in charging Ncala seems to be an alternative, self-contained ground for quashing the travel claim charge. By the time the commissioner makes this finding, he had already, on the evidence, accepted Ncala's explanation for the extra distances claimed.

42] If the finding on delay were the only reason for dispensing with this charge, I probably would have found it to be an instance of process-related unreasonableness. However, the commissioner gives other distinct and complete reasons for dismissing this charge based on an analysis of the evidence itself. The misdirection on the alternative issue of delay therefore had no material effect on the outcome, as long as those other reasons for finding Ncala not guilty hold, which I discuss hereunder.

Evidence of dishonesty or misrepresentation

43] Using an electronic map, Kok calculated that Ncala claimed 1180 km in excess of what trips to the locations on his travel claims should have been. It was put to Kok, and Ncala later testified, that when he logged a trip, for instance, to 'Braamfontein' or 'Cresta', he visited several clients in that general area on the same day. He did not put down the details of the whole trip on the form. Thus the distances measured by Kok to and from the suburbs Ncala indicated on his trip logs would be shorter than what Ncala actually travelled and legitimately claimed for. This is because intra-suburban travel was not accounted for in Kok's calculations.

44] As support for his version, Ncala indicated that his supervisors at the time were aware of this practice and thus authorised his travel claims without demur. This was put to Kok who was not in a position, from his own experience, to deny that Ncala's supervisors were aware of how he claimed for trips. It is clear from the evidence that the claims were approved. The applicant produced no additional admissible evidence to cast doubt on Ncala's explanation. Ncala's defence is further not inherently improbable, especially in light of the fact that his claims were approved by his supervisors, from the exercise of proper oversight and checking could be expected. These were all factors that, although not elegantly set out by the commissioner, informed his finding that Ncala's explanation for the distances claimed was more believable than the employer's accusation of dishonesty and misrepresentation. This finding is, in my view, not unreasonable.

45] The applicant complained that the commissioner prevented printouts of the abovementioned electronic map being placed before him as evidence. There is nothing in the transcripts to substantiate this claim. However, since Ncala did not dispute the calculations provided by Kok but rather provided an explanation for the extra mileage, it was not necessary to have produced the map as evidence.

46] It might though have been useful to produce the map, in order to interrogate and measure Ncala's claims about the number of clients he visited in a given area in greater depth, something the applicant's representative failed to do. It

appears that this is what the commissioner meant when he stated the following:

‘The applicant’s argument that his mileage is higher than what Mr Kok’s map indicated as he visited a number of government departments in a given area that he visited is credible especially as Mr Kok did not produce a copy of the map on which he based his calculations.’

47]When the commissioner accepted Ncala’s explanation about visiting a number of departments, the commissioner erroneously uses the word ‘credible’ to describe the basis of his preferring Ncala’s evidence. Perhaps a better way of making the point would have been to say that Ncala’s explanation was not shaken under cross-examination or nor contradicted by any witnesses or documents such as the electronic map. The commissioner may also rather have noted that Ncala’s explanation was not inherently improbable. The award does not fall to be set aside on the basis of the commissioner’s mislabeling of his assessment of the evidence; an assessment that does not otherwise appear to be unjustifiable when the award is read as a whole.

48]Kok did testify that he had spoken to Ncala’s previous supervisor who told him that he did not scrutinise Ncala’s claims but signed them off on trust. This is hearsay and was not unreasonably assigned low weight by the commissioner, if considered admissible at all.

49]In argument, the applicant brushed aside the fact that information from Kok about how Ncala’s supervisors handled his claims is hearsay by inviting the court to find it improbable that Ncala’s supervisors would have signed off on his claims because they were dishonest. This is a circular form of reasoning which assumes as a premise, its very own conclusion. It also fails to address the reason, implied in the award, why the commissioner did not have regard to the evidence about the supervisors authorising travel claims solely on trust. The supervisors ‘did not testify’ and therefore Ncala’s plausible version stood unrebutted.

50]The duty to rebut the employee's defence flows from the shifting of the evidentiary burden. The evidentiary burden "refers to one party's duty of producing sufficient evidence for a judge to call on the other party to answer and it also encompasses the duty cast upon a litigant to adduce evidence in order to combat a *prima facie* case made by his opponent." (See P.J. Schwikkard *et al Principles of Evidence*; Juta & Co. 1997 at p.393). Put differently, it is an informal but practical need to persuade the commissioner that a party's version is sufficiently credible to mean that it should be believed and that the opposing party needs to introduce further evidence or explanation in order to rebut it. In practice the evidentiary burden shifts back and forth between the parties as a case unfolds. This shifting happens independently of which party has the formal burden of proof, which is assigned as a matter of law. The reason for imposing an evidentiary burden is to ensure that the party alleging wrongdoing does not have to disprove all imaginable defences, only those properly supported by sufficient evidence. In dismissal proceedings, even though the employer has the overall burden of proof, once it has adduced evidence of sufficient weight to warrant a rebuttal, a dismissed employee needs to consider how he is going to meet the evidentiary burden. If, however, the employee's explanation appears sufficiently persuasive, the employer will be faced with a challenge to provide sufficient evidence and argument to negate the employee's version and so on. None of this means that a hearing is an open-ended affair with parties reopening their cases to add evidence. The way in which the evidentiary burden swings between the parties means that it is important for parties to assess in advance what evidence is available to support their version and how this evidence may be best adduced. A further opportunity to assess the sufficiency of its case is presented to the party leading evidence first, when its opponent's version is put to its own witnesses in cross-examination

51]It seems to me that once it was put to Kok that Ncala visited a number of clients in a given area which he supervisors knew about and shown to him that Ncala's supervisors had actually signed off on his travel claims, it was no longer safe for the party bearing the overall onus to rely solely on the evidence of Kok. It was not unreasonable to regard Ncala's version not only

as a plausible explanation for the higher travel claims but a preferable one. The applicant would have needed to provide enhanced proof of its allegations to rebut Ncala's explanation, which was put to its witness.

52] It might be argued that it was Ncala's duty to call his supervisors to corroborate his explanation. I do not see it this way. The nature of the original evidence of wrong-doing against Ncala consisted of an inference that the discrepancy in Kok's calculations and Ncala's travel claims constituted dishonest conduct. It is not unreasonable, in analysing the evidence, and in particular considering the nature, extent and weight of the evidence against Ncala, to regard his explanation as being sufficient to rebut the *prima facie* impression of wrong-doing. In any event, at least one former supervisor was interviewed by Kok who testified that this supervisor told Kok that he simply signed off on the travel claims without verifying them. It seems that this was a witness the employer was in a better position to call in order to corroborate its witness' testimony.

The discrepancy of 4 November 2008

53] One entry on Ncala's travel log is, though, incorrect as a matter of logic. On 3 November 2008, Ncala recorded the odometer reading as 9080 when returning to the applicant's offices after work travel. On 4 November 2008, when he started out on a work trip again from the applicant's offices, he recorded the odometer reading as still being 9080. It was common cause however that, overnight, Ncala had gone home with the same car. The odometer reading in the morning should therefore have been at least 24 kilometres greater.

54] The explanation Ncala gave is that he did not include his work to home kilometres on a daily basis but adjusted his claim accordingly at the end of each month. The commissioner found that, while Ncala's explanation is not altogether satisfactory, he accepted it. After all, Ncala's claims were checked

by two people and authorised by his supervisor. It would be 'strange' if they permitted unauthorised or inflated claims to go through. The commissioner reasoned that if Ncala dishonestly did not make these adjustments to his travel claims at the end of each month, the probabilities favoured the checkers picking this up and not 'actioning' the claims.

55]As awkward as Ncala's explanation is in respect of this discrepancy, the commissioner found that, on a balance of probability, this discrepancy did not constitute sufficient proof of dishonesty or deliberate misrepresentation as per the charge. This finding is not unjustifiable or unreasonable based on the *evidence* before him.

56]The applicant urged this court to find that this discrepancy amounted to dishonesty because other travel claims Ncala made were also dishonest. This reasoning is dubious. It also fails because there was insufficient evidence before the commissioner that the other claims were in fact dishonest or misrepresentations.

The "admission" to Mr Kok

57]Kok testified that, during an interview with Ncala, he admitted to making 'mistakes' with his travel claims. In the hearing, Ncala both denied making mistakes or making this admission. Faced with a dispute of fact about whether an admission was made, Kok testified that another person was present during this interview, one Naicker. After Kok's re-examination, a discussion ensued between the commissioner and the applicant's representative about calling Naicker as a witness. Referring to Naicker, the commissioner expressed a view, *inter alia*, that 'if you can get him here today you can call him ...'

58]It does not appear that he made a ruling that Naicker not be allowed to testify if the applicant's representative insisted. The commissioner seems to have tried to speed up the process by urging the applicant to be decisive and

efficient about producing Naicker if it elected to use him as a witness to corroborate Kok.

59] In assessing whether this was an instance of process-related unreasonableness, I am mindful that CCMA commissioners may sometimes need to be slightly more robust in their guidance and direction to parties on the conduct of the litigation than may be the case in a court. This is especially if they are to give full effect to section 138 of the LRA, discussed above.

60] The commissioner also found it improbable that such an admission was made by Ncala, given his firm, 'not guilty' stance in the hearing. Once again, the commissioner mistakenly employed the concept of 'credibility' and 'benefit of the doubt' to describe the basis on which the evidence was accepted. It is however patent from a perusal of the passage as a whole that the commissioner was in fact questioning whether it was probable that a person who had all but admitted to misrepresentation during a tape-recorded and witnessed interview would come to a hearing with a completely and demonstrably different version of this interview. As stated above, I do not think that the misuse of terminology to describe the process by which evidence was evaluated should count as a ground for review when it is fairly clear what the commissioner meant to find and this finding was not itself unreasonable.

The sanction for dishonesty

61] The commissioner spent a relatively small portion of his award indicating that, even were Ncala to have been found guilty on the travel claim charge, it was not clear that this was a dismissible offence as no company disciplinary code stipulating as much was entered as evidence. I tend to agree with the applicant that these comments are irrelevant in respect of the travel claim charge, on which Ncala was found not guilty. As such, unreasonably made or not, they have no material effect on the result.

62] I disagree that the commissioner was 'pre-occupied' with the failure of the applicant to tender its disciplinary code as evidence to the extent that he

allowed this issue to influence his mind in deciding other matters. The applicant merely criticises the commissioner without clearly setting out the factual basis upon which it relies to show any level of reviewable preoccupation at all.

Reinstatement or compensation

63] It is clear that from the award (para 47), as well as the transcripts, that Ncala sought reinstatement as relief. Therefore, when the commissioner summarised his evidence and indicated (para 18) that Ncala wanted compensation; this was an obvious and innocuous error. That the applicant even raised this as a ground for review on the basis that the commissioner misconstrued the evidence and that Ncala was entitled only to compensation is surprising. This ground for review has no merit whatsoever.

Amount of compensation

64] Ncala was reinstated but not with full retrospectivity. He was reinstated “from 7 November 2010 with no loss of salary from that date”. In calculating the amount owing, the commissioner noted that approximately three months had passed from the effective date of reinstatement with full salary and the date of the award. He went on to surmise that two weeks would pass before the parties received his award and thus ordered an additional two weeks salary to be paid to Ncala in lieu of this predicted period of administrative hiatus. As it turned out, the CCMA conveyed the award to the applicant on the day it was signed and thus, there was no delay. This is not a point to take on review. It falls way beneath the review test radar. The applicant was granted 30 days to reinstate Ncala and so the 12 days ‘overpayment’ becomes negligible and a minor inconsequential issue.

Conclusion

65] In the end, the question that I have to answer is whether the commissioner reached a decision that a reasonable decision-maker could not reach? The

answer is no.

Order

66] In the premise, my order is as follows:

1. The application for review and setting aside of the award issued by the commissioner under case number GAJB26897-10 is dismissed with costs.

Whitcher, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: Advocate S Baloyi

Instructed by: Maserumule Inc Attorneys

For the Third and

Fourth Respondent: Advocate F J Van der Merwe

Instructed by: Kelly Morekwa Lekoto Attorneys