THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 2560 / 14

In the matter between:

POLICE AND PRISONS CIVIL RIGHTS UNION

OBO SANDILE LUNGA BIYELA **Applicant**

and

THE SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL **First Respondent**

L G P LEDWABA N.O. (AS ARBITRATOR) **Second Respondent**

SOUTH AFRICAN POLICE SERVICE **Third Respondent**

Heard: **30 August 2016**

Delivered: **7 February 2017**

Summary: **Practice and procedure – late filing of review application – proper application for condonation needs to be made – condonation principles set out and considered – applicant made out no case for condonation – application must be dismissed on this reason alone**

Bargaining council arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – Test for review – Section 145 of LRA – application of review test set out – determinations of arbitrator compared with evidence on record – commissioner's decision regular and sustainable – award upheld

Bargaining council arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – assessment of evidence by arbitrator – no proper record against which to assess credibility findings of arbitrator – findings must stand

Misconduct – collective misconduct – principles considered – employee part of group misconduct – employee having knowledge of misconduct but taking no positive action to report it – employee guilty together with other police officers

Misconduct – dishonesty – dismissal justified – duties of police officer discussed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerns an application by the applicant to review and set aside an arbitration award made by the second respondent in his capacity as an arbitrator of the Safety and Security Sectoral Bargaining Council (the first respondent). This application has been brought in terms of Section 145 of the Labour Relations Act[1] ('the LRA').

[2] This matter arose from the dismissal of the individual applicant, Mr S L Biyela, by the third respondent for misconduct relating to corruption. The individual applicant challenged his dismissal as an unfair dismissal to the first respondent. This dispute came before the second respondent for arbitration, which arbitration proceedings concluded in October 2014. Following completion of the arbitration proceedings, and in an arbitration award dated 14 November 2014, the second respondent found in favour the third respondent,

[1] Act 66 of 1995.

and decided that the individual applicant's dismissal by the third respondent was fair. The second respondent dismissed the claim. This award then gave rise to the current review application.

[3] The applicant's review application was filed on 21 January 2015, despite the applicant having received the arbitration award on 21 November 2014. As a result of the 6(six) weeks' time limit under Section 145[2] of the LRA within which to bring a review application, the applicant's review application was actually due by 5 January 2015. Because the review application was only filed on 21 January 2016, it was brought thus just more than 2(two) weeks late. This meant the applicant needed to show good cause and thus apply for condonation[3], in order for this Court to entertain such application.

<u>The issue of condonation</u>

[4] It is trite that where a review application has been filed out of time and no condonation is applied for, the Labour Court has no jurisdiction to entertain the application.[4] In *SA Transport and Allied Workers Union and Another v Tokiso Dispute Settlement and Others*[5] the Court held:

> 'The onus, generally speaking, was upon the appellants to show that the review application had been launched timeously because this is a fact or element which goes to establishing the jurisdiction of the Labour Court to hear the application for review. …'

The Court concluded:[6]

> '… where the steps constitutes a jurisdictional step, a time-limit, and the party is out of time then, in the absence of an application for condonation, a court cannot come to the party's assistance. …'

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[2] Section 145(1)(a) reads: 'Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award - (a) within six weeks of the date that the award was served on the applicant …'
[3] Section 145(1A).
[4] See *F & J Electrical CC v Metal and Electrical Workers Union on behalf of Mashatola and Others* (2015) 36 ILJ 1189 (CC) at paras 29 – 30; *Zeuna-Starker Bop (Pty) Ltd v NUMSA* (1999) 20 ILJ 108 (LAC) at paras 108 – 109.
[5] (2015) 36 ILJ 1841 (LAC) at para 8
[6] Id at para 18.

[5] The applicant has failed to properly apply for condonation. The notice of motion in the review application contains no prayer seeking condonation. The founding affidavit equally does not deal with condonation at all. Condonation is briefly touched on in the supplementary affidavit in terms of Rule 7A(8), which was only filed on 17 August 2015. What is however required for a proper application for condonation is a notice of motion, or at least a prayer in the notice of motion in the review application, specifically asking for condonation. The condonation so asked for in such a prayer must then be properly supported by affidavit, dealing with all the requirements discussed below.[7]

[6] The sum total of the applicant's condonation case, if one can call it that, is found in three paragraphs in the supplementary affidavit. The delay is not explained at all. It is simply said that the applicant has a strong prospect of success and would suffer 'extreme prejudice' if condonation is not granted. The applicant approaches the matter as if it is entitled to condonation.

[7] In specifically dealing with an application for condonation for the late filing of a review application, the LAC in *A Hardrodt (SA) (Pty) Ltd v Behardien and Others*[8] referred to the judgment in *Queenstown Fuel Distributors CC v Labuschagne NO and Others*[9] and said:

> 'The principles laid down in that case included, firstly that there must be good cause for condonation in the sense that the reasons tendered for the delay had to be convincing. In other words the excuse for non-compliance with the six-week time period had to be compelling. Secondly, the court held that the prospects of success of the appellant in the proceedings would need to be strong. The court qualified this by stipulating that the exclusion of the appellant's case had to be very serious, ie of the kind that resulted in a miscarriage of justice.'

[8] The Court in *Academic and Professional Staff Association v Pretorius No and Others*[10] aptly summarized all the considerations applicable to deciding condonation in the instance of the late filing of a review application, and said:

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[7] See *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-E.
[8] (2002) 23 ILJ 1229 (LAC) at para 4.
[9] (2000) 21 ILJ 166 (LAC).
[10] (2008) 29 ILJ 318 (LC) at paras 17 – 18.

> 'The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with time frame; (c) prospects of success or bona fide defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. … It is trite law that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay.'

[9] As touched on above, the delay in this instance was just more than two weeks. I may mention that in *Academic and Professional Staff Association* a three weeks' delay was found to be excessive when it came to review applications. The entire period of the delay must be explained, meaning that not only the late period of two weeks must be explained, but it must be explained what the applicant did about the matter since receiving the award on 21 November 2014. In setting out how the explanation for the delay must be provided, the Court in *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others*[11] held:

> 'In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay. The mere listing of significant events which took place during the period in question without an explanation for the time that lapsed between these events does not place a court in a position properly to assess the explanation for the delay. This amounts to nothing more than a recordal of the dates relevant to the processing of a dispute or application, as the case may be.'

[10] However, the approach of the applicant was quite simply that condonation was there for the asking. This the applicant did by way of a mere cursory reference

[11] (2010) 31 ILJ 1413 (LC) at para 13

in the supplementary affidavit, which affidavit is not even intended for that purpose.[12] This approach is clearly wrong. The Court in *Seatlolo and Others v Entertainment Logistics Service (A Division of Gallo Africa Ltd)*[13] was critical of this kind of approach of entitlement, where the Court explained:

> 'It is trite law that condonation should only be granted where the legal requirements have been met and is not a default option. It remains an indulgence granted by a court exercising its discretion whilst being cognizant of the criticism emanating from the Constitutional Court and the SCA and bearing in mind the primary objective of the expeditious resolution of disputes articulated in the Act.'

In my view, it can hardly be said better.

[11] It is equally trite that without any explanation for the delay, the issue of prospects of success are actually irrelevant.[14] In *National Education Health and Allied Workers Union on behalf of Mofokeng and Others v Charlotte Theron Children's Home,*[15] the Labour Appeal Court said that:

> '… this court has previously confirmed the principle that without a reasonable and acceptable explanation for a delay the prospects of success are immaterial'.

In this case, and because the applicant has not offered any explanation, the alleged "strong prospects' it says exists, cannot come to its assistance.

[12] Applying the above principles, it is my view that in essence the applicant did not apply for condonation. That should be the end of the matter. But even if what is contained in the supplementary affidavit is considered to be some or other form of a condonation application, it falls the proverbial mile short of what is needed, especially considering that there is no explanation at all for

[12] A supplementary affidavit is filed in terms of Rule 7A(8) and is intended to supplement grounds of review following the procuring and filing of the record of the proceedings.
[13] (2011) 32 ILJ 2206 (LC) at para 27.
[14] See *Mziya v Putco Ltd* [1999] 3 BLLR 103 (LAC) at para 9; *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at 211G-H; *Colett v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 *ILJ* 1948 (LAC) at para 38.
[15] (2004) 25 *ILJ* 2195 (LAC) at para 23.

the delay. Without even an explanation, prospects of success are immaterial. The issue of prejudice has also not been properly addressed. On these grounds alone, the applicant's review application must fail, without even having to consider the prospects of success in the review application. Even if the applicant may have a "strong case' as it suggests, it is my view that the following *dictum* in *Ferreira v Die Burger*[16] aptly describes what should equally apply *in casu*:

> 'I am sympathetic to the fact that the applicant may have a case but, were we to grant this application, this court would subvert a crucial principle in matters which deal with personal relationships, namely labour relations, that these disputes have to be dealt with expeditiously and finalized as quickly as possible. Where in a case such as this, there has been so flagrant of violation of the rules, then, as Myburgh JP correctly decided, a lack of any explanation at all shrugs off other considerations.'

[13] The applicant's review application should thus be dismissed for want of jurisdiction of this Court. However, and for the sake of completeness, I will nonetheless shortly deal with the merits of the applicant's review application, which I will turn to next.

<u>The relevant background</u>

[14] The individual applicant was a police officer in the employ of the third respondent. The individual applicant was dismissed on 28 August 2012, along with three other police officers, being Nkambule, Molapo and Sithebe, on a charge of misconduct relating to what was in essence corruption in soliciting a bribe from arrested suspects for their release.

[15] On 5 April 2011, all the mentioned police officers were involved in the arrest of two suspects for attempting to sell stolen copper at a scrap metal yard in Alrode. These two suspects were Thabo Sibeko ('Sibeko') and Bongani Masetle ('Masetle'). They were pointed out to officer Molapo by an informant whilst attempting to sell the copper, and it was the individual applicant that identified them.

[16] (2008) 29 *ILJ* 1704 (LAC) at para 8.

[16] Molapo then ordered Sibeko and Masetle to load the copper into a marked police vehicle TZ 16 ('TZ 16') and then arrested them and loaded them into TZ 16 as well. TZ 16 was driven by Molapo with the individual applicant as crew. There was also another police vehicle on the scene, being vehicle TZ 38 ('TZ 38'), driven by Nkambule. The two vehicles then drove off, the one following the other, towards Phola Park.

[17] After driving for about 400 to 600 metres to just get away from the scene, the two vehicles then stopped on a bridge. Nkambule got out of TZ 38 and came to TZ 16 in which the suspects were. Nkambule told Sibeko and Masetle that they were arrested and would be imprisoned for a long period, unless they paid a sum of R1 000.00, and they would then be released. They did not have such money on them, and Masetle suggested that they could go to a third party, one 'Oupa', who could pay the money.

[18] Sibeko and Masetle were taken out of TZ 16 and told to get into TZ 38. The copper remained behind in TZ 16. Sibeko and Masetle sat on the back seat with Molapo, who left TZ 16 to get into TZ 38. Nkambule continued to drive the vehicle, and the fourth officer, Sithebe, occupied the front passenger seat. The individual applicant then took to driving TZ 16, and drove away with the confiscated copper.

[19] TZ 38 with all the occupants referred to above was then driven to a premises in Khumalo Street that belonged to this Oupa, who was found to be present at the premises.

[20] Nkambule informed Oupa of the arrest of Sibeko and Masetle, and informed Oupa that money could be paid for their release. A discussion then ensued between Nkambule and Oupa, and Oupa agreed to pay R800.00 for the release of Sibeko and Masetle. The amount was paid and they were released.

[21] As stated above, the copper remained behind in vehicle TZ 16 which was driven away by the individual applicant. This copper was later found in the possession of another suspect, who stated that he received the copper from the individual applicant who dropped it off at a scrap yard in TZ 16. Pursuant

to an investigation, the investigating officer (Letsoalo) was informed that the individual applicant was working with Molapo in disposing of the copper.

[22] All four the police officers (including the individual applicant) were found to be jointly involved in the above events, and were then each charged. The charge was that of contravening Regulation 20(Z) of the SAPS Disciplinary regulations, 2006, in being directly or indirectly involved in corrupt activities by offering and then accepting a benefit (bribe) from Sibeko and Masetle for not arresting them for being in possession of stolen copper.

[23] The disciplinary proceedings then took place before Lieutenant Colonel Falk as chairperson. On 11 January 2012, the chairperson found all four the police officers guilty of the charge against them, and the hearing then continued to deal with the issue of an appropriate sanction. Then, and on 1 February 2012, the chairperson recommended dismissal as an appropriate sanction for all the employees. The documentary record contained a detailed written finding by the chairperson motivating why he came to the conclusion that he did.

[24] The four employees then appealed, but this appeal was dismissed in a written finding dated 28 August 2012.

[25] All four the employees, including the individual applicant, then challenged their dismissal as an unfair dismissal dispute to the first respondent, and this dispute came before the second respondent for arbitration. Following the conclusion of the arbitration proceedings, and in the arbitration award referred to above, the second respondent upheld the dismissal of all four police officers as being fair. But only the individual applicant sought to challenge the award on review.

<u>The test for review</u>

[26] The appropriate test for review is now settled. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[17] Navsa AJ held that the standards as contemplated by Section 33 of the Constitution[18] are in essence to be blended into the review grounds in Section 145(2) of the LRA, and

[17] (2007) 28 ILJ 2405 (CC).
[18] Constitution of the Republic of South Africa, 1996.

remarked that 'the reasonableness standard should now suffuse s 145 of the LRA'. The learned Judge held 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?...'[19]

[27] Accordingly, in every instance where the constitutionally suffused Section 145(2)(a)(ii) pursuant to *Sidumo* is sought to be applied to substantiate a review application, any failure or error of the arbitrator relied on must lead to an unreasonable outcome arrived at by the arbitrator, for this failure or error to be reviewable. In my view therefore, what the review applicant must show to exist in order to succeed with a review in this instance is firstly that there is a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. But even if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure that is equally the end of the review application. In short, in order for the review to succeed, the error of failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable. In *Herholdt v Nedbank Ltd and Another*[20] the Court said:

> '…. 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.'

[28] As to the application of the reasonableness consideration as articulated in *Herholdt*, the LAC in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[21] said:

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[19] Ibid 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.

[20] (2013) 34 *ILJ* 2795 (SCA) at para 25.

[21] (2014) 35 ILJ 943 (LAC) at para 14. The *Gold Fields* judgment was followed by the LAC itself in *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

> '…. in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material.'

[29] Accordingly, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.[22] This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on that material, 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.[23] In *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others*[24] it was held:

> '…. the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the evidence viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review.'

[30] Against the above principles and test, I will now proceed to consider the applicant's application to review and set aside the arbitration award of the second respondent.

Grounds of review

(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.
[22] See *Fidelity Cash Management* (*supra*) at para 102.
[23] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32.
[24] (2015) 36 ILJ 1453 (LAC) at para 12.

[31] The applicant's case for review must be made out in the founding affidavit, and supplementary affidavit.[25] As was said in *Northam Platinum Ltd v Fganyago NO and Others*[26]:

> '…. The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit'.

[32] In the founding affidavit, the applicant's review grounds are in essence general in nature, and unmotivated. The only proper discernible review ground emanating from the founding affidavit is the complaint that the second respondent did not consider that no one ever identified or implicated the individual applicant as being directly involved in the events, and that the individual applicant was not present when the money was exchanged and the suspects released.

[33] In the supplementary affidavit[27], the applicant in essence mostly elaborates on the review ground in the founding affidavit referred to above, but just providing further detail to motivate this ground. The applicant complains that the evidence against the individual applicant is 'very weak' and tantamount to speculation. The applicant does add two further review grounds, the first being a challenge of the credibility findings made by the second respondent where it came to the testimony of the other three officers and the individual applicant. The second further review ground is a contention that it was inappropriate and irregular for the third respondent to deal with all four employees collectively when the individual applicant's specific involvement in the incident was never proven, an issue which the second respondent should have appreciated.

[34] I will consider the applicant's review application based on these grounds of review.

<u>Evaluation</u>

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[25] See *Brodie v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 608 (LC) at para 33; *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC) at para 9; *De Beer v Minister of Safety and Security and Another* (2011) 32 ILJ 2506 (LC) at para 27.

[26] (2010) 31 ILJ 713 (LC) at para 27.

[27] Filed in terms of Rule 7A(8) on 17 August 2015.

[35] In this matter, the case of the third respondent was in essence that all four the police officers, which included the individual applicant, were acting in cahoots in the extortion of a bribe from Sibeko and Masetle, and that the misconduct was committed by them as a group. Where it came to the individual police officers, each one of them had a different explanation as to what happened on the day and what their respective involvement was. Clearly only one scenario could be true, and it was the second respondent's duty to decide which was true. As was said in *Sasol Mining (Pty) Ltd v Ngqeleni NO and Others:*[28]

> 'One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him'.

[36] In deciding which version and case was the truth, the second respondent considered the issue of credibility. The second respondent stated that whilst he accepted that the third respondent had the onus to prove the employees had committed the misconduct, he was nonetheless compelled to evaluate and determine the evidence as presented by the employees. This approach is in my view undoubtedly correct. The second respondent then compared the respective explanations offered by each of the employees against one another, and found numerous contradictions. The second respondent also compared the evidence presented by the employees to the statements obtained in the course of the investigation from all the parties involved, and once again identified numerous contradictions. The second respondent in the end found the third respondent's evidence to be more consistent and credible, as opposed to that presented by the employee parties. The second respondent thus preferred the evidence and case of the third respondent, on the basis of a credibility finding.

[37] In *Standerton Mills (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[29] the Court dealt with credibility findings made by arbitrators as follows:

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[28] (2011) 32 ILJ 723 (LC) at para 9.
[29] (2012) 33 ILJ 485 (LC) at para 18.

'... 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. In *Moodley v Illovo Gledhow and Others* (2004) 25 *ILJ* 1462 (LC) at 1468C-D Ntsebeza AJ observed in this regard as follows:

'Sitting as I do as a review judge, I fail to understand, in this case, how I could decide to set aside an award given by an arbitrator who sat at the hearing, observed the witnesses, their demeanour and the manner in which they came across. I cannot see that I can interfere merely on an assessment of whether she misdirected herself by reason of the fact that she considered whether the witnesses were credible before determining what the probabilities were in the light of their testimonies.... I should be extremely reluctant to upset the findings of the arbitrator unless I am persuaded that her approach to the evidence, and her assessment thereof, was so glaringly out of kilter with her functions as an arbitrator that her findings can only be considered to be so grossly irregular as to warrant interference from this court.'

[38] I also dealt with the very issue of the challenge of credibility findings of arbitrators, in Labour Court review proceedings, in the matter of *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others*[30] and said:

'The issue of the importance of credibility findings made by the commissioner being accepted in this court on review was made by Mr *Snider*, who represented the third respondent. He submitted that it was the commissioner who sat in the arbitration proceedings, looked at the witnesses, listened to them, and assessed their credibility, and on review, this court should not readily interfere with this, as the commissioner was in the best position to make these findings. I agree with these submissions. This court should not readily interfere with credibility findings made by CCMA commissioners, and should do so only if the evidence on the record before the court shows that the credibility findings of the commissioner are entirely at odds with or completely out of kilter with the probabilities and all the evidence actually on the record and considered as a whole. Findings by a commissioner relating to demeanour and candour of witnesses, and how they came across when giving evidence, would normally be entirely unassailable, as this court is simply not in a position to contradict such findings. Even if I do look into the issue of the credibility findings of the second respondent in this case, I am of the view that

[30] (2013) 34 ILJ 945 (LC) at para 31.

> the record of evidence in this case, if considered as a whole simply provides no basis for interfering with the credibility findings of the second respondent. There is simply nothing out of kilter between the evidence by the witnesses on record and the credibility findings the second respondent came to. The evidence on record in my view actually supports the second respondent's credibility findings. The credibility findings of the second respondent therefore must be sustained.'

[39] Applying the above considerations, the applicant's challenge where it comes to the credibility findings of the second respondent faces an insurmountable obstacle. This obstacle is the failure by the applicant to transcribe the record of the proceedings before the second respondent. The record discovered by the applicant in terms of Rule 7A(6) contains the bundle of documents used in the arbitration proceedings, as well as 207 pages of a transcript of the disciplinary proceedings before chairperson Lieutenant Colonel Falk. The second respondent, in his award, states that two cd's were used to record the arbitration proceedings. These cd's were never transcribed, nor were the transcripts placed before me.

[40] It is clear from the applicant's supplementary affidavit that it is only relying on the transcript of the disciplinary proceedings before Lieutenant Colonel Falk to make out their case. But surely this cannot assist the applicant where it is seeking to challenge the credibility findings of the second respondent as made in his award. In order for the applicant to successfully challenge these credibility findings it needed the full transcript of the evidence presented in the arbitration itself. In short, there is nothing against which to compare the second respondent's credibility findings. As such, there is no basis to contradict what is contained in the second respondent's arbitration award, and what is contained therein must stand. That in itself should mean the end of the matter for the applicant, because once the evidence of the third respondent is to be preferred, then the applicant must fail.

[41] But the second respondent did not only decide the matter based on credibility findings. The second respondent also considered a number of pertinent

probabilities.[31] This included that the two vehicles were only driven 400 to 600 metres away from the scene before stopping and then transferring the suspects from one vehicle to another, in the presence of all four the police officers. The second respondent also considered in this regard that no explanation could be offered as two why these two suspects would specifically implicate these four police officers. These are certainly legitimate and important considerations.

[42] It must also be remembered that the review test contemplates a consideration of probabilities which may not have even been mentioned in the award of the second respondent, so as to ascertain whether the outcome arrived at could nonetheless be considered to be reasonable. In this regard, there are actually a number of further important probabilities, specifically concerning the individual applicant. Firstly, it surely should have appeared to be most strange to the individual applicant who was the crew on TZ 16, to have his driver drive for a short distance, then stop, and move to another vehicle with the suspects, leaving the individual applicant to drive TZ 16 further alone. Secondly, the confiscated copper remained behind in TZ 16 driven away by the individual applicant, who could offer no explanation as to what actually happened to it. Thirdly, it was the individual applicant who identified the two suspects so that they could be arrested, and then surely, once again, it had to have been strange to the individual applicant to not have the two suspects turn up at the relevant police station to process their arrest. It must also be taken into account that none of the other three police officers challenged the award of the second respondent on review.

[43] It is true that the individual applicant was not present when the actual bribe was solicited and paid. But that does not change things materially. The individual applicant was in TZ 16 when Nkambule came to the vehicle to tell the two suspects that they could avoid going to prison by paying a bribe, and then immediately after this discussion the suspects were moved to TZ 38. It is highly unlikely that the individual applicant would not be aware of what was

[31] See *SFW Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para 5 where it was said: 'The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. 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.'

happening. It simply does not matter that the individual applicant was not physically present when the bribe was paid.

[44] In my view, it the most natural, plausible and logical inference to be drawn from the evidence as a whole that the individual applicant was involved in soliciting the bribe from Sibeko and Masetle. In *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport,*[32] it was held that the inference drawn from the evidence just has to be "the most natural or acceptable inference", and not the only inference.[33] The second respondent correctly appreciated this.

[45] The principal difficulty with the review case of the individual applicant is that it is based on an evaluation of the evidence so as to establish reasonable doubt. The points made in the principal ground of review of the applicant all serve to establish reasonable doubt. In short, and what the applicant says is that because no one directly implicated the individual applicant in the bribe, this created reasonable doubt as to his involvement. But this is entirely the wrong approach. The applicant needed to show that the inference of his involvement in the bribe was not the most natural, plausible and logical inference to be drawn from the evidence as a whole, which the applicant simply did not do. The approach of the applicant *in casu* is similar to that I came across in *National Union of Mineworkers*[34] and in that judgment I said:

> 'The difficulty I had with the case of the applicants, in challenging the issue of the probabilities arrived at and considered by the second respondent, and as put forward by Mr *Maunatlala*, was that the case was more aimed at the creation of reasonable doubt rather than the assessment and determination of probabilities. The pertinent points made by Mr *Maunatlala*, which will be referred to hereunder, were all advanced, in my view, to establish 'reasonable doubt' as to the involvement of the second applicant in the misconduct. This is however not the proper test in arbitration proceedings.'

The same considerations now apply in this matter as well, where it comes to the approach of the applicant.

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[32] (2000) 21 ILJ 2585 (SCA) at para 9.
[33] See also *Govan v Skidmore* 1952 (1) SA 732 (N) at 734A-C; *Bates and Lloyd Aviation (Pty) Ltd v Aviation Insurance Co* 1985 (3) SA 916 (A) at 939I-J; *Food and Allied Workers Union and Others v Amalgamated Beverage Industries Ltd* (1994) 15 ILJ 1057 (LAC) at 1064C-E.
[34] (*supra*) at para 36.

[46] In the end, there is nothing irregular in the manner in which the second respondent considered, evaluated and then determined the evidence. The conclusions the second respondent came to where it came to what evidence he preferred and why, were reasonable, and are simply unassailable on review.

[47] I will turn next to the applicant's other primary ground of review, being the complaint that he was in essence collectively dealt with together with all the other miscreants, when there was no evidence of his individual involvement. From the outset, it must immediately be said that the concept of holding employees collectively accountable as a group, without having to prove the individual misconduct of each and every member of the group, is not foreign to employment law. In *Foschini Group v Maidi and Others*[35] it was said:

> 'In *Chauke's* case the Labour Appeal Court accepted that this type of matter presents a difficult problem for fair employment practices, and illustrated the problem by posing the following question: 'Where misconduct necessitating the disciplinary action is proved, but management is unable to pinpoint the perpetrator or perpetrators, in what circumstances will it be permissible to dismiss a group of workers which incontestably included them?' Cameron JA then postulated two lines of justification for a fair dismissal in such circumstances. The first is where an employee, who is part of the group of perpetrators, is under a duty to assist the employer in bringing the guilty to book. The second is where an employee 'has or may reasonably be supposed to have information concerning the guilty, his or her failure to come forward with the information may itself amount to misconduct. The relationship between employer and employee is in its essentials is one of trust and confidence, and, even at common law, conduct clearly inconsistent with that essential warranted termination of employment … Failure to assist an employer in bringing the guilty to book violates this duty and may itself justify dismissal'. The learned judge of appeal further held that this derived justification is wide enough 'to encompass those innocent of it, but who through their silence make themselves guilty of a derivative violation of trust and confidence'.'

[35] (2010) 31 ILJ 1787 (LAC) at para 47.

[48] The Labour Appeal Court elaborated on what was said in *Foschini* and earlier related authorities in the judgment of *Western Platinum Refinery Ltd v Hlebela and Others*[36] and held:

> '… The effect of these dicta is to elucidate the principle that an employee bound implicitly by a duty of good faith towards the employer breaches that duty by remaining silent about knowledge possessed by the employee regarding the business interests of the employer being improperly undermined. Uncontroversially, and on general principle, a breach of the duty of good faith can justify a dismissal. Non-disclosure of knowledge relevant to misconduct committed by fellow employees is an instance of a breach of the duty of good faith. Importantly, the critical point made by both *FAWU v ABI* and *Leeson Motors* is that a dismissal of an employee is derivatively justified in relation to the primary misconduct committed by unknown others, where an employee, innocent of actual perpetration of misconduct, consciously chooses not to disclose information known to that employee pertinent to the wrongdoing. …'

The Court concluded:[37]

> 'Perhaps obvious, but important to stress in relation to the facts of this case, the disclosure of information relevant to the wrongdoing, pursuant to the duty of good faith, ought not be dependent upon a specific request for relevant information; often the wrongdoing per se might not be known to the employer. Mere actual knowledge by an employee should trigger a duty to disclose.
>
> Furthermore, the anterior premise of these considerations is that an employee is a witness to wrongdoing, not a perpetrator. The misconduct lies within the bosom of a general duty of good faith to rat on the wrongdoers, not on culpable participation, even in a lesser degree than other perpetrators. The employee is thus not a person who has made common cause with the perpetrators. A disinclination to disclose the wrongdoing from a sentiment of worker solidarity or some other subjective sentiment of solidarity falling short of common purpose is likely to be a typical explanation for non-disclosure, but is per se not a defence to a charge of a breach of a duty of good faith.'

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[36] (2015) 36 ILJ 2280 (LAC) at para 8.
[37] Id at paras 14 – 15.

[49] This approach has equally been consistently applied in the Labour Court. In *True Blue Foods (Pty) Ltd t/a Kentucky Fried Chicken v Commission for Conciliation, Mediation and Arbitration and Others*[38] the Court said:

> 'What is clear to me is that in the case of 'team misconduct' just as in the case of derivative misconduct and common cause purpose there is no need to prove individual guilt. It is sufficient that the employee is a member of the team, a team the members which have individually failed to ensure that the team meets its obligations …'

And in *Dunlop Mixing and Technical Services (Pty) Ltd and Others v National Union of Metalworkers of SA on behalf of Khanyile and Others*[39] it was held:

> '… the derivative misconduct the applicants relied upon related, in addition to failing to identify the perpetrators, to a breach of trust arising from the failure to come forward. Either to identify the perpetrators or to exonerate themselves …'

[50] The above kind of duty must surely have even more of an impetus where the employees concerned are police officers. Any police officer must conduct himself or herself beyond reproach. A police officer cannot be seen, even tacitly or impliedly, to be associated with or even condoning criminal activity. Where a police officer witnesses anything suspicious or untoward, on the part of his or her colleagues or even superiors, this must be immediately and without hesitation reported to someone in authority who can do something about it. This is especially so in cases of corruption in the form of soliciting bribes. The only way this situation can be rooted out, is by individual police officers on the ground, so to speak, reporting it. If they do not, then they must be held accountable along with the perpetrators they did not report for the same offence. This is especially important because victims seldom come forward, which is understandable. The following sentiments in *Mphigalale v*

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[38] (2015) 36 ILJ 1375 (LC) at para 46.
[39] (2016) 37 ILJ 2065 (LC) at para 42.

Safety and Security Sectoral Bargaining Council and Others[40] must serve as a guide when considering any involvement of police officers in corrupt activities:

> 'Corruption by a police officer, employed in a position of trust and with a duty to perform his or her functions in the interest of society and in accordance with the fundamental values of the Constitution, is a material factor to be considered in determining the appropriateness of the sanction to be imposed. Not only is it a 'sensible operational response to risk management' but it provides a sound reason to justify a finding that the imposition of the sanction of dismissal was fair in the circumstances.'

[51] The chairperson in the disciplinary hearing (Lieutenant Colonel Falk) was very much alive to the above considerations. In his finding, he specifically said the following, in referring to the misconduct committed by the four police officers: 'This action was not a single action of one employee but was an action where all 4 employees had a part in. It was clear that all members knew what the other members were doing. And the chairperson believes if the employee were not arrested would have shared in the taking …' (sic). That is, in short, what it was all about.

[52] It is untenable for the individual applicant to in essence plead ignorance, considering all that had happened. As I have already said above, it is hard to believe that the individual applicant, on the probabilities, did not know what was happening on 5 April 2011. The circumstances were simply too suspicious and unusual to be ignored or for the individual applicant to legitimately claim ignorance. And added to that, I could find no trace of an explanation by the individual applicant as to what happened to the copper which was left in TZ 16 he drove away in. When the chairperson said in the course of the disciplinary hearing that one rotten fruit left in a box makes the other fruit rotten, he clearly meant that all four of the police officers concerned must have known what was happening, and either directly participated in the bribe, or turned a blind eye to it thereby making them all rotten. Far from being irregular, this was a reasonable point of view. Whether by direct participation or by way of turning a blind eye, all four of the police officers, including the individual applicant, were complicit in the wrongdoing that happened, and this justified their dismissal. The second respondent's award in this respect is

[40] (2012) 33 ILJ 1464 (LC) at para 24.

simply not irregular, and in any event resorts well within the parameters of what may be considered to be a reasonable outcome.

[53] There is accordingly no merit in the applicant's ground of review relating to the fact that he was dealt with as part of group, instead of his individual misconduct being proven. In the absence of the individual applicant immediately coming forward, of his own accord, to report all that he had witnessed taking place on 5 April 2011, he must fall with his other three colleagues. The second respondent's finding that this is the case is unassailable on review.

[54] I am therefore satisfied that the conclusion of the second respondent to the effect that the individual applicant was indeed involved in the misconduct of soliciting a bribe from the two suspects, was not irregular, would in any event constitute a reasonable outcome, and as such, should be upheld. It follows that the individual applicant's dismissal was fair, and the second respondent's finding that this was indeed the case must be upheld.

<u>Conclusion</u>

[55] Therefore, and 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 properly conducted the arbitration proceedings, and there is nothing untoward or irregular in his evaluation and determination of the evidence. Insofar as the issue of the outcome arrived at by the second respondent may be considered on the basis of it being reasonable or unreasonable, there is in my view no doubt that it would comfortably rest within the bands of reasonableness as required, in order to be sustainable on review. The applicant's review application falls to be dismissed.

[56] As the applicant is not opposed, the question of costs does not arise.

<u>Order</u>

[57] In the premises, I make the following order:

1. The applicant's review application is dismissed.

S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Adv B R Edwards
Instructed by:	Makgahlela Mashaba Attorneys
For the Third Respondent:	No appearance